

Interveners or Interferers: Intervention in Decisions to Withhold and Withdraw Life-Sustaining Medical Treatment

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1. Introduction

An important feature of our judicial system is the discretion a court has to allow an individual or (more usually) a group who is not a party to proceedings to intervene in a dispute between others. While historically it has been comparatively rare for a non-party to become involved in litigation, over the past fifteen years, courts appear to have become more willing to allow such intervention.¹ If leave to intervene is granted, the role of the non-party is potentially quite significant and can affect the nature of the proceedings. For example, it can result in the parties having to argue aspects of their case that were otherwise not in dispute.²

Over the years, intervention by non-parties has been sought in a range of different legal contexts including in environmental,³ constitutional,⁴ commercial,⁵ and defamation cases.⁶ Intervention has also been an issue in health law cases.⁷ This article focuses on intervention in a particular health law context, and that is for cases that deal with the withholding or withdrawal of life-sustaining medical treatment from adults who lack capacity. Requests to intervene generally arise in cases that raise implications beyond the current dispute before the court, and decisions to withhold or withdraw life-sustaining medical treatment clearly fall within this category. Although there is a very private decision being made about an individual's future, there are also wider repercussions. This decision, which is

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1 For a review of the more liberal approach of the High Court on this issue, see Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adel LR* 159.

2 See, for example, *Superclinics Australia Pty Ltd v CES & Ors* Transcript of Proceedings, HCA S88 (11 and 12 September 1996). In that matter, intervention meant that the dispute essentially shifted from whether there had been medical negligence to whether it would have been lawful to provide an abortion.

3 *Commonwealth v Tasmania* (1983) 158 CLR 1.

4 *Levy v State of Victoria* (1997) 189 CLR 579 (hereafter *Levy*) and *Kruger v Commonwealth* (1997) 190 CLR 1.

5 *Corporate Affairs Commission v Bradley; Commonwealth of Australia (Intervener)* [1974] 1 NSWLR 391.

6 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

literally of life and death, raises public interest issues such as the sanctity of life, personal autonomy and safeguarding the rights of the individual patient. As such, although very few cases have come before the Australian courts to date, any future decisions are ripe for intervention.

In the most publicised Australian case raising these issues, *Re BWV; Ex parte Gardner*,⁸ the Victorian Supreme Court gave leave for Right to Life Australia Incorporated, the Catholic Archbishop of Melbourne and Catholic Health Australia Incorporated to appear as amici curiae in an application for declaratory relief by the Public Advocate. The relief sought was that the artificial provision of nutrition and hydration constituted medical treatment. Such a declaration would then enable the Public Advocate to refuse that treatment on behalf of a 68 year old woman who had lost capacity to make this decision for herself. These issues have also arisen in other jurisdictions, such as the United Kingdom and New Zealand, and cases there have involved varying levels of intervention.

Examining the scope of appropriate intervention in these sorts of cases is timely, given the recent trend in Australia for decisions to withhold or withdraw life-sustaining medical treatment to come before the courts. Although in other jurisdictions like the United Kingdom, the courts have played a supervisory role for some time with these sorts of decisions, Australian courts have only rarely been called upon to adjudicate in them. However, this is changing and in the last couple of years courts (and tribunals) have been hearing more of these cases. One of them, *Re BWV; Ex parte Gardner*, has already been mentioned but there have also been others.⁹ If these cases are to be considered more often by the courts, then there are also likely to be more calls by others interested in the outcome for leave to intervene.

Given the likelihood of interested people and groups seeking to intervene in decisions to withhold or withdraw life-sustaining medical treatment, it is suggested that a systematic approach to intervention in these sorts of cases should be taken. The rules relating to intervention depend heavily on the type of case before the court, and given that cases of this category share common features, it is

7 For example, *Superclinics Australia Pty Ltd v CES*, above n2, where the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference were granted the right to be heard as amici curiae in an action for damages by a woman against a medical clinic for failing to diagnose her pregnancy in sufficient time to allow her to obtain an abortion. Following the intervention by the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference, the Abortion Providers' Federation also sought and was granted leave to appear as amicus curiae. See also *McBain v State of Victoria* (2000) 99 FCR 116 where the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church were granted leave to appear as amici. They did not seek to intervene as a party to the proceedings, but later unsuccessfully sought to quash the Federal Court decision: see *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

8 (2003) 7 VR 487.

9 For example, *Northridge v Central Sydney Area Health Service* (2000) 50 NSWLR 549; *Isaac Messiha (by his tutor Magdy Messiha) v South East Health* [2004] NSWSC 1061; *Re MC* [2003] QGAAT 13; *Re TM* [2002] QGAAT 1 and *Re RWG* [2000] QGAAT 2.

suggested that it is appropriate that a common approach be taken in relation to intervention. Accordingly, in this article we propose to draw together some of the law as it relates to intervention in this context and suggest how courts may wish to approach this issue.

The article begins with a review of the law as it applies to intervention generally. The distinction between involvement as an intervener and as *amicus curiae* is discussed, as are the different tests that the courts will apply in considering whether to grant leave to appear in each of these roles. The article then turns to the types of cases being considered: those involving decisions to withhold or withdraw life-sustaining medical treatment from an adult¹⁰ who lacks capacity. As part of the process of building a model for intervention, it reviews the limited case law in Australia and important judgments in selected overseas jurisdictions where non-party involvement has occurred. The article then explores the advantages and disadvantages of intervention in the context of end of life decision making. Particular comment is made about the nature of the decision being made and the extent to which it can be considered a private matter between the parties. The article concludes by outlining a proposed model for intervention in these sorts of cases. The approach suggested seeks to limit intervention more narrowly than it has in the past, with specific consideration of the exclusion of interest groups.

2. *Role of Intervener and Amicus Curiae*

An individual or organisation who wants to become involved in a proceeding has two options. The first is to become an ‘intervener’ which results in that individual or organisation being joined as a party to the proceedings. The status of intervener brings with it the same rights and obligations as the other parties to the action, including the ability to ‘appeal, tender evidence and participate fully with all aspects of the argument’.¹¹ This includes the right to examine and cross-examine witnesses.

The second way in which an outsider can become involved in proceedings is as ‘*amicus curiae*’ or a ‘friend of the court’. The circumstances in which a court will permit this intervention are explored later in the article but, in simple terms, an *amicus curiae* will be allowed to appear if that individual or organisation would assist the court to be properly informed of material relevant to reaching its decision.¹²

If such an appearance is permitted, the role of *amicus curiae* is more limited than that of an intervener. Traditionally, an *amicus* gave disinterested advice to the court on a point of law,¹³ and this was achieved through oral submissions. The *amicus* was not a party and so was not entitled to file proceedings, require service

10 Those cases that explore this issue in the context of children raise different legal issues and so are not considered in this article.

11 *Corporate Affairs Commission v Bradley*, above n5 at 396.

12 *Levy*, above n4 at 604 (Brennan CJ).

13 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 82 ALR 509 at 524 (hereafter *United States Tobacco Co*).

of documents, inspect documents discovered by the parties, examine or cross-examine witnesses or appeal from a decision.¹⁴ Further, as an amicus is not a party to the proceedings, the court's decision is not binding on it.¹⁵

Today, the role of amicus remains limited but there have been some cases where courts have permitted a greater role. For example, amici have been allowed to make both written and oral submissions¹⁶ and there has been some judicial recognition that an amicus curiae may, in appropriate circumstances, lead evidence¹⁷ and be entitled to inspect documents discovered by the parties.¹⁸ Also significant is the acceptance that an amicus curiae can now provide the court with partisan views.¹⁹

3. *Court Discretion: Tests for Interveners and Amici Curiae*

It is now well established that courts have power to grant leave to an individual or organisation to be joined as an intervener or to appear as amicus curiae.²⁰ This power stems from a court's inherent jurisdiction to regulate its own procedures,²¹ although commonly the different court rules also regulate non-party joinder.²² The courts originally applied a strict test in deciding whether to exercise their discretion to allow a party to intervene in proceedings either as intervener or amicus curiae. The classic statement of this test was by Dixon J in a constitutional case, *Australian Railways Union v Victorian Railways Commissioners*:²³

The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to

14 Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14 *MULR* 522 at 525.

15 *Ibid.*

16 See, for example, *Re BWV; Ex parte Gardner*, above n8 (hereafter *Re BWV*) where Morris J allowed three separate parties to make written submissions and an oral submission that was limited to one hour. Compare *Breen v Williams* (1994) 35 NSWLR 522 (hereafter *Breen*) where the NSW Court of Appeal allowed the Public Interest Advocacy Centre to make a written submission but not to address the court orally.

17 See, for example, *United States Tobacco Co*, above n13 at 528–529 (Einfield J); and *Bropho v Tickner* (1993) 40 FCR 165 at 172 (Wilcox J).

18 In *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, Einfield J ordered that a party be joined as amicus curiae. He subsequently gave a direction that the parties including the amicus curiae inspect documents by a specified date. On appeal, however, the Full Court of the Federal Court commented that his Honour's order 'went well beyond the limited role usually conferred upon an amicus': *United States Tobacco Co*, above n13 at 539.

19 See, for example, the successful applications to appear as amici made by the Tasmanian Wilderness Society in *Commonwealth v Tasmania* (1983) 158 CLR 1; by the Australian Catholic Health Care Association, the Australian Catholic Bishops' Conference and the Abortion Providers' Federation in *Superclinics Australia Pty Ltd v CES*, above n2; and by Right to Life Australia Incorporated, the Catholic Archbishop of Melbourne and Catholic Health Australia Incorporated in *Re BWV*, above n16.

20 *Levy*, above n4 at 601 (Brennan CJ); *Breen*, above n16 at 532–533; *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 at 380–381 (hereafter *NAB v Hokit*); *United States Tobacco Co*, above n13 at 534.

21 *Breen*, above n16 at 532–533; *NAB v Hokit*, above n20 at 380–381; *United States Tobacco Co*, above n13 at 534.

maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.

However, the courts have now moved away from this strict approach, and this shift has been achieved partly by the courts being more inclined to allow counsel to appear in the limited role of *amicus curiae* rather than permitting joinder as an intervener.²⁴ This development in the law has led to the courts applying different tests when considering which form of intervention to permit. Because an intervener becomes a party, the courts have demanded a closer connection to the proceedings than for individuals or organisations seeking to appear as an *amicus*.²⁵

A. *Interveners*

In the case of *Levy v The State of Victoria & Ors*, Brennan CJ outlined the circumstances in which an individual or organisation may intervene in proceedings. The basic test to be applied was that an individual or organisation must be able to establish an interest, either *direct or indirect*, in the proceedings.²⁶ Brennan CJ went on to explain the difference between direct and indirect interests and the corresponding scope of the right to intervene. A *direct* interest is established where a non-party will be bound by the court's decision, and accordingly, intervention to protect their interests must be permitted.

The right to intervene for a non-party with an *indirect* interest is more limited. Such an interest will be established only if it can be shown that there will be 'a substantial affectation of a person's legal interests'.²⁷ However, even if an indirect interest can be established, intervention in such a case is not as of right.²⁸ The court's discretion will only be exercised if the non-party can show 'that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination.'²⁹

22 See for example, High Court Rules 2004 (Cth), ch 2 pt 21; *Uniform Civil Procedure Rules 1999* (Qld) ch 3 pt 1 div 2–3; *Supreme Court (General Civil Procedure) Rules 1996* (Vic) O 9; *Supreme Court Rules 1970* (NSW) pt 8. The *Federal Court Rules 1979* (Cth) are of particular interest because they address the role of interveners specifically (as opposed to the joinder of parties generally) and provide quite detailed guidance to the court as to how its discretion should be exercised: O 6 r 17. See also High Court of Australia, Practice Direction No 1 of 2000, *Written Submissions and Authorities: All Full Court Matters Except Removal Applications or Leave or Special Leave Applications*, which provides procedural guidance relating to the filing of material by interveners and *amicus curiae* in the High Court.

23 (1930) 44 CLR 319 at 331.

24 George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) *Fed LR* 365 at 379.

25 *Levy*, above n4 at 604. The Chief Justice also previously confirmed that the tests were different in Transcript of Proceedings, *Superclinics Australia Pty Ltd v CES*, above n2 at 8.

26 *Levy*, above n4 at 601.

27 *Id* at 602.

28 *Id* at 601–602.

In addition to the rules outlined by Brennan CJ in *Levy*, Attorneys-General are also empowered to intervene in two special circumstances. The first is where a right has been granted through statute, such as the automatic right given to Commonwealth and State Attorneys-General to intervene in constitutional cases pursuant to section 78A(1) of the *Judiciary Act 1903* (Cth).³⁰ The second circumstance is the right at common law of an Attorney-General to intervene in any civil litigation that may affect the prerogatives of the Crown.³¹ There was some suggestion that a third category may exist giving an Attorney-General a right to intervene in civil litigation that raises matters of public policy.³² However, the better view appears to be that this is not the law.³³ Accordingly, unless there is a statutory right or the proceedings raise the Crown's prerogatives, the Attorney-General is subject to the general law relating to intervention.

B. *Amicus curiae*

The courts have taken a more liberal attitude as to when leave will be given to an individual or organisation to appear as *amicus curiae*. Brennan CJ in *Levy* made clear that the matter was one entirely for the court's discretion, with the test being whether the applicant 'is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted'.³⁴ Having outlined the general test, Brennan CJ then proceeded to discuss a number of qualifying guidelines:

- The court must be cautious in considering applications for leave to appear as *amicus* as the efficient operation of the court could be prejudiced;³⁵
- The court must be of the opinion that the *amicus* will significantly assist the court and that any resultant cost to the parties or any subsequent delay will not be disproportionate to the anticipated assistance;³⁶

29 *Id* at 603.

30 This right also extends to the Attorneys-General of the Territories pursuant to s78AA of the *Judiciary Act 1903* (Cth). The Commonwealth Attorney-General also has a statutory right to intervene in matters before the Federal Court or Federal Magistrates Court concerning applications for judicial review (*Administrative Decisions (Judicial Review) Act 1977* (Cth) s18) and in family law proceedings in a variety of circumstances, including where the Family Court requests intervention or where a matter concerns the public interest (*Family Law Act 1975* (Cth) s91).

31 *Adams v Adams* [1971] P 188.

32 *Ibid*.

33 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [14.3], [14.27]; Kenny, above n 1 at 160, Christopher Maxwell, 'In the Line of Fire: *Re McBain* and the Role of the Attorney-General as a Party' (2002) 13 *Pub LR* 283 at 288; *Corporate Affairs Commission v Bradley*, above n5 at 402. Compare with the earlier views of the Australian Law Reform Commission (ALRC), where it regarded the law in this area as being unsettled: ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [6.7] and ALRC, *Standing in Public Interest Litigation*, Report No 27 (1985) [276].

34 *Levy*, above n4 at 604.

35 *Levy*, above n4 at 604 quoting from Transcript of Proceedings. See also *Kruger v Commonwealth* Transcript of Proceedings, HCA M21 (Brennan CJ) (12 February 1996) at 12.

- The current parties to the matter must be unable or unwilling to provide the assistance to the court proposed by the amicus that is needed to arrive at the correct decision in the case.³⁷

This test and the further guidelines (collectively referred to as the Brennan principles) indicated a shift by the High Court to a more cautious approach to allowing amicus curiae to appear than it had previously taken. In an earlier decision, *Superclinics Australia Pty Ltd v CES*,³⁸ the High Court seemed to apply only the basic test, without examining further factors such as the efficient operation of the Court or the potential delay to the parties.³⁹ The case eventually settled. However, had it proceeded, the widening of the issues arising from the intervention of the amici would have led to the case being extended from a two to a three day hearing, and there would have been a six month delay in the hearing of the case.⁴⁰ It is suggested that the application of the Brennan principles, having regard to their consideration of the potential cost and delay to the parties, may have led to a different result.

An alternative approach from within the High Court comes from Kirby J who has suggested that the High Court should follow the lead of the United States and Canada and take a more liberal approach to permitting the appearance of interveners and amici.⁴¹ His Honour noted that the High Court is the final appellate Court in Australia⁴² and concluded that a more liberal approach was appropriate, particularly when hearing constitutional cases or cases concerning legal principle and legal policy.⁴³ His Honour was of the view that the Court can minimise the disruption to the parties' case by maintaining a tight procedural rein.⁴⁴ The cases

36 *Levy*, above n4 at 605. This was confirmed by Kirby J in *The Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83 at 133.

37 *Levy*, above n4 at 604 quoting from *Kruger v Commonwealth*, above n4.

38 [1996] HCATrans S88.

39 Transcript of Proceedings, *Superclinics Australia Pty Ltd v CES & Ors*, above n2. In that case, the court permitted the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference to appear as amici, against the wishes of the parties, to argue matters outside the central issue in dispute between the parties.

40 *Superclinics Australia Pty Ltd v CES & Or*, above n2. Mr Callaway, Counsel appearing for the first and second respondents (11 September 1996) at 20.

41 *The Attorney-General of the Commonwealth v Breckler*, above n36 at 134–137. Kirby J also noted that the practice is starting to gain favour in the United Kingdom, particularly in immigration cases: above n36 at 134–135. See also *Levy*, above n4 at 651 and Michael Kirby, 'Change and Decay or Change and Renewal' (Speech delivered at the Australian National University Centre for International and Public Law Annual Dinner, Canberra, 5 November 1997) at 3 and Ralph Simmons, 'Interview with Justice Kirby' (Australasian Law Reform Agencies Conference on Globalisation and Law Reform: Cooperation Through Technology, Perth, March 2000) at 7.

42 *Levy*, above n4 at 650–651.

43 *Levy*, above n4 at 651–652. See also *The Attorney-General of the Commonwealth v Breckler*, above n36 at 134–135.

44 His Honour argued that the disruption to the parties and their proceedings could be minimised by the court imposing costs orders on amici and ensuring that the majority of submissions were in writing: *Levy*, above n4 at 650–651.

subsequent to *Levy* reveal that the Brennan principles represent the current practice of the High Court⁴⁵ and have been subsequently applied in a variety of jurisdictions.⁴⁶ However, the views of Kirby J have been persuasive, and some judges have also considered his Honour's approach.⁴⁷

Another interesting approach is found in the New South Wales Court of Appeal decision of *National Australia Bank Ltd v Hokit Pty Ltd*.⁴⁸ This case was decided a year before *Levy*,⁴⁹ but is worthy of special mention as it makes some comments that may be particularly applicable to intervention in cases about withholding and withdrawing medical treatment. Mahoney P considered a number of factors to be relevant to the court's discretion, but addressed two factors that were not raised (at least expressly) by the Brennan principles: the parties' wishes and the motive of the proposed amicus.⁵⁰ His Honour stated that the parties' wishes may be a relevant consideration, as they may prefer their case to be confined to their own issues rather than be expanded by amici to more general issues or matters of public interest.⁵¹ His Honour was also of the view that the reasons why a person is seeking leave to appear as an amicus may be relevant. For example, they may be seeking to assist the court or to serve the public interest, or alternatively, they may have less altruistic motives, such as to establish their own public position or reputation.⁵²

45 Williams, above n24 at 366. This can be contrasted with the approach of the Federal Court which seems to have adopted a wider test: 'The general principle is that parties are entitled to carry on their litigation free from the interference of persons who are strangers to the litigation. But there is an overriding right of the court to see that justice is done. An amicus may be heard if good cause is shown for doing so and if the court thinks it proper': *United States Tobacco Co*, above n13 at 536. See also *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2001] FCA 1379. This test has also been interpreted by courts as meaning '[t]he Court may hear an amicus curiae if the Court considers it to be in the interests of justice': *Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 1663. However, in *Wulgurukaba People No 1 (Johnson) v Queensland* [2002] FCA 1555 the Federal Court applied both the basic Brennan test and 'in the interests of justice' test, while in *Australian Automotive Repairers Association (Political Action Committee) Inc v NRMA Insurance Limited (No 2)* [2003] FCA 1301, the Federal Court applied only the Brennan test.

46 See for example, *Re BWV*, above n8 at 491; *Brooks v Krosch* [1997] QSC 171; *Wentworth v Wentworth (Estate of Wentworth)* (Unreported, Supreme Court of New South Wales, Equity Division, Santow J, 10 November 1997) at 2–3.

47 For example, *Re BWV*, above n8 at 490–491. In this case, Morris J stated that he took into account both the approach of Brennan CJ in *Levy* and the approach of Kirby J.

48 *NAB v Hokit*, above n20.

49 *NAB v Hokit* was cited only by Kirby J, although it was clear from the context of his argument that the citation was a favourable one: *Levy*, above n4 at 561.

50 *NAB v Hokit*, above n20 at 380–382.

51 *Ibid.* See also Peter Young, 'Recent Cases' (1996) 70 *ALJ* 882.

52 *NAB v Hokit*, above n20 at 380–382.

4. *Intervention in Life-Sustaining Medical Treatment Cases*

Having outlined the general principles relating to intervention, this section now considers how this area of law applies to cases involving decisions to withhold or withdraw life-sustaining medical treatment from adults⁵³ who lack capacity. There has been only limited judicial or quasi-judicial consideration of this issue in Australia, but these cases provide a useful starting point. We then turn to the experience overseas in other common law jurisdictions, and examine how intervention has been handled there. Although these other jurisdictions will apply different judicial criteria as to when to permit intervention, the factors that those courts consider relevant and the nature of the intervention that has occurred, provide a helpful source of comparison. However, before reviewing the relevant case law, it may be useful to identify the various interests that might arise in this kind of case.

A. *Private Decisions with a Public Interest*

A decision to withhold or withdraw medical treatment that will result in the death of an adult will be intensely personal. To this extent, for the adult and the adult's family, friends and possibly the medical team who is treating the adult, the matter is a private one in which no outsider could be regarded as having a legitimate interest.⁵⁴ Nevertheless, from an objective perspective, it is difficult to deny that this kind of decision has a broader public significance. The community has a legitimate interest in the case, with the following issues potentially being relevant:

- Whether the rights of the adult have been adequately protected;
 - Can such treatment (namely withholding or withdrawing the life support) be regarded as being in the adult's best interests?
 - Has the decision been made by the family for reasons other than the adult's best interests?
- Whether financial implications of keeping adults in these sorts of conditions alive, are relevant in the decision to withhold or withdraw treatment;
- Whether such a decision puts quality of life considerations (inappropriately) above sanctity of life considerations;
- Whether such a decision has the potential to result in compromised treatment for individuals who do have capacity to make decisions but are vulnerable to the influence of family members.

There are a number of individuals, interest groups (such as voluntary euthanasia societies or right to life groups), churches and statutory or government officers that may be interested in these 'private decisions with a public interest'. However, can

53 It is noted that there are also cases where decisions about whether to withhold or withdraw life-sustaining medical treatment have been made in relation to children. However, those cases raise different legal issues and so are not considered in this article.

54 Indeed, it has been suggested that because of their closeness to the patient, family members should be at the centre of the decision making process regarding treatment at the end of life: Cameron Stewart, 'Who Decides When I Can Die? Problems Concerning Proxy Decisions to Forego Medical Treatment' (1997) 4 *J of Law and Med* 86.

such entities demonstrate that they satisfy the tests for intervention that were outlined earlier? Is there a direct or indirect interest in the proceedings (required for intervention as a party)? Or can the applicant ‘offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted’ (required for appearance as amicus)? Even if the latter test is satisfied, is the resultant cost or delay to the parties disproportionate to the anticipated assistance? Another issue that may require consideration is whether these tests are applied differently, depending on the person seeking to intervene. Does it matter whether the applicant is a government officer or a lobby group seeking to have the law interpreted in a particular way?

B. Intervention in Australian Cases

As has already been mentioned, there have been only a small number of decisions in Australia that have considered the lawfulness of withholding or withdrawing life-sustaining medical treatment from adults who lack capacity. One such case is *Re BWV; Ex parte Gardner* (‘*BWV*’).⁵⁵ The case involved an elderly woman in the terminal stages of Pick’s disease (a progressive and fatal form of dementia) who was receiving artificial hydration and nutrition through a percutaneous endoscopic gastrostomy (PEG) tube directly into her stomach. A family member wanted to be appointed guardian so that he could consent to the withdrawal of the tube.

The case was first considered by the Victorian Civil and Administration Tribunal.⁵⁶ Before the hearing, the Tribunal referred the proceeding to the Public Advocate for investigation. (The Public Advocate is a statutory officer whose function is, among other things, to be an advocate for a person with a disability).⁵⁷ The Public Advocate provided a written report to the Tribunal in which he outlined the medical history of the adult, and also made submissions on the legal issues raised by the proceedings. Right to Life Australia Incorporated (‘Right to Life’) sought leave to intervene. The request was to appear as a party because Right to Life wished to have access to the Tribunal’s file.

The Tribunal has a wide discretion regarding joinder of parties under its enabling legislation. Section 60(1) of the *Victorian Civil and Administration Tribunal Act 1998* (Vic) provides:

The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that –

- (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
- (b) the person’s interests are affected by the proceeding; or
- (c) for any other reason it is desirable that the person be joined as party.

55 *BWV*, above n8. This is the decision of the Victorian Supreme Court (the matter was also before the Victorian Civil and Administrative Tribunal. Unless otherwise specified, a reference to ‘*BWV*’ is to the Supreme Court decision.

56 *Re BWV* [2003] VCAT 121.

57 The office of Public Advocate is established by *Guardianship and Administration Act 1986* (Vic), pt 3.

The Tribunal decided against permitting the joinder, 'given especially the most sensitive and personal nature of the proceeding'.⁵⁸ Accordingly, the Tribunal must have concluded that Right to Life's 'interests' were not affected by the proceedings, and that joinder was not desirable 'for any other reason'. The Tribunal did, however, give leave for Right to Life to make a written submission. This was requested for the purpose of addressing 'the broad public interest question'.⁵⁹ There was no elaboration on what the public interest question was, or the precise reasons for granting leave. The submission that was made subsequently by the organisation focused primarily on questions of law.

Although the Tribunal did not refer to *Levy*, the outcome in this case is still consistent with the High Court's test for intervention. Applying the test set out by Brennan CJ, Right to Life would not have been allowed to intervene as a party in these proceedings because it lacked a direct or indirect interest. However, the organisation may well have been permitted under the Brennan principles to appear as amicus to make written submissions because it offered the Tribunal an interpretation of the relevant law that was not otherwise available. This conformity with principle is interesting, given that the Tribunal applied its wider statutory discretion for joinder without reference to the law as set out in *Levy*.

The matter was then brought before the Victorian Supreme Court by the Public Advocate who was seeking certain declarations under the relevant legislation.⁶⁰ A number of parties sought to appear before the Supreme Court. Because no defendant was named in the application, the Victorian Attorney-General sought leave to intervene as a party 'to ensure that there was a proper contradictor; and, also, to ensure that certain matters concerning the public interest were considered by the Court'.⁶¹ Such leave was granted, and the Attorney-General made submissions to the Court on matters of law.

Right to Life again applied to be joined as a party to the proceeding but were refused as they could not demonstrate any legal interest that would entitle them to intervene.⁶² Applications to appear as amici were made by the Most Reverend DJ Hart, Catholic Archbishop of Melbourne, and Catholic Health Australia. Morris J granted them leave to appear as amici and similarly permitted an appearance as amicus by Right to Life. These entities were allowed to make written submissions and oral submissions which were to be confined to one hour for each amicus.

In granting these amici leave to appear, Morris J stated that he had regard to the comments of Brennan CJ and Kirby J in *Levy* and gave the following reasons.⁶³

It is unusual for the status of *amicus curiae* to be given to a person in a hearing before the Trial Division of this Court. However, it struck me that the nature of the proceeding, the novelty of the issues raised, the possible implications of any

58 *Re BWV*, above n56 at 22.

59 *Ibid*.

60 *Re BWV*, above n8.

61 *Id* at 490.

62 *Ibid*.

63 *Id* at 491.

decision and the uncertainty about the precise role that the Attorney-General might play in the proceeding all justified this course.

The outcome in relation to the amici is consistent with the test set out by the High Court. Morris J granted leave because he was not certain that all relevant submissions would otherwise be brought before the Court. For example, at the time that His Honour made the order to allow the appearances as amici, it was not clear whether the Attorney-General would support the Public Advocate's position or oppose it.⁶⁴ Granting leave to appear as amici, therefore, was a way to ensure that the relevant arguments would be put before the Court.

There are two comments that can be made in relation to the decision to allow intervention in this case. The first is that the reasoning of Morris J is relatively brief and does not explain why leave for amici to appear was granted. For example, although the judgments of Brennan CJ and Kirby J in *Levy* were relied upon, it is unclear how His Honour weighed or treated the judges' differing views. A second comment is that the basis for the Attorney-General being granted leave to intervene as a party was also not explained. Although this was a decision of another judge (Master King), because of the significant consequences of allowing joinder as a party, some discussion of the reasons for the exercise of this discretion was warranted.

It is interesting to compare this case with a similar one, *Re MC*,⁶⁵ decided by the Queensland Guardianship and Administration Tribunal. In that case, the adult's relatives lodged an application for Tribunal consent to the withdrawal of a PEG tube through which an 80 year old woman in a persistent vegetative state was being provided with artificial hydration and nutrition. To ensure that the interests of the adult were protected, the Tribunal appointed the Adult Guardian (Queensland's equivalent to the Public Advocate) to appear on behalf of Mrs MC.⁶⁶ The Adult Guardian made written submissions on the views, wishes and interests of the adult, as well as on matters of law. The Tribunal also informed itself through a wide range of written and oral evidence, including reports from medical practitioners, empirical research on the proposed treatment, and relevant medical guidelines.

No submissions were received from organisations of the kind that sought to take part in the Victorian case. The Queensland Tribunal does have the power to obtain evidence that is necessary for it to make a decision.⁶⁷ However, even if non-party involvement was sought, there was no suggestion in the reasons for decision that the Tribunal considered that it needed further submissions on points of law, fact or any other issue to make its determination.

64 As it turned out, the Attorney-General made submissions as to the law that were contrary to those made by the Public Advocate: *Re BWV*, above n8 at 491.

65 Above n9.

66 The Tribunal is empowered to appoint a person to represent the adult's views, wishes and interests in a proceeding if the adult is not represented, or if the adult is represented and the presiding member considers that agent to be inappropriate to represent the adult's interests: *Guardianship and Administration Act 2000* (Qld) s125.

67 *Id* at s130.

C. *Intervention Overseas*

Non-parties have also sought to become involved in these decisions in overseas jurisdictions. The landmark case on the issue of withholding and withdrawing life-sustaining medical treatment in the United Kingdom is *Airedale NHS Trust v Bland*.⁶⁸ Anthony Bland was seriously injured in the Hillsborough football ground disaster in 1989 which left him in a persistent vegetative state. The House of Lords was asked to rule on whether it would be lawful for health providers to discontinue certain life-sustaining medical treatment. The application to stop treatment was made by the hospital treating Anthony Bland, with the full support of his family, doctor and independent physicians.

The Official Solicitor was Bland's guardian *ad litem* and appeared (as a party) on behalf of Bland. The Official Solicitor actively opposed the application, arguing that the proposed withdrawal was unlawful and that the existing treatment should continue. In addition to the parties to the action, the Attorney-General appeared as *amicus curiae* and made submissions that effectively supported the hospital's application. In effect, therefore, the Attorney-General did not play the role of contradictor by challenging the legal submissions of the applicant (although opposing submissions were presented by the Official Solicitor), nor did he provide an alternative analysis of the legal issues. No other individual or group sought leave to intervene as a party, or appear as *amicus curiae*.

Unfortunately, there was no discussion in the report about the grounds upon which the Attorney-General sought leave to appear, and why leave was granted. However, it is interesting to note Lord Mustill's criticism of what he regarded to be the limited role played by the Attorney-General in the case. His Lordship commented:

... it is a great pity that the Attorney-General did not appear in these proceedings between private parties to represent the interests of the state in the maintenance of its citizens' lives and in the due enforcement of the criminal law, for although ... the Official Solicitor and Mr Lester [appearing for the Attorney-General] as *amicus curiae* have made invaluable submissions they were here in a different interest.⁶⁹

Lord Mustill's concern is not that the Attorney-General took part only as an *amicus* instead of a party. Rather, it seems that his concern is that the Attorney failed to put all relevant issues before the court, and in particular address the difficulties raised by granting a declaration in the House of Lords' civil jurisdiction as to the lawfulness of proposed conduct, which inevitably involves reaching a conclusion as to the state of the criminal law.

The issue of intervention in cases involving withholding and withdrawing medical treatment remains topical in the United Kingdom and featured in the recent decision of *R (on the application of Burke) v The General Medical Council*.⁷⁰ In that case, an adult with a degenerative brain condition who retained

68 *Airedale NHS v Bland* [1993] AC 789 (hereafter *Airedale*).

69 *Id* at 889.

capacity to make decisions about treatment challenged the published guidelines of the General Medical Council on withholding and withdrawing life-prolonging treatment. The adult's concern in that case was that artificial nutrition and hydration might be withdrawn from him at some stage in the future against his wishes. At first instance, the Disability Rights Commission was joined as an 'interested party', Munby J being of the view that the Commission had a 'particular and highly relevant informed expertise which none of the other parties could bring to the task in hand.'⁷¹ The Official Solicitor was joined as intervener, although was of the view that as the adult was competent and would remain so until almost immediately before his death, many of the matters raised by him did not require determination by the court.⁷²

A different approach to intervention has been taken by the New Zealand High Court. The first case in which the court had to decide on the lawfulness of withdrawing life-sustaining treatment was *Auckland Area Health Board v Attorney-General*.⁷³ The proceedings involved a man suffering from an extreme case of Guillain-Barre syndrome, a disease that affects the nervous system of the brain. The man's brain was effectively disconnected from his body, but he was not medically brain stem dead. His condition had persisted for 12 months and there was no prospect of recovery. Doctors in the intensive care unit of the treating hospital sought a declaration, with the support of the man's family and the hospital's ethics committee, that it would be lawful to withdraw artificial ventilation.

The appropriate role of the Attorney-General was an interesting feature of this case. The Attorney-General was originally named as a defendant in the action but, after a preliminary conference before Thomas J, he was removed as a party. There was also some discussion as to whether the Attorney-General should be involved as *amicus curiae* or an intervener. Counsel for the Attorney-General indicated that there was relevant information (factual and legal) that she would be able to bring before the court that would be of assistance, and therefore it might be appropriate to appear as *amicus curiae*. The matter was finally resolved at hearing where counsel for the Attorney-General sought and was granted leave to appear as intervener. Thomas J granted leave on the basis that:

... the proceeding raises matters of general public importance and the relief sought, if granted, would impinge upon the prosecutorial discretion and prerogative powers of the Crown ...⁷⁴

70 [2004] EWHC 1879 (Admin) which was overturned by on appeal by the Court of Appeal: [2005] EWCA Civ 1003.

71 *R (on the application of Burke) v The General Medical Council* [2004] EWHC 1879 (Admin) at [34].

72 When the matter went on appeal to the Court of Appeal, the Disability Rights Commission appeared as an intervener rather than an "interested party". Also intervening were the Official Solicitor, the Catholic Bishops' Conference of England and Wales, the Secretary of State for Health, Patient Concern, Medical Ethics Alliance Alert, the British Section for the World Federation of Doctors who Respect Human Life and the Intensive Care Society. There was, however, no discussion in the report of the basis upon which intervention was permitted.

73 [1993] 1 NZLR 235.

Two points are relevant here. Firstly, the Attorney-General was joined as a party and did not appear merely as *amicus curiae*. This is because the interests of the Attorney-General in terms of his prosecutorial discretion were squarely before the court. This is consistent with the position in Australia which permits intervention in civil litigation that may affect the prerogatives of the Crown. The second point is that the Attorney-General did not make submissions on the merits of the application, nor act as an advocate for the adult. Instead, the Attorney-General raised only procedural issues regarding whether the proposed order would amount to a fetter on the prosecutorial discretion of the Crown.⁷⁵ The report of the case indicated that an appearance was made on behalf of the adult patient, but there is no indication that counsel opposed the application or took any active part in the proceedings.

*Re G*⁷⁶ is a later decision of the New Zealand High Court involving an application to withdraw life-sustaining treatment. The case involved a 69 year old man who suffered extensive brain damage from a motor vehicle accident. The man was totally immobile and unable to talk or otherwise communicate and attempts at rehabilitation had failed. The man's next of kin brought an application to terminate life support, and this application was supported by both the health authority and its ethics committee.

There were five entities involved in the proceedings: the applicants (the adult patient's next of kin), the adult patient (through counsel), the health authority, the ethics committee of the health authority, and the Attorney-General. Unfortunately, there was very little discussion in the report about the extent and nature of their respective involvement. However, a number of observations can be made. Firstly, the Attorney-General was granted leave to intervene as party to the application. Again, procedural considerations were the major focus for the Attorney-General, rather than the merits of the individual matter before the court. Secondly, the man was separately represented by counsel, although rather than opposing the application as occurred in *Bland*, submissions were limited to commenting on procedural issues and providing information to the court about the man's likely views and wishes.

D. Themes in Intervention

A number of themes emerge from this discussion of the intervention that has occurred in some of the major cases in this area of law in Australia and overseas. The first and clearest theme is that intervention has occurred on an *ad hoc* basis, often without judges clearly articulating the reasons for the exercise of their discretion. There has been a lack of consistency as to the nature of intervention that

74 *Id* at 241.

75 The Attorney-General was concerned that a declaration regarding the lawfulness of the proposed conduct would affect the Attorney's prosecutorial discretion, and argued that the alternative relief of consenting to the withdrawal of treatment on behalf of the patient would have avoided this difficulty: *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 at 240-241, 242.

76 [1997] 2 NZLR 201.

is allowed. Further, for those non-parties who have been permitted to intervene in the proceedings, there has been no clear pattern as to the role that the different interveners or amici will play.

Having said that, there are also other themes in these cases that reveal some level of common practice. One is that the Attorney-General has regularly appeared in these cases, generally as a party to the proceedings. Although the role undertaken (and the submissions made) by the Attorney-General has differed in the various cases, the presence of this office was a constant in all of the overseas decisions. Another theme that emerged from the cases is some kind of involvement of a separate representative for the adult whose future is being considered. This is worth noting because this form of representation is an issue that is considered further in the model proposed in this article.

A final theme is to note that those granted leave as amici have generally been able to satisfy the *Levy* test, in that they are able to make a submission on law or relevant fact that will assist a court in a way in which the court would not otherwise be assisted. A more difficult question, and one illustrated by the *BVV* decision, is whether that particular individual or organisation is the appropriate entity to provide the court with such information. This issue is also considered later in the article.

5. *Advantages and Disadvantages of Intervention*

Before addressing the issues discussed in the preceding section and outlining a model for intervention in cases involving withholding and withdrawing life-sustaining medical treatment, a discussion of some of the arguments for and against intervention is needed. Allowing non-party involvement in proceedings is based on discretion, and the balancing of these arguments needs to inform the development of the proposed model.

There are a number of compelling reasons for permitting intervention. Perhaps the strongest argument is that intervention can assist a court by providing information otherwise not available to it so that it is able to make the best decision possible. Given the importance of decisions in these types of cases, described by one judge as decisions ‘literally of life and death’,⁷⁷ there is some merit in permitting non-party involvement. This assistance to the court may go beyond the mere provision of information and may include argument about the ethical and moral issues (to the extent that they inform legal decision making) associated with end of life decisions.⁷⁸ This role of an intervener or amicus will be particularly important where one party is unable or unwilling to arrange legal representation,⁷⁹

⁷⁷ *Airedale*, above n68 at 808 (Sir Thomas Bingham MR).

⁷⁸ The right to self-determination has been described as one of ‘a cluster of ethical principles which we apply to decisions about how we should live’: *Airedale*, above n68 at 826 (Hoffman LJ). It is respect for the individual and the individual’s right to choose how he should live his own life. The other connected ethical principles are sanctity of life and respect for the dignity of the individual human being, including the right to die with dignity: *Airedale*, above n68 at 826–832 (Hoffman LJ).

where the parties have not submitted sufficient material⁸⁰ or where they have overlooked some aspect of the case.⁸¹

Intervention can also be useful in developing an area of law that is still, in Australia at least, relatively new to the courts. It may be of some assistance to the court in refining its thinking to have an intervener or amicus play the role of ‘contradictor’ to ensure that all opposing arguments are put before it.⁸² This may be particularly important if the decision will affect not only the parties before the court, but also a range of other people or organisations,⁸³ such as adults in similar conditions and their medical teams.

There may also be other more indirect advantages of permitting intervention. Allowing the participation of interest groups may result in them feeling that their concerns have been heard, and accordingly they are more likely to respect the ultimate court decision.⁸⁴ It can also enable courts to promote a greater understanding and acceptance of the decision by the wider community.⁸⁵ It is perhaps reasonable to ask, however, whether these more indirect advantages are likely to follow in cases involving withholding or withdrawing life-sustaining medical treatment, given the strong differences in values that often underpin disputes in this area.

Despite all of these advantages, there are compelling arguments to restrict the involvement of non-parties in cases involving the withholding or withdrawing of life-sustaining medical treatment. One major concern is that allowing intervention defies the well established principle of the adversarial system that the parties to a proceeding control their case and define the issues in dispute. If intervention is permitted, an intervener or amicus may expand the issues of a case,⁸⁶ causing substantial prejudice to the parties, the lengthening of proceedings and potential court delays.⁸⁷ The overseas experience shows that matters can become extremely lengthy and complicated when numerous bodies seek to appear as interveners or amici in the one case.⁸⁸ These disadvantages of intervention are likely to be significant in cases of this kind, as it is often family members with limited resources who are seeking the court’s assistance. Further, lengthy delays may also have a negative impact upon the adult patient who is the subject of the proceedings, as he or she may have to endure continued burdensome treatment.

79 *Johnson v Sammon* [1974] 7 SASR 431 at 435.

80 Williams, above n24 at 366.

81 *Bropho v Tickner* (1993) 40 FCR 165 at 172–173.

82 See, for example, the argument of Luke Gormally in ‘Commentary on Skene and Parker: The Role of the Church in Developing Law’ (2002) 28 *J of Modern Ethics* 224 that the Catholic Bishops played a legitimate role in a number of health cases in ensuring that all the relevant legal arguments were before the court.

83 Re, above, n14 at 533.

84 Bernadette McSherry, ‘Amici Curiae and the Public Interest in Medical Law Cases’ (2003) 11 *J of Law and Med* 5 at 8, Kenny, above n 1 at 169.

85 Kenny, above n 1 at 169.

86 Id at 167, Rosemary Owens, ‘Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy’ (1998) 20 *Adel LR* 193 at 195–196.

87 Kenny, above n 1 at 167.

88 Ibid. Kenny gives the example of the United States case of *Webster v Reproductive Health Services* 494 US 490 (1989) when over 60 amici briefs were filed in that one case.

There are also a range of objections that apply specifically to intervention by interest groups, and these concerns are particularly relevant to decisions to withhold or withdraw medical treatment, given the interest that different organisations and groups have shown to date in this area of decision making. One worry is that by entertaining the views of interest groups, the courts may offend the principle of equality before the law.⁸⁹ For example, where there are several public interest groups seeking to appear as amici, should the court allow access to all? The key test, that the applicant must be 'willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted',⁹⁰ may be satisfied by the first applicant. However this test becomes harder to satisfy for subsequent applicants.⁹¹ Given the range of different organisations with a clear interest in this area of law, there is a concern that access to the courts may be inequitable.

A related issue is that some of these groups are better funded than others and so are more able to afford litigation. This raises fears that the courts may only listen to powerful and well-funded interest groups.⁹² A further danger in permitting intervention by interest groups is that they will use the role of amicus for their own political purposes rather than for the reason they were permitted to appear: to assist the court to determine the issues before it.⁹³ This is of particular relevance to cases considering end of life decision making, as some of the legal and other arguments that have been put forward have been heavily influenced by a particular religious viewpoint or set of values.

A final disadvantage of permitting intervention in decisions to withhold or withdraw life-sustaining medical treatment is that it makes very public what is an intensely private matter for the adult and his or her family. The private nature of proceedings of this kind is obvious. For example, although such a decision is informed by a range of factors, of critical importance for a court are the adult's own views and wishes.⁹⁴ Further, evidence about what the adult would have wanted is usually provided by his or her family, and the adult's family generally are also central figures in the different legal frameworks established for making these sorts of decisions.⁹⁵ Finally, from a wider non-legal perspective, the last days of an individual's life is an experience that is intensely personal, and this is sometimes

89 Kenny, above n 1 at 168; McSherry, above n 85 at 8.

90 Levy, above n4 at 604.

91 Owens, above n 86 at 196.

92 Kenny, above n 1 at 168.

93 Anthony Mason, 'Interveners and Amici in the High Court: A Comment' (1998) 20 *Adel LR* 173 at 174. See also Loane Skene & Malcolm Parker, 'The Role of the Church in Developing Law' (2002) 28 *J of Modern Ethics* at 215.

94 For example, in relation to decisions made under the common law as to what is in the adult's 'best interests' (which is the primary test for these matters), consideration is given to his or her views and wishes: *Airedale*, above n68 at 817 (Butler-Sloss LJ), at 833 (Hoffman LJ), at 872 (Goff LJ); *Re D* (1997) 38 BMLR 1 and *Re G (Adult Incompetent: Withdrawal of Treatment)* (2001) 65 BMLR 6. An adult's views and wishes have also been given specific recognition as a factor to consider in these decisions under some guardianship legislation: see *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld) sch 1 general principle 7.

highlighted by the indignity being suffered by an adult, due to the condition that eventually causes his or her death. Permitting intervention by an outsider changes the nature of this private decision. The matter can instead become a very public one, and the proceedings can attract a lot of media publicity. Intervention can also bring a particularly resented intrusion into the personal sphere if it involves interest groups that advocate a set of values not shared by the adult and his or her family.

This final disadvantage also raises a wider issue that forms part of the context in which these advantages and disadvantages are raised, and this is the *nature* of these sorts of decisions.⁹⁶ From one perspective, decisions of this kind are intensely private ones. This was recognised by the Victorian Civil and Administrative Tribunal in *BWV* when it referred to ‘the most sensitive and personal nature’ of the proceedings before it.⁹⁷ However, there is also a range of wider public interest considerations raised by these sorts of cases. These considerations include whether the rights of the adult have been adequately protected, the financial implications of keeping such patients alive and the role of quality of life assessments in these decisions. To reflect the relevance of these wider considerations in what might otherwise be regarded only as a personal matter, these decisions can be described as ‘private decisions with a public interest’.

It is suggested that the nature of a dispute before a court is relevant to whether intervention should be permitted. If the discretion to allow appearances is informed by weighing its advantages and disadvantages, then the context in which that occurs is critical. For example, when compared with decisions about withholding and withdrawing medical treatment, constitutional cases would generally be regarded as raising issues that are less private and less personal. Accordingly, a judge may be more inclined to permit intervention in cases of that nature. By contrast, although withholding and withdrawing cases have an element of public interest, their intensely personal nature might make the disadvantages of intervention more prominent.

This characterisation of withholding and withdrawing cases as ‘private decisions with a public interest’ informs the model for intervention that we propose. The public interest considerations present in such a decision warrant the involvement of non-parties to some degree, but the predominantly private nature of the decision suggests that the intervention should be limited.

95 In relation to the role of the adult’s family under the common law in these sorts of decisions, see for example, *Airedale*, above n68 at 789; *Auckland Area Health Board v Attorney-General*, above n75; *Re G* [1997] 2 NZLR 201; *Re G (Persistent Vegetative State)* [1995] 2 FCR 46 (Fam Div) 46. Under some guardianship legislation, the role of the adult’s family is further enhanced and a family member or friend may even be the person who makes the decision to withhold or withdraw life-sustaining medical treatment (although subject to certain safeguards): see *Guardianship and Administration Act 2000* (Qld) s66 and *Powers of Attorney Act 1998* (Qld) s63.

96 This also raises the issue of the dichotomy between private and public issues in our legal system: Owens, above n 86 at 197.

97 *Re BWV*, above n56 at 22.

6. *A Model of Limited Intervention*

Decisions to withhold or withdraw life-sustaining medical treatment from adults who lack capacity share common features. Accordingly, it is possible to develop a model for guiding the level of intervention that would be appropriate in cases of this kind. Indeed, it is suggested that some uniformity would be desirable given the ad hoc approach to this issue in the cases discussed above. The proposed model could operate whether the application to withdraw or withhold treatment or to oppose that withholding or withdrawal was brought before a Tribunal pursuant to statute, or before the Supreme Court in the exercise of its *parens patriae* jurisdiction. The model proposed incorporates the analysis of the advantages and disadvantages of permitting non-party involvement and also draws on the intervention that has taken place in cases to date. Also of particular importance is the nature of the decisions raised in these sorts of cases: ‘private decisions with a public interest’.

The starting point is, of course, the existing law because any model must operate within the established legal framework. The test applied as to whether an outsider should be permitted to become an intervener is whether that individual or organisation is able to establish either a direct or indirect interest in the proceedings.⁹⁸ Under the model proposed, there are two parties who should be permitted to intervene in these cases. The first is the adult him- or herself. Generally, the matter is brought before a court by another interested party so the adult is not automatically represented, although usually the adult’s family will advocate on his or her behalf. However, the adult clearly has a direct interest as he or she is bound by the court’s decision and therefore is able to be made a party to the proceedings. Our model goes further and suggests that this should be mandatory in those cases where a court is called upon to decide whether to withhold or withdraw life-sustaining medical treatment. If the parties have not arranged representation for the adult, the court should direct that this occurs. Separate representation of the adult has been a feature of these sorts of decisions both in Australia and overseas, and has generally been performed by the relevant statutory officer appointed to protect the interests of adults who lack capacity.⁹⁹ If the jurisdiction does not have a statutory officer charged with this kind of protective role, legal counsel could be appointed on the adult’s behalf.¹⁰⁰ Given the inability of adults for whom these decisions are being made to express their own voice, separate representation is an essential part of safeguarding these adults’ rights and interests.

98 *Levy*, above n4 at 601.

99 This officer has different names in the various jurisdictions: the Official Solicitor (in the capacity as guardian ad litem) in the United Kingdom (in *Airedale*, above n68), the Public Advocate in Victoria (in *Re BWV* above n16 at 487) and the Adult Guardian in Queensland (in *Re MC*, above n9. Compare New South Wales, however, where the Office of the Public Guardian has a more limited role.

100 See, for example, *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 and *Re G* [1997] 2 NZLR 201 where the patient was separately represented by counsel.

The second party who should be entitled to intervene is the Attorney-General. In the cases discussed, there has generally been some level of involvement by the Attorney-General, although the reasons for permitting intervention have been sometimes incomplete. For the model that we are proposing, the Attorney-General should intervene as a party to the proceedings because of the important public policy issues that a decision to withhold or withdraw a life-sustaining measure raise. It has been suggested that there is no automatic right for the Attorney-General to intervene in civil litigation that raises matters of public policy,¹⁰¹ but we argue that such a right should attach to proceedings relating to medical treatment that will result in the death of an adult. Although there is no Australian case authority that the Attorney-General will have a direct or indirect interest in the proceedings as set out in *Levy*, there is a considerable amount of dicta suggesting that the Attorney-General has an important public policy role to play in this kind of case.

In *Airedale*, for example, Lord Mustill noted that, in his view, the Attorney-General should have appeared in the proceedings ‘to represent the interests of the state in the maintenance of its citizens’ lives’.¹⁰² In *BWV*, Morris J permitted intervention ‘to ensure that there was a proper contradictor; and, also, to ensure that certain matters concerning the public interest were considered by the Court’.¹⁰³ Similarly, in *Auckland Health Board v Attorney-General*,¹⁰⁴ one of the reasons given by Thomas J for allowing intervention by the Attorney-General was that ‘the proceeding raises matters of general public importance’. Further support for this view is also found in three successive reports of the Australian Law Reform Commission. In its report, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*,¹⁰⁵ the Commission affirmed its recommendations in earlier reports,¹⁰⁶ finding that Attorneys-General should be permitted to intervene in cases that raise ‘an important question affecting the public interest’.¹⁰⁷

Where declaratory relief concerning the lawfulness of the proposed withholding or withdrawing of medical treatment is granted by the court, this could operate as a potential fetter on the prosecutorial discretion of the Attorney-General. This effect on a Crown prerogative was one of the grounds upon which the Attorney-General intervened in the two New Zealand cases. However, the position may be different if alternative relief is sought. If, for example, an application is made for the court to provide consent to withholding or withdrawing treatment, the prosecutorial discretion is not affected, as a declaration is not necessarily made about the lawfulness of the proposed conduct. In such a case, the

101 See above n33.

102 *Airedale*, above n68 at 889.

103 *Re BWV*, above n8.

104 Above n75 at 240.

105 ALRC, *The Judicial Power of the Commonwealth*, above n33 at [14.33]–[14.34], [14.38].

106 ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, above n33 at [6.43], Recommendation 10 and ALRC, *Standing in Public Interest Litigation*, above n33 at [300].

107 ALRC, *The Judicial Power of the Commonwealth* above n33 at [14.38].

impact of the decision on the Attorney-General's prosecutorial discretion may not justify intervention, so another basis for his or her involvement is required.

It is therefore suggested that the basis for intervention by the Attorney-General should be the public policy considerations that a decision to withhold or withdraw life-sustaining medical treatment raise. It can be argued that the public policy considerations that are inherent in such a decision give the Attorney-General an indirect interest in the proceeding, and so satisfy the *Levy* test for intervention. In its role as protector of its citizens, the Attorney should test any submission regarding the lawfulness of proposed action to withhold or withdraw life-sustaining medical treatment. The Attorney-General should act as a contradictor in the proceeding and provide submissions on both issues of law and public policy.¹⁰⁸

Having determined who should be allowed to intervene as parties in the proceedings, the question then arises whether further appearances as amici also should be permitted. The general test is whether an applicant 'is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted',¹⁰⁹ and this is qualified by a number of guidelines. A critical part of the court exercising its discretion under these Brennan principles is determining what material is likely to be before the court and what further material is likely to assist.

In cases involving decisions to withhold or withdraw life-sustaining medical treatment, a court will need both argument on the law that governs these decisions and also the factual evidence needed to decide whether the criteria established by the law are met in the particular case being decided. In relation to the law, this will include argument as to the difficult legal issues that arise in this area, both at common law¹¹⁰ and under any applicable legislative regime.¹¹¹ In relation to the factual evidence, this will include testing claims that further treatment need not be provided to the adult, and this will involve ascertaining the adult's medical condition and his or her likely views and wishes.

It is suggested that further appearances by amici will be unnecessary because the parties to the proceedings suggested above will be able to supply all the material needed by a court.¹¹² Under the model proposed, there are already likely to be at least three parties involved. In addition to the adult's separate representative and the Attorney-General, there will also be an applicant, that is the

108 This was one of the grounds for intervention argued by counsel for the Attorney-General in *Re BWV*, above n16.

109 *Levy*, above n4 at 604 (footnotes omitted).

110 See, for example, *Airedale*, above n68; *Auckland Area Health Board v Attorney-General*, above n33 and *Re G*, above n76.

111 See, for example, *Re BWV*, above n8 and *Re MC*, above n9 which considered the Victorian and Queensland legislative regimes respectively. For a more detailed consideration of the difficult legal issues arising under the Queensland regime, see Ben White and Lindy Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) available at <http://www.law.qut.edu.au/research/lifesustain/issues.jsp>.

112 Compare Skene & Parker, above n93, where the authors express concern about the influence exerted by the church through intervention in civil proceedings. However, they suggest at 215 that 'there is no logical basis upon which such intervention can be precluded'.

person or organisation who is bringing the application before the court. These matters may come before the courts in a range of ways. For example, there may be agreement amongst an adult's family and medical team that treatment should be stopped, but court approval is being sought due to worries about the lawfulness of that decision.¹¹³ In this case, either the family or the doctor, or both, may be the applicants. There may also be another active party who is opposing the application; for example, where a doctor is proposing to terminate treatment and a family member or friend objects.¹¹⁴ In this situation, either the family or the doctor may be the applicant with the other party opposing the application. For the purposes of our model, it is argued that regardless of how the application is brought and the different parties who appear, a court will have all the material it needs without further non-party involvement.

In relation to the law that governs decisions to withhold or withdraw life-sustaining medical treatment, there will be argument both for and against the proposed course of action being lawful. The party arguing that treatment should not be provided (which we will call here the applicant, although as discussed above, it may be a party opposing the application) will provide the legal argument that supports the lawfulness of that decision. The opposing arguments will be presented by the Attorney-General who would participate as a contradictor and test the legal submissions of the applicant. It should be noted that the involvement of the Attorney-General in these kinds of cases need not be ongoing. Once the legal framework and public policy considerations are settled, there would no longer be a need for the Attorney-General to intervene as a party and contradictor. However, as this area of law is still developing (at least in Australia), this role is presently still warranted.

In relation to the factual evidence needed to decide whether the criteria established by law are met in the particular case being decided, again there are two sides. The facts that support withholding or withdrawing the treatment will be provided by the applicant, who presumably has some evidence to warrant reaching that conclusion. What could be missing potentially, however, is the factual evidence needed to ensure that the interests of the adult who lacks capacity are safeguarded. As was noted earlier, some individuals or institutions may wish to terminate treatment for reasons other than the best interests of the adult. To avoid this and to ensure that the appropriate evidence is before the court, an independent party should be appointed as a separate representative for the adult, generally the statutory officer who is responsible for protecting the rights of adults who lack capacity. This person would provide all of the factual evidence needed to safeguard the interests of the adult patient, including the adult's medical condition and his or her views and wishes, to the extent that they can be ascertained. That role then also includes advocating for the decision that is in the adult's best interests. In practice, this role has also included addressing the legal arguments (which of course would assist the court as well), but this role is less important under the proposed model with the Attorney-General playing the role of contradictor.¹¹⁵

113 For example, *Airedale*, above n68.

114 For example, *Isaac Messiha*, above n9.

The result of the participation of these parties is that all of the legal argument and factual evidence needed by a court to decide whether to withhold or withdraw life-sustaining medical treatment is available. Accordingly, the scope for further assistance to be provided to the court is very limited, which in turn limits the ability of other non-parties to argue they should be permitted to appear as amici curiae. However, even if a further non-party could identify information that would assist the court, it is argued that the discretion to appear under the Brennan principles should be exercised sparingly. The private nature of the proceedings is critical to the balancing exercise that occurs. For example, when considering whether the assistance provided to the court is disproportionate to the cost and delay to the parties, the impact of the intrusion by further outsiders to the dispute is likely to be significant and so should be influential in considering whether an appearance should be allowed.

Our model has been designed deliberately to limit this further intervention, particularly by interest groups. It is suggested that this approach represents an appropriate balance between protecting the private rights of those involved in personal decisions while recognising and protecting public interest considerations. It permits some intervention but limits that to officials fulfilling statutory roles so that the public interest is being represented by public officers: the Attorney-General and a separate representative who is the statutory officer responsible for protecting the interests of adults who lack capacity. It is submitted that the involvement of private interest groups as occurred in *BWV* is inappropriate, and so the model has attempted to render that unnecessary.

Although decided prior to the seminal decision of *Levy*, the caution urged by Mahoney P in *NAB v Hokit*¹¹⁶ discussed earlier is especially apt in these kinds of decisions where intervention is sought by interest groups. Provided legitimate public interests (including the welfare of the adult) are protected, the wishes of the parties should be relevant in considering whether a non-party is permitted to appear as amicus.¹¹⁷ It is likely that family and friends of the adult would not welcome what they might perceive as interference from an outside body. The adult's separate representative is likely to be of the same view. Also regarded as relevant by Mahoney P is the motive behind the request to appear in the matter. If intervention is sought so that the proposed amici can pursue their own political goals, such as reform of the law on a particular issue, then that militates against granting leave to appear as amicus curiae. This note of caution resonates clearly in *BWV* where, it can be argued, the goal of intervention was to restrict the practice of withholding or withdrawing life-sustaining measures, that goal being grounded in religious beliefs.

115 This is what happened in *Re BWV*, above n8 and *Re MC*, above n9 where the statutory officer appearing on behalf of the adult made representations on matters of law as well as the particular circumstances of the adult's case.

116 *NAB v Hokit*, above n20 at 380–382.

117 The Australian Law Reform Commission was also of the view that the parties' wishes are relevant in deciding whether to permit intervention: ALRC, *Beyond the Door-Keeper*, above n33 at [4.21]–[4.22].

7. Conclusion

Traditionally, decisions in Australia to withhold or withdraw life-sustaining medical treatment have not been brought before the courts. However, the small but steady stream of cases¹¹⁸ that have reached the courts in recent years may be indicative of greater legal involvement in these sorts of decisions in the future. This increased use of the courts to resolve these disputes is likely to bring with it requests from non-parties who are interested in the outcome to be able to intervene. Indeed, this has already happened in *BWV*, Australia's most publicised decision involving life-sustaining medical treatment, where Right to Life Australia Incorporated, the Catholic Archbishop of Melbourne and Catholic Health Australia Incorporated all sought and were given permission to appear as amici.

Given the likelihood of interested people and groups seeking to intervene in decisions to withhold or withdraw life-sustaining medical treatment, we have suggested a model that might be appropriate for dealing with these requests. Central to our approach is the characterisation of these matters as 'private decisions with a public interest'. These decisions are intensely private and that should be respected. However, there are also wider public interest considerations that need to be addressed.

Our approach is one of limited intervention which attempts to restrict non-party involvement to the Attorney-General and a separate representative for the adult, usually the statutory officer responsible for protecting the interests of adults who lack capacity. Specifically, the intervention of interest groups in these matters is discouraged. While it is accepted that some intervention may be warranted to address the public interest considerations that these decisions raise, this should be limited to officials fulfilling statutory roles. Their official position means that they are better placed than interest groups to represent the public good and their involvement in the private affairs of the adult is less likely to be regarded as intrusive by those close to the adult.

Interest groups play a vital role in a democracy, and their participation in the political process is encouraged. However, their role needs to be balanced against other competing considerations, such as the likely impact that intervention will have on the adult and those close to him or her. The exclusion of interest groups from participation in court proceedings does not mean though that they are unable to lobby for change or influence the law. We suggest that other forums, such as the Parliament, are the appropriate place for interest groups to be making their case¹¹⁹ rather than in the private decisions of others.

118 See above n 9.

119 In oral argument in *Superclinics Australia Pty Ltd v CES*, McHugh J asked counsel for the applicant amici whether 'the legislature is the place you should be addressing your arguments. You are asking us, in civil proceedings, to make a ruling on the lawfulness or otherwise of abortion': *Superclinics Australia Pty Ltd v CES & Ors* Transcript of Proceedings, S88 HCA (McHugh J) (11 September 1996) 7. See also Owens, above n 86 at 193–194 and the comments of Gaudron and McHugh JJ in *Breen*, above n16 at 115.

