

**Queensland  
Law Reform Commission**

**A Review of Queensland's  
Guardianship Laws**

**Report**

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*Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62, vol 1 (June 2007), vol 2 (July 2007)

*Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (September 2008)

*Shaping Queensland's Guardianship Legislation: A Companion Paper*, WP No 64 (September 2008)

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# Chapter 14

## The appointment of guardians and administrators

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### INTRODUCTION

14.1 One of the key issues that has arisen in the course of the Commission's review is the appointment of guardians and administrators. This issue is antecedent to the consideration of another issue within the Commission's terms of reference, the scope of the powers of guardians and administrators.<sup>1</sup>

14.2 This chapter gives an overview of the appointment of guardians and administrators under the *Guardianship and Administration Act 2000* (Qld). It also provides an outline of similar provisions in other jurisdictions, and raises some

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1

The terms of reference are set out in Appendix 1.

specific issues for consideration. However, it does not deal with the appointment of guardians for restrictive practice matters under Chapter 5B of the Act.<sup>2</sup>

## BACKGROUND

14.3 The law recognises that an adult is entitled to make his or her own decisions. If an adult has impaired capacity for making decisions about a particular matter or type of matter, he or she may need someone to make decisions on his or her behalf. This substitute decision-making can often be undertaken by the adult's family and friends in an informal way. An adult who has capacity may also anticipate the time when he or she may need a substitute decision-maker and formally appoint an attorney under an enduring power of attorney or in an advance health directive.<sup>3</sup> If an appointed attorney is not competent, the *Guardianship and Administration Act 2000* (Qld) provides for the Adult Guardian to suspend the attorney's powers, and for the Adult Guardian to act as the guardian and the Public Trustee to act as administrator.<sup>4</sup> If there is no attorney, and a substitute decision-maker is required,<sup>5</sup> the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian or an administrator to make decisions for the adult.<sup>6</sup>

14.4 A guardian can be appointed for personal matters, such as decisions about where the adult will live, who the adult will live with, where the adult will work, the services the adult will receive, and consent to certain types of health care.<sup>7</sup> An administrator can be appointed for financial matters, such as day-to-day financial decisions, buying and selling property, making investments and entering into contracts.<sup>8</sup>

<sup>2</sup> Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with substitute consent for the use of restrictive practice matters for an adult with an intellectual or cognitive disability who receives disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. Although the Commission is not generally reviewing ch 5B of the *Guardianship and Administration Act 2000* (Qld), Chapter 19 of this Report considers a number of specific issues that have been raised in relation to the use of restrictive practices.

<sup>3</sup> *Powers of Attorney Act 1998* (Qld) s 32. Enduring powers of attorney are considered in Chapter 16 of this Report.

<sup>4</sup> *Guardianship and Administration Act 2000* (Qld) s 195. An attorney is not competent if, for example, a relevant interest of the adult has not been, or is not being, adequately protected; the attorney has neglected the attorney's duties or abused the attorney's powers, whether generally or in relation to the specific power; or the attorney has otherwise contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld): *Guardianship and Administration Act 2000* (Qld) s 195(2).

<sup>5</sup> The decision-making process for an adult may need to be formalised, for example, if the person wishing to make a decision on behalf of the adult does not have the necessary legal authority to do so; the authority of the person making the decision is disputed; there is no appropriate person available to make the decision; the decision or decisions being made are inappropriate; or a conflict occurs over the decision-making process.

<sup>6</sup> *Guardianship and Administration Act 2000* (Qld) ss 12(1), 82(1)(c).

<sup>7</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 2 s 2. Subject to s 74 of the Act, no-one may be appointed as a guardian for a special personal matter or a special health matter: *Guardianship and Administration Act 2000* (Qld) s 14(3). Section 74 of the Act empowers the Tribunal, if it has consented to special health care for an adult, to appoint a guardian for the adult to consent to subsequent special health care.

<sup>8</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 2 s 1.

14.5 In the 2008–09 reporting year, the Tribunal heard 2064 applications and reviews in relation to guardianship. Of these, the Tribunal made 1069 appointments. The Tribunal also heard 2671 applications and reviews in relation to administration. Of these, the Tribunal made 2116 appointments.<sup>9</sup>

## THE GROUNDS FOR AN APPOINTMENT

### The law in Queensland

14.6 Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) deals with the appointment of guardians and administrators.

### *The appointment of a guardian or an administrator*

14.7 Section 12 provides for the appointment, by the Tribunal, of a guardian or an administrator for an adult for a matter:

#### **12 Appointment**

- (1) The Tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied—
  - (a) the adult has impaired capacity for the matter; and
  - (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
  - (c) without an appointment—
    - (i) the adult's needs will not be adequately met; or
    - (ii) the adult's interests will not be adequately protected.
- (2) The appointment may be on terms considered appropriate by the tribunal.<sup>10</sup>
- (3) The tribunal may make the order on its own initiative or on the application of the adult, the adult guardian or an interested person.
- (4) This section does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B. (note added)

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<sup>9</sup> Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 41–2.

<sup>10</sup> The Tribunal may also impose a mandatory requirement, including a requirement about giving security, on a person who is to become a guardian or an administrator: *Guardianship and Administration Act 2000* (Qld) s 19.

*Editor's note—*

Section 80ZD provides for the appointment of guardians for restrictive practice matters.

14.8 The Tribunal may make an order to appoint a guardian or an administrator for an adult only if it is satisfied that each of the three grounds set out in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) is established. These grounds set out a three-step process for determining whether an appointment should be made.

14.9 The first ground, or step, under section 12(1)(a) is that the adult has impaired capacity for the matter.<sup>11</sup> This is a threshold issue under the guardianship legislation because it determines whether an adult falls within the scope of the legislation. The Tribunal has no power to make an appointment order unless it is established that an adult has impaired capacity for a matter.<sup>12</sup>

14.10 If it has been established that the adult has impaired capacity for the matter, the second ground, or step, under section 12(1)(b) is that there is a need for a decision in relation to the matter;<sup>13</sup> or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property.<sup>14</sup>

14.11 The scope of the application of section 12(1)(b) in relation to the criterion of 'a need for a decision in relation to the matter' was considered by the Supreme Court in *Williams v Guardianship and Administration Tribunal*.<sup>15</sup> This matter was taken on appeal to the Supreme Court after the Tribunal had dismissed the application by the adult's parents and brother to be appointed as her joint guardians. The Court summarised the proceedings at first instance as follows:<sup>16</sup>

11 'Impaired capacity', for a person for a matter, means the person does not have capacity for the matter: *Guardianship and Administration Act 2000* (Qld) sch 4. 'Capacity' is defined in the *Guardianship and Administration Act 2000* (Qld) sch 4 as follows:

**Capacity**, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

12 *Re SWV* [2005] QGAAT 68, [40]. The Tribunal must determine the issue of capacity based on the nature and sufficiency of the evidence before it. The nature and assessment of decision-making capacity is discussed in Chapter 7 of this Report. The receipt of evidence in Tribunal proceedings is discussed in Chapter 21 of this Report.

13 See eg *Re KAB* [2007] QGAAT 34; *Re DAB* [2008] QGAAT 13; *Re BPV* [2006] QGAAT 6; *Re MME* [2005] QGAAT 70. In these decisions, the Tribunal declined to make an appointment order on the basis that there was no need to make a decision (for example, a financial decision or a personal decision about accommodation, the provision of services, contact or access visits for the adult). The Tribunal also noted that current or future decisions about health care can be made by an attorney for health matters under an enduring power of attorney (if one has been appointed) or by a statutory health attorney.

14 See eg *Re MDCA* [2005] QGAAT 24, in which the Tribunal made administration and guardianship orders for an adult who had a history of substance abuse involving heroin and amphetamines and a history of poor financial management.

15 [2003] 1 Qd R 465.

16 *Ibid* [2].

Declining to appoint the appellants as the adult's guardians, the Tribunal took the view that there was no 'pressing need for someone to be given specific legal authority to make a decision' for the adult. Given her 'obvious vulnerability due to her total dependence on others', what she needed in these circumstances was not a surrogate decision-maker, but 'strong and effective advocacy' such as the appellants had provided and could continue to provide. Her parents are her statutory health attorneys, and the Tribunal 'expect(ed) Cootharinga and its staff to respect (the parents') authority as ... attorneys and to comply with their decision made under that authority'.

14.12 The Supreme Court held that section 12(1)(b) was not to be construed as importing any criterion of urgency or immediacy; it merely contemplated a situation where an adult had a subsisting need for a surrogate decision-maker.<sup>17</sup>

14.13 The Supreme Court further held that, in circumstances where an adult had a constant need for decision-making on the adult's behalf, there was doubt about the adequacy of her institutional care and members of her family were capable of performing the role and sought appointment, they should be appointed guardians:<sup>18</sup>

In a case like this, where there are doubts about the adequacy of the institution's treatment of Kathleen — in some respects, why should her support be limited to advocacy on the part of her family? There being no question as to their devoted, competent, responsible approach, and their capacity to advance her interests, why should she be denied the assurance contemplated by the Act, through the appointment of guardians with the legal capacity to direct, as necessary, her future course? It seems to me that is plainly justified in this case to ensure, in terms of the Act, her 'adequate' support in terms of s 12(1)(b).

The Tribunal was influenced by s 5(d), acknowledging that Kathleen's right to make decisions should be restricted as little as possible. The sad reality, however, is that most decisions have to be made for her (cf *RL* [2002] VCAT 12 para [24]). The Tribunal was also bound to apply the 'general principles' set out in sch 1 (s 11(1)), and referred to cl 2(1) and 7(2) especially. But again, those general principles neither excluded nor militated against the appointment sought here.

The Tribunal read s 5(d) as requiring the Tribunal not to appoint a guardian should there be 'a less restrictive option'. But appointing guardians here would not in any practical way restrict or interfere with Kathleen's 'right ... to make decisions': she has the right, but, through impairment, no real capacity to exercise it.

The Tribunal gave undue application to the principle that it respect any capacity in Kathleen to make relevant decisions for herself. It allied that consideration with its factual conclusion that there was no (pressing) need for decision-making to justify the ultimate refusal to appoint. Each plank was misfounded. As to the former, the Tribunal's findings as to her lack of capacity robs it of application. As to the latter, the finding was simply wrong in fact.

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17 Ibid [6].

18 Ibid [9]–[13]. See also *Re MRA* [2004] QGAAT 14, [35].

In my view, consistently with the legislative intent, this was a prime case for the appointment of guardians: a need for decision-making; doubts about the standard of the institutional care — and to a degree its responsibility; consequent doubt about the adequacy of Kathleen's care; family members of indubitable, careful commitment to Kathleen who are plainly up to the task and seek appointment.

14.14 The third ground, or step, under section 12(1)(c) is that, without an appointment, the adult's needs will not be adequately met or the adult's interests will not be adequately protected.

14.15 In *Public Trustee v Blackwood*,<sup>19</sup> the Supreme Court of Tasmania considered the scope of the adult's 'needs' under section 51 of the *Guardianship and Administration Act 1995* (Tas) (the general equivalent of section 12 of the *Guardianship and Administration Act 2000* (Qld)).<sup>20</sup> Section 51 provided:

**51 Administration orders**

(1) If, after a hearing, the Board is satisfied that the person in respect of whom an application for an order appointing an administrator or an order appointing a guardian is made—

- (a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and
- (c) is in need of an administrator of his or her estate—

the Board may make an order appointing an administrator of that person's estate.

(2) In determining whether or not a person is in need of an administrator of his or her estate, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.

14.16 The Court held that the adult's 'needs' encompass the protection of the adult's interests generally, and include the need for a particular decision to be made by a guardian or an administrator.<sup>21</sup>

In my opinion, the word 'need' and the word 'needs' in s 51(2) mean different things. The expression 'needs of the proposed represented person' is of wide import and encompasses all the wants and necessities of the proposed represented person. Such needs include food, clothing, housing, medical treatment and the like. One such need may be, and was in this case, to have someone to protect and manage the estate. This is the need firstly referred to in subs (2) as 'the need for an administrator of his or her estate'. In my opinion,

<sup>19</sup> (1998) 8 Tas R 256.

<sup>20</sup> The *Guardianship and Administration Act 1995* (Tas) specifies similar grounds for the appointment of a guardian: *Guardianship and Administration Act 1995* (Tas) s 20.

<sup>21</sup> *Public Trustee v Blackwood* (1998) 8 Tas R 256, 265 (Underwood J).



acceptance of the construction contended for by Mr Porter, would do violence to the meaning and purpose of s 51(1) and (2). If the only need in subs (2) is the need for an administrator, the provisions of subs (1)(c) and (2) would, in the vast majority of cases, be otiose. Once it was established in accordance with s 51(1)(a) and (b), that the proposed person was under a disability and that he or she was, by reason thereof, unable to make reasonable judgments in respect of matters relating to all or part of his or her estate, it would almost invariably follow that there was a need for an administration order. In my view, Parliament, by enacting subs (2), directed the Board to consider, not only the need for an administrator to manage and protect the estate, but also all the other needs of the proposed represented person. If, having done this, the Board reaches the view that all the needs could be satisfied by means less restrictive of freedom of action and decision than would be the case if an administration order was made, then an administration order should not be made. This construction reflects the philosophy apparent in the Act and enacted in sections such as ss 6, 51 and 57, that control over and restriction on a person under a disability is to be kept to a minimum.

14.17 In exercising its power to make an order for the appointment of a guardian or an administrator, the Tribunal must apply the General Principles,<sup>22</sup> one of which requires that the Tribunal must exercise its power in the way least restrictive of the adult's rights.<sup>23</sup>

14.18 The grounds on which the Tribunal must be satisfied before making an appointment order, and the requirement that the Tribunal must exercise its power to make an appointment order in the way least restrictive of the adult's rights, are each consistent with article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*, which deals with the exercise of legal capacity by persons with disabilities and is of particular significance to substitute decision-making legislation.<sup>24</sup>

14.19 Article 12 provides that persons with disabilities are to be given necessary support to exercise their legal capacity and that such measures must respect the rights, will and preferences of the person, be free of conflict of interest and undue influence, be proportional and tailored to the person's circumstances, apply for the shortest time possible and be subject to regular review. At the time it ratified the Convention, Australia issued a formal declaration about its understanding of article 12.<sup>25</sup> The declaration states in part:

Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.

22 *Guardianship and Administration Act 2000* (Qld) s 11(1).

23 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). See now the new General Principle 7(b) recommended in Chapter 4 of this Report.

24 The United Nations *Convention on the Rights of Persons with Disabilities* is considered in Chapter 3 of this Report. Article 12 of the Convention is set out at [3.11] above.

25 United Nations Enable, 'Declarations and Reservations' <<http://www.un.org/disabilities/default.asp?id=475>> at 27 September 2010.

## The law in other jurisdictions

14.20 The legislation in each of the other Australian jurisdictions includes provision for the appointment of a substitute decision-maker for an adult who lacks capacity to manage his or her personal or financial affairs. These provisions have some broad similarities to the Queensland provisions. However, there are some differences in their detail.

14.21 In each of the other jurisdictions, like Queensland, an appointment may be made for all matters (sometimes called a plenary or full order) or particular matters only (sometimes called a limited order).

14.22 There are some differences in terminology between the jurisdictions. In South Australia, Tasmania, Victoria and Western Australia, like Queensland, a person who is appointed to make decisions about the control and management of an adult's property is called an 'administrator', while in the ACT and New South Wales, the equivalent term is a 'manager'.<sup>26</sup> In each of the jurisdictions, a 'guardian' is a person appointed to make decisions for an adult for personal matters.<sup>27</sup>

14.23 The grounds for an appointment in the ACT are generally similar to the grounds in the Queensland provision.<sup>28</sup> In the other jurisdictions, the grounds are generally based on the incapacity of the adult and the adult's need for a guardian or an administrator.<sup>29</sup>

14.24 In Victoria, the legislation sets out a list of factors that the Tribunal must consider in deciding whether or not an adult is in need of a guardian or an administrator:<sup>30</sup>

- whether the needs of the adult could be met by other means less restrictive of the adult's freedom of decision and action; and
- the wishes of the adult, so far as they can be ascertained.

14.25 The Victorian legislation also requires the Tribunal, in deciding whether or not an adult is in need of a guardian, to consider:<sup>31</sup>

<sup>26</sup> *Guardianship Act 1987* (NSW) ss 25E, 25S. In the Northern Territory, an application may be made under the *Aged and Infirm Persons' Property Act* (NT) for a protection order for the management of an adult's estate. A person appointed under a protection order is called a manager: *Adult Guardianship Act* (NT) s 13.

<sup>27</sup> In the Northern Territory, the legislation provides for a person to be appointed as an 'adult guardian' to exercise powers for personal matters, and, in some circumstances, financial matters: *Adult Guardianship Act* (NT) s 16(1)(a), (2).

<sup>28</sup> *Guardianship and Management of Property Act 1991* (ACT) ss 7(1), 9(1).

<sup>29</sup> *Guardianship Act 1987* (NSW) ss 14, 25G; *Adult Guardianship Act* (NT) s 15(1); *Guardianship and Administration Act 1993* (SA) s 29, 35(1); *Guardianship and Administration Act 1995* (Tas) ss 21(1), 51(1); *Guardianship and Administration Act 1986* (Vic) s 22(1)–(2); *Guardianship and Administration Act 1990* (WA) ss 43(1), 64(1)–(2).

<sup>30</sup> *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a)–(ab), 46(2).

<sup>31</sup> *Guardianship and Administration Act 1986* (Vic) s 22(2)(b)–(c).

- the wishes of any nearest relatives or other family members of the adult; and
- the desirability of preserving existing family relationships.

14.26 In the ACT, New South Wales, the Northern Territory, Victoria and Western Australia, the legislation provides for several of these considerations to be taken into account in deciding whether a person is appropriate or suitable for appointment.<sup>32</sup> In Queensland, some of these considerations are provided for in the General Principles.<sup>33</sup>

14.27 In South Australia, the legislation provides as one of its guiding principles that, where the Board makes an order (including a guardianship or administration order) in relation to an adult or the adult's property under the legislation, it must consider the adequacy of existing informal arrangements for the care of the adult or the management of his or her financial affairs and the desirability of not disturbing those arrangements.<sup>34</sup>

## Discussion Paper

14.28 The aim of the *Guardianship and Administration Act 2000* (Qld) is to establish a comprehensive regime for the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity in Queensland.<sup>35</sup> The Act seeks to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to receive adequate and appropriate support for decision-making.<sup>36</sup> The Act also recognises that decisions for an adult with impaired capacity may be made on an informal basis by members of the adult's existing support network.<sup>37</sup>

14.29 In the Discussion Paper, the Commission noted that it is not always necessary that decisions for an adult with impaired capacity be made by a person

<sup>32</sup> *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(a)–(g); *Guardianship Act 1987* (NSW) s 14(2)(a)(i), (ii), (b); *Adult Guardianship Act* (NT) s 14(2)(a)–(b); *Guardianship and Administration Act 1995* (Tas) ss 21(2)(a)–(b), 54(2)(a); *Guardianship and Administration Act 1986* (Vic) ss 23(2)(a)–(b), 47(2)(a)–(b); *Guardianship and Administration Act 1990* (WA) ss 44(2)(a), (c), 68(3)(b).

<sup>33</sup> Section 15 of the *Guardianship and Administration Act 2000* (Qld) sets out the considerations the Tribunal must consider in deciding whether a person is appropriate for appointment as a guardian or an administrator for an adult with impaired capacity. These include the General Principles and, if the appointment is for a health matter, the Health Care Principle, and whether the person is likely to apply them. The General Principles are discussed in Chapter 4 of this Report.

<sup>34</sup> *Guardianship and Administration Act 1993* (SA) s 5(c). This section also requires a guardian, an administrator, the Public Advocate or any court or other body or authority that makes any decision or order pursuant to the Act or pursuant to powers conferred by or under the Act to consider the adequacy of existing informal arrangements for the care of the adult or the management of his or her financial affairs and the desirability of not disturbing those arrangements.

<sup>35</sup> Explanatory Notes, *Guardianship and Administration Bill 1999* (Qld) 1.

<sup>36</sup> *Guardianship and Administration Act 2000* (Qld) s 6.

<sup>37</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

who has formal legal authority.<sup>38</sup> There are, however, various circumstances in which it may be necessary to appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult with impaired capacity. A formal appointment may be necessary if the adult has no family or friends willing and able to make decisions for him or her and a decision needs to be made for the adult. It may also be necessary if the adult has family or friends willing and able to make decisions for him or her but, for some reason, the adult's needs are not being met. This situation may arise, for example, if inappropriate decisions are being made for the adult, including decisions which may endanger the adult's health, welfare or property. It may also be that, for certain types of decisions, the decision-maker may need formal legal authority to make the decision or to have that decision recognised by third parties.<sup>39</sup> A formal appointment may also be necessary if an attorney is not acting in the adult's interests and an alternative decision-maker is required.<sup>40</sup>

14.30 As mentioned earlier, the Tribunal may make an order to appoint a guardian or an administrator for an adult only if it is satisfied that each of the three grounds set out in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) is established.<sup>41</sup>

14.31 In addition, the Tribunal must apply the General Principles.<sup>42</sup> The Principles, which focus on the adult's rights, do not specifically refer to existing informal decision-making arrangements for the adult. They do provide, however, that the importance of maintaining the adult's 'existing supportive relationships' must be taken into account.<sup>43</sup> They also require that a person or entity (including the Tribunal) in performing a function or exercising a power under the *Guardianship and Administration Act 2000* (Qld) must do so in a way consistent with the adult's

38 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [5.25]. However, medical treatment ordinarily requires consent from the patient. If an adult lacks capacity, health care decisions will need to be made for the adult by someone else, such as a guardian appointed by the Tribunal or the court, an attorney appointed under an enduring document, a statutory health attorney, or by the Tribunal or the court. If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction: *Guardianship and Administration Act 2000* (Qld) (Qld) ss 65(2), 66(2).

39 *Re CAD* [2008] QGAAT 50. In that case, the Tribunal observed that 'the increase and complexity of legal requirements concerning financial institutions, social services and privacy requirements, to name just a few, would mean that without a formal appointment CAD alone would be responsible for these matters and his family and support network would, by law, find it difficult and at times impossible at best to provide informal assistance to the extent that CAD requires': at [21].

40 *Re SAD* [2007] QGAAT 8.

41 See [14.7]–[14.16] above.

42 *Guardianship and Administration Act 2000* (Qld) s 11(1).

43 *Guardianship and Administration Act 2000* (Qld) sch 1 s 8. See now new General Principle 4 recommended in Chapter 4 of this Report. New General Principle 4(1), which restates existing General Principle 8, states that the importance of maintaining an adult's existing supportive relationships must be taken into account. New General Principle 4(2) specifies that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis or both.

care and protection<sup>44</sup> and in the way least restrictive of the adult's rights,<sup>45</sup> and must apply the presumption that an adult is presumed to have capacity for a matter.<sup>46</sup>

14.32 The grounds for appointment set out in section 12(1) of the *Guardianship and Administration Act 2000* (Qld), in effect, define the legislative boundary between formal guardianship or administration and informal decision-making.

14.33 Section 12(1) is based on the recommendation of the Queensland Law Reform Commission in its original 1996 report.<sup>47</sup> In that Report, the Commission recognised the role of informal decision-making:<sup>48</sup>

in many cases, a person whose decision-making capacity is impaired will have a loving and supportive family or alternative form of support network which substantially reduces the impact of the incapacity. The person's needs may be met on an informal basis by the people closest to him or her who are in the best position to know and understand his or her preferences. ... informal arrangements are therefore often the simplest and most effective means of alternative decision-making for a person with impaired decision-making capacity.

14.34 In the Commission's earlier draft report, it also noted some disadvantages of informal decision-making, including that there is no formal control over decision-makers.<sup>49</sup>

A person whose decision-making capacity is impaired may be vulnerable to abuse or exploitation. He or she will usually trust close relatives or members of support networks, and the closeness of the relationship may make abuse of that trust difficult to detect. However, it is the view of the Commission that, although in the majority of cases informal arrangements work perfectly well

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44 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5). General Principle 7(5) has been replaced by General Principle 7(a) recommended in Chapter 4 of this Report. New General Principle 7(a) provides that a person or other entity in performing a function or exercising a power under this Act must do so in a way that promotes and safeguards the adult's rights, interests and opportunities.

45 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). See now new General Principle 7(b) recommended in Chapter 4 of this Report. New General Principle 7(b) provides that a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights, interests and opportunities. Section 5(d) of the Act also acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.

46 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(1). See General Principle 1 recommended in Chapter 4 of this Report.

47 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 180.

48 *Ibid* 178. Another suggested advantage of informal decision-making is that it avoids the cost, stress and time involved in setting up and administering formal decision-making arrangements: R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 15.

49 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Draft Report, WP No 43 (1995) [4.4.14]. The Commission also noted the disadvantage related to the risk of personal liability for a person who acts as a decision-maker for an adult: at [4.4.15]. This concern, however, is addressed by s 154 of the *Guardianship and Administration Act 2000* (Qld) which empowers the Tribunal, in certain circumstances, to approve or ratify decisions and provides that an informal decision-maker does not incur legal liability for a decision that has been ratified by the Tribunal. See also A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' 8(1) (2006) *The Journal of Adult Protection* 20.

without supervision, some level of abuse is, unfortunately, probably inevitable. The question is whether a requirement that decision-makers be formally appointed would prevent that abuse. The Commission considers it unlikely that such a requirement would deter potential exploitation but would rather constitute an unwarranted intrusion into existing relationships and an additional burden on the honest. If there is conflict among relatives or if there is evidence that a person with a mental or intellectual disability is being overborne, neglected or abused, the facts may come to the notice of a professional carer, service provider or health care worker. A person who becomes aware of such a situation would be able to approach the Adult Guardian or to make an application to the tribunal if it appears that appropriate assistance is not being given or that advantage is being taken of the person. (note omitted)

14.35 In the Discussion Paper in the present review, the Commission also noted that, if the grounds for making an appointment order are too wide, an adult may be unnecessarily subject to an appointment order, with a consequential loss of decision-making autonomy.<sup>50</sup> However, if the grounds are too narrow, an adult may be unnecessarily deprived of having the safeguards or certainty provided by an appointment order.

14.36 The Commission sought submissions about whether the grounds in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) for the appointment of a guardian or an administrator strike the right balance between formal guardianship and administration and informal decision-making.<sup>51</sup> It also sought submissions about whether the grounds in section 12(1) should be changed in any way and, if so, how they should be changed.<sup>52</sup>

## Submissions

### *The balance between formal and informal decision-making*

14.37 A number of submissions, including those from the Adult Guardian and the Public Trustee, considered that the current grounds in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) for the appointment of a guardian or an administrator strike the right balance between formal and informal decision-making.<sup>53</sup>

<sup>50</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [5.31]. In *Williams v Guardianship and Administration Tribunal* [2003] 1 Qd R 465, at [11], de Jersey CJ rejected this argument because the adult had no real capacity to exercise her autonomy:

The Tribunal read s 5(d) as requiring the Tribunal not to appoint a guardian should there be 'a less restrictive option'. But appointing guardians here would not in any practical way restrict or interfere with Kathleen's 'right ... to make decisions': she has the right, but, through impairment, no real capacity to exercise it.

<sup>51</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 53.

<sup>52</sup> Ibid.

<sup>53</sup> Submissions 54A, 156A, 164.

14.38 However, a number of submissions raised issues about the recognition of the role of informal decision-makers, particularly family members.<sup>54</sup>

14.39 Several respondents commented that the authority of an adult's informal decision-makers is not always recognised by service providers, medical practitioners and others who provide services to the adult.<sup>55</sup>

14.40 Queensland Advocacy Incorporated commented that:<sup>56</sup>

The spirit of the Act espouses the valued role of informal decision-makers and sets the presumption that informal arrangements are often the simplest and most effective means of alternative decision-making for a person with impaired decision-making capacity. It also assumes that in many cases, a person whose decision-making capacity is impaired will have a loving and supportive family or alternative form of support network, which substantially reduces the impact of the incapacity. These conclusions lead to the presumption that the person's needs may be met on an informal basis by the people closest to him or her who are in the best position to know and understand his or her preferences.

...

In daily life, the role of the informal decision maker is being questioned more and more, making it difficult for family members or close friends to be able to do what they have always done in relation to acting in the best interests of the person on an informal basis. With the much greater emphasis on risk assessment, duty of care and other legalistic practices in relation to any services that a person with impaired decision-making capacity is likely to use, the role of family members and close friends is now being frequently questioned.

It seems rather ludicrous that a person with impaired decision-making capacity, who has always had family members in guardianship roles that give them the authority to make decisions on the person's behalf when they are a child, has those same roles held by the same people immediately questioned when the person becomes an adult. Yet current trends point toward many specialist disability services, as well as banks, doctors and other generic services, asking to see a formal guardianship authority before being prepared to accept that the person is attempting to act in the person's best interests. (note omitted)

14.41 Queensland Advocacy Incorporated also suggested that these types of responses 'push informal decision-makers into having to take the steps to be granted formal guardianship when it is often not needed'. It also suggested that 'this also makes ordinary life much more complex when one has to deal with the required formalities of appointment and of reporting to authorities'.

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54 Submissions 63, 135, 146, 148, 162, 164, 163, 167.

55 Submissions 162, 164.

56 Submission 162. Speaking Up For You Inc, an individual advocacy organisation for people with a disability who live in Brisbane and the Moreton Region, also adopted the recommendations made by Queensland Advocacy Incorporated in its submission.

14.42 Some submissions also expressed concerns that sometimes service providers have made applications for the appointment of a guardian or an administrator for an adult to circumvent the involvement of the adult's family.<sup>57</sup>

14.43 For example, Queensland Advocacy Incorporated commented that:<sup>58</sup>

A very disturbing trend in service provision is to ask for the appointment of a formal guardian, as well as the Public Trustee, before a service will agree to provide support to a person with impaired decision-making capacity. This undermines the authority of the family and the whole spirit of the Act. This tactic is being used to assert paid workers' power and to push families out of the person's life, as well as making things easier for the service to deal with only one public authority instead of personalising the service around the individual's needs and including their caring informal network.

A very negative and seditious use of the Act that has become apparent is where a service supporting a person with impaired decision-making capacity will threaten a family member or close friend by saying that they will make application to the ... Tribunal for the Adult Guardian to become involved. This situation usually arises in relation to questioning the family's role in the person's life, if they do not agree with a service's decision-making or practice. Such a threat is often enough for a family member to give in and relinquish their important advocacy role on behalf of their family member with impaired capacity. This fearful response then gives full authority to the service provider to do as they please. Yet many of these family members are often the very people who are protecting the person from the outcomes of very poor service decisions and are in fact being bullied into submission.

If the service does activate the threat and puts in an application to the ... Tribunal, the service has at its behest all the backup it needs to put in high powered submissions and develop cogent arguments to support its case. The easy presumption can then be that the service must be professional in its dealings and must therefore be given greater credence than an informal decision maker.

14.44 Queensland Advocacy Incorporated recommended that the Act should be amended to strengthen the authority of family members:<sup>59</sup>

Because it is well known that paid services tend to drive out and take over the authority that is usually vested in informal supports, the Act needs to be strengthened to ensure that the natural authority of family members is better upheld. It is also important to recognise that a family member who cares for an adult does many activities that can never be done and will never be done by the Adult Guardian.

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57 Submissions 63, 148, 162, 163.

58 Submission 162.

59 Queensland Advocacy Incorporated noted that 'When a child who has impaired decision-making capacity becomes an adult, the process from childhood to adulthood should be seamless with the authority of the family still recognised and not challenged unless there is concern about abuse, neglect or exploitation or other forms of harm'. It also suggested that the importance of existing family relationships could be strengthened by raising the status of the General Principle 8 to being General Principle 4, so that the new Principle demonstrated a hierarchy of authority, similar to the hierarchy that applies for the statutory health attorney. See now new General Principle 4 recommended in Chapter 4 of this Report.



14.45 The Adult Guardian suggested that a system of registration for informal decision-makers may assist in the recognition of their authority.<sup>60</sup>

14.46 Pave the Way and one other respondent proposed the introduction of an alternative legislative mechanism for making financial decisions, namely the amendment of the *Guardianship and Administration Act 2000* (Qld) to provide for the automatic appointment of a statutory decision-maker for an adult for simple financial decisions.<sup>61</sup>

14.47 Pave the Way explained that:<sup>62</sup>

Families all over Queensland face difficulties acting as informal decision-makers. The problems most commonly occur around financial matters but can also arise in areas of personal decision-making. Family members are routinely asked to produce an enduring power of attorney even though their family member does not have the capacity to sign an [enduring power of attorney]. Even for health matters, where the family members are statutory health attorneys, many are still asked to produce an enduring power of attorney.

Regrettably, many families are forced to apply to the Tribunal for a formal appointment when they face a problem over relatively minor financial matters, including contractual situations. Some families apply to the tribunal because they feel they need formal authority to back up their advocacy efforts, which was the situation faced by the family in the *Williams Case*.

14.48 Pave the Way suggested that there is ‘an obvious and widespread need for a mechanism that offers a degree of formality but which does not require an application to the Tribunal for a formal appointment’:

One option would be something similar to the statutory health attorney mechanism for simple financial decisions. Close relatives could be designated in legislation as ‘statutory financial attorneys’ with the authority to manage pension payments, bank accounts to a certain limit (say \$20,000), enter into contracts to a certain amount (say \$5000), sign tenancy agreements under specified conditions, and to obtain all necessary information relating to these sorts of transactions. Statutory health attorney provisions cover very serious health decisions and those provisions, with the safeguards in place, appear to work well. This proposal would only cover relatively simple financial decisions.

Such a mechanism might require a form of registration with a financial authority such as a bank, so that once particular relatives were registered with that bank, they would be the only people authorized to operate those accounts. If banks and others required ‘statutory financial attorneys’ to sign indemnities, that could be allowed under the legislation.

Subject to resources, there could be a requirement that family members be registered with the Tribunal as the ‘statutory financial attorneys’ and issued with registration certificates. Copies could be given to any agency or business that required evidence of the family members’ role. This could be a relatively simple

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60 Submission 164.

61 Submissions 61, 135. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

62 Submission 135.

administrative process requiring only personal details and a medical report supporting the contention that the adult lacked capacity. Any significant disputes or problems that arise could result in refusal or cancellation of registration and referral to the Tribunal for a formal appointment.

14.49 Queensland Aged and Disability Advocacy Inc submitted that the guardianship system should emphasise the adult's independence by the promotion of assisted rather than substitute decision-making and the provision of support for people in the adult's support network who wish, either formally or informally, to assist an adult with decision-making or, where appropriate, to assume the role of substitute decision-maker.<sup>63</sup>

14.50 Queensland Parents of People with a Disability Inc commented that many people seek a formal appointment of a guardian when they are actually managing quite well on an informal basis, but they are under the impression that their family member's life would be better managed by a formal order.<sup>64</sup> It also commented that once this process is set up the family is often unhappy as they see the process not acting in the best interests of the family member. Queensland Parents of People with a Disability Inc recommended that this issue should be addressed by a public education campaign that 'tells people in plain English what the role of [the Tribunal] is and when it is appropriate to seek advice'.

14.51 The Endeavour Foundation noted that some families are 'fearful of the Guardianship regime' because their 'appropriateness' as a guardian comes under scrutiny in this process.<sup>65</sup>

Families have been the informal guardian in their person with a disability's life prior to reaching adulthood, they fear losing informal guardianship to an appointed formal guardian who does not know or care for their relative in the same manner as a family member.

### ***The grounds for appointment under section 12(1)***

14.52 The former Acting Public Advocate considered that the current grounds in section 12 are sufficient to enable the appointment of a family member as a guardian and/or an administrator where there is a need for formal substitute decision-making, and the family member is an appropriate or suitable person for appointment.<sup>66</sup> He explained that:

The Queensland guardianship regime seeks, in essence, to place adults with impaired decision-making capacity as far as possible in the place of adults with capacity. It aims to restrict the adults' personal exercise of their rights to the minimum degree and allows adults as far as possible to make their own decisions or experience the least interference with those rights. A substitute decision-maker has a role to play only where the adult's capacity is impaired and there is a need.

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63 Submission 148.

64 Submission 167.

65 Submission 163.

66 Submission 160.

The current grounds recognise that a person's needs may be met appropriately on an informal basis by family members or support networks, and that an appointment is only necessary where informal support for decision-making is not operating adequately or effectively. It also represents the least restrictive and intrusive approach, and upholds an adult's right to autonomy while acknowledging the need, in some cases, for support in decision-making. In this regard, it is considered that the current grounds for the appointment of a guardian or administrator strike the appropriate balance between guardianship and administration and informal decision-making, and should not be altered in any way.

It is understood that some families of adults with [impaired decision-making capacity] consider the current threshold requirements in section 12 of the [*Guardianship and Administration Act 2000* (Qld)] difficult to satisfy, which may result in their lack of appointment as guardians/administrators. The significant role played by families in caring for and supporting adults with [impaired decision-making capacity] is acknowledged. The ongoing involvement of families in the lives of adults with [impaired decision-making capacity] is also recognised as providing an important function in most cases in protecting the adult from abuse, neglect and exploitation. The vast majority of family members who act as a substitute decision-maker make decisions with the best of intentions, and genuinely believe they are acting in the adult's interests.

However, it should not be assumed that because a person is the parent or sibling or child of an adult with [impaired decision-making capacity] that person is best placed to make decisions which appropriately serve the interests and needs of the adult. Family members may be overly protective and stifling of an adult's development of independence and life experiences. Some families perceive their adult son/daughter to still be a child, and may unintentionally overlook their ability to contribute to decision-making or exercise personal choice. Unfortunately in some instances financial, psychological or physical abuse may be perpetrated by family members/members of an adult's support network against them.

Accordingly, in some cases it is not appropriate for family members to be appointed guardians/administrators for an adult. In those cases, arguably the adult's interests may be better promoted, protected and served through the appointment of an independent decision-maker.

It is therefore considered that the current grounds in section 12 are sufficient to enable the appointment of a family member as a guardian and/or administrator where there is a need for formal substitute decision-making, and the family member is an appropriate/suitable person for appointment. The three-step process also provides a safeguard for vulnerable adults by preventing appointments being made unnecessarily, and consequently restrictions on the adult's rights and autonomy.

14.53 While the Public Trustee generally considered that the current grounds in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) for the appointment of a guardian or an administrator strike the right balance between formal guardianship and administration and informal decision-making, he also commented that:<sup>67</sup>

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Submission 156A.

From time to time there will be controversy in respect of appointments but this is not so much a reflection on the provisions of the [*Guardianship and Administration Act 2000* (Qld)] but, more likely the particular matter before the Tribunal.

Certainly the only matter which might give rise to reconsideration is that which perhaps underpinned the decision of *Williams v Guardianship and Administration Tribunal* [2003] 1 Qd R 465 ... that section 12 on one view (and likely the Tribunal's view in that matter) requires a direct temporal connection for there to exist a need for a decision. This issue is perhaps more subtly expressed in the judgement; not that there needed to be a pressing need but there needed to be an actual decision, a particular decision which requires determination. This approach is reflective of the plain words of section 12(1)(b).

That which is usually contemplated and ought be entertained by the legislation (perhaps by way of amendment) however is not that there necessarily be a particular decision to be made but that it is reasonably contemplated that a decision will need to be made.

14.54 Pave the Way commented that one difficulty which arises for the Tribunal in applying section 12(1)(a) when making a determination of capacity is a lack of adequate evidence of capacity:<sup>68</sup>

This issue arises in all other proceedings where a determination of capacity is required. While the Tribunal has the power to make a direction that a professional examination be carried out and a report obtained that will assist it in its decision, it has no power to order that such examinations and reports be arranged and paid for by any government agency.

The majority of families with whom we have discussed these issues wish to avoid formal appointments and favour informal decision-making where possible. This is particularly the case for families who have had some experience of the legislation, participating in hearings before Tribunal and/or have been appointed to formal roles.

14.55 Pave the Way considered that the decision in *Williams v Guardianship and Administration Tribunal*<sup>69</sup> (the Williams Case) has 'tipped the balance too far in favour of formal guardianship and administration against informal decision-making'.<sup>70</sup>

In that case, there was no need for any specific decisions which required formal appointments. Rather, there were circumstances where parents believed that they would be in a stronger position to advocate for their daughter if they held a formal appointment as guardians. The Supreme Court confused the issue of advocacy with guardianship, assuming that a formal appointment, which grants authority to make decisions, could (in the circumstances of that case) change the quality of services provided by an unresponsive service organisation. Having formal authority to consent to provision of services and make other relevant personal decisions for an adult, does not change the quality of the service provided to that adult.

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68 Submission 135.

69 [2003] 1 Qd R 465. See [14.11]–[14.13] above.

70 Ibid.

In our view, the Supreme Court in the Williams Case failed to understand the importance and significance of the principle of the least restrictive option. That decision would sanction many formal appointments where they are not necessary and where they would be against the legislative intent of the *Guardianship and Administration Act*.

14.56 Pave the Way suggested that there needs to be ‘legislative clarification of the ground for appointment’ which makes clear that it is not sufficient for an appointment to be made where there is no actual decision or decisions to be made that require a formal appointment and where the desired outcome can be achieved though informal decision-making and advocacy.<sup>71</sup> It suggested that one possibility would be to add to section 12(1)(c), after 12(1)(c)(ii):

through advocacy or informal decision-making support; and

- (d) the decision-making authority conferred by making a formal order will address the needs of the adult and/or protect their interests in a way that cannot be achieved through informal decision-making support or advocacy.

14.57 Queensland Aged and Disability Advocacy Inc also contended that all three grounds set out in section 12 should be given equal weight by the Tribunal when determining if an appointment is required.<sup>72</sup> It considered, for example, that the Tribunal must be prepared to articulate what needs of the adults will not be met or interests not protected if an appointment is not made.<sup>73</sup>

### The Commission’s view

14.58 The Commission considers that the grounds under section 12 of the *Guardianship and Administration Act 2000* (Qld), which constitute the test for making an appointment order, are appropriate and should not be changed.

14.59 Section 12 provides that the Tribunal may make an order to appoint a guardian or an administrator for an adult only if it is satisfied that each of the three grounds set out in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) is established. First, the Tribunal must consider whether the adult has impaired capacity for the matter.<sup>74</sup> In deciding this question, the Tribunal must apply the presumption of capacity<sup>75</sup> which can be displaced only if, in applying the functional test of capacity provided under the Act,<sup>76</sup> the Tribunal is satisfied that the

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71 Submission 146.

72 Submission 148.

73 Ibid.

74 See n 11 above.

75 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(1).

76 The definition of capacity in the *Guardianship and Administration Act 2000* (Qld) is based on a functional approach, which focuses on the adult’s ability to make a specific decision or type of decision. This approach maximises the adult’s decision-making autonomy by enabling the adult to continue to make decisions in those areas of life for which he or she has capacity. The nature and assessment of decision-making capacity is discussed in Chapter 7 of this Report.

adult does not have capacity for the matter. Only if the adult has impaired capacity for the matter will the Tribunal then consider the second and third grounds in section 12 and whether, applying the least restrictive principle, the adult's needs can be addressed in any other way than the appointment of a guardian or an administrator. Section 12 therefore sets a high threshold for enlivening the Tribunal's jurisdiction to make an appointment order.

14.60 The grounds of which the Tribunal must be satisfied before making an appointment order, and the requirement that the Tribunal must exercise its power to make an appointment order in the way least restrictive of the adult's rights, are each consistent with article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*,<sup>77</sup> which deals with the exercise of legal capacity by persons with disabilities.

14.61 In practical terms, the test under section 12(1) of the *Guardianship and Administration Act 2000* (Qld) sets the boundary between formal and informal decision-making for an adult with impaired capacity.

14.62 If informal decision-making for an adult with impaired capacity is effectively meeting the adult's needs, the grounds for making an appointment order will not be satisfied.<sup>78</sup> It would be inconsistent with the principle of maximising the adult's right to the greatest possible degree of autonomy and the least restrictive approach, if it were possible to make an appointment order even though the adult's informal decision-making arrangements were working well.<sup>79</sup>

14.63 If, however, informal decision-making for an adult with impaired capacity is not effectively meeting the adult's needs, an appointment order may be made. The Commission notes that the submissions have raised some concerns about the recognition of the role of informal decision-makers. These concerns involve different issues, some of which may be addressed by the Commission's recommendations to amend the *Guardianship and Administration Act 2000* (Qld) to empower the Tribunal to make an order for a person to give an adult's informal

<sup>77</sup> The United Nations *Convention on the Rights of Persons with Disabilities* is considered in Chapter 3 of this Report. Article 12 of the Convention is discussed at [14.19] above.

<sup>78</sup> The *Guardianship and Administration Act 2000* (Qld) recognises in s 9(2)(a) that, depending on the type of matter involved, decisions may be made on an informal basis by members of an adult's existing support network. The Act also provides in s 154 that the Tribunal may ratify an exercise of power, or approve a proposed exercise of power, by an informal decision-maker for an adult with impaired capacity for a matter.

<sup>79</sup> See eg *Re BMR* [2006] QGAAT 21. In that case, a family member applied for an order appointing family members as guardians and administrators for the adult. The application was made for the adult's 'future security and protection'. The Tribunal found that the existing informal decision-making arrangements for the adult were working well and dismissed the application. The Tribunal observed that:

While it is understandable that families want to ensure that a vulnerable member of their family is adequately protected, the material did not indicate that the decision making processes presently in place were deficient. Indeed, the material suggested that BMR's lifestyle was positive and well supported through existing arrangements. The material available to the Tribunal on the 17 March 2006 did not indicate that BL was not coping as the primary decision maker.

On the basis of both the material from 2003 and the new material presented in 2006, the Tribunal was satisfied that, at 17 March 2006, without formal appointment BMR's needs are adequately met and her interests are adequately protected. She has a close and enduring relationship with family members who can continue to make all decisions on her behalf under the existing informal arrangements.

decision-maker access to information about the adult,<sup>80</sup> and to ensure that, like the Adult Guardian, the Public Trustee may be appointed only if there is no other appropriate person who is available for appointment.<sup>81</sup> The Commission has also emphasised the benefits of the use of mediation in situations of conflict between the adult's family members or between an adult's family member and a service provider for an adult.<sup>82</sup>

14.64 It was suggested in the submissions that an alternative approach to the appointment of an administrator under section 12 of the Act may be the development of a legislative mechanism for the automatic appointment of a financial decision-maker. The Commission, however, considers that such a mechanism would need to be highly regulated, in a similar way to administration orders, to minimise problems of neglect, exploitation or abuse; a circumstance that would likely defeat its original purpose. The Commission also notes that section 154 of the *Guardianship and Administration Act 2000* (Qld), which provides a mechanism for the ratification or approval of the exercise of power by an informal decision-maker, may be of assistance to informal decision-makers who may, on occasion, need to make a decision which has formal legal authority.<sup>83</sup>

14.65 Although the submissions revealed a concern that some service providers pay inadequate regard to an adult's informal decision-makers and support network, the Commission notes that disability service providers are subject to a detailed regulatory scheme under the *Disability Services Act 2006* (Qld). Funded service providers under that Act must obtain certification and thereafter undergo annual surveillance audits and three-yearly recertification measured against a set of Disability Service Standards.<sup>84</sup> The Disability Service Standards<sup>85</sup> prescribe a range of matters about the way in which services are to be provided, having regard to the rights of service users.

14.66 The importance of an adult's support network is specifically addressed in Disability Service Standard 5 which will be met if, among other things, 'the service provider promotes the use of social networks and informal supports for service

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80 See Recommendations 30-13 to 30-17 of this Report.

81 See Recommendation 14-13 of this Report.

82 See [14.198]–[14.204] below.

83 Section 154 of the *Guardianship and Administration Act 2000* (Qld) is set out at [30.145] below.

84 See Disability and Community Care Services, Key Projects, Disability Sector Quality System, 'Overview of the Disability Sector Quality System' <<http://www.disability.qld.gov.au/key-projects/quality/overview/>> at 24 September 2010. There are also 'Disability Advocacy Standards', in similar but modified terms, against which certification for service providers solely funded to provide advocacy services is measured, as well as a set of modified standards against which certification for service providers solely funded for certain types of specialist services must be measured.

85 Disability Services Queensland, *Queensland Disability Service Standards: Partners in Quality* (2008) <<http://www.disability.qld.gov.au/key-projects/quality/documents/disability-service-standards.pdf>> at 24 September 2010. And see *Disability Services Act 2006* (Qld) s 34.

users'.<sup>86</sup> In addition, Disability Service Standard 9 requires that policies and practices are 'underpinned by the principles contained in relevant Commonwealth and State Legislative and Human Rights instruments' and 'empower and support service users to exercise their human rights enshrined within the principles of the *Disability Services Act 2006 (Qld)*'.<sup>87</sup>

14.67 The principles of the *Disability Services Act 2006 (Qld)* also include specific recognition for the role of an adult's family members and support network. For instance, when using disability services, people with disability have the right to 'services supporting their achieving quality of life in a way that supports their family unit and their full participation in society'.<sup>88</sup> In addition, services should be designed and implemented to:<sup>89</sup>

- (a) have sufficient regard to the needs of families, carers and advocates of people with a disability; and
- (b) recognise the demands on the families of people with a disability; and
- (c) take into account the implications for, and demands on, the families of people with a disability.

14.68 While the existing principles in the *Disability Services Act 2006 (Qld)*, which inform the Disability Service Standards, recognise the role of an adult's family and support network, the Commission nevertheless considers that those principles should be revised to take account of the principles in the United Nations Convention and the relevant General Principles under the guardianship legislation,<sup>90</sup> and to specify that supporting the person to achieve quality of life by supporting the person's family unit and the person's full participation in society (under Human Rights Principle 19(3)(a))<sup>91</sup> may involve consultation with either or both of the following:

- persons who have an existing supportive relationship with the person;
- members of the person's support network who are making decisions for the adult on an informal basis.

<sup>86</sup> Disability Services Queensland, *Queensland Disability Service Standards: Partners in Quality* (2008), Disability Service Standard 5 (Participation and integration), Service Standard Indicator 5.2. The role of an adult's family and support persons is also recognised, for instance, in assisting adults to enter or leave a service, in the development of personalised plans for the adult, and in assisting adults to make decisions and choices: Disability Service Standards 1, 2 and 3.

<sup>87</sup> Disability Services Queensland, *Queensland Disability Service Standards: Partners in Quality* (2008), Disability Service Standard 9 (Protection of legal and human rights and freedom from abuse and neglect). And see the Human Rights Principle and the Service Delivery Principles in *Disability Services Act 2006 (Qld)* pt 2, div 1, 2.

<sup>88</sup> *Disability Services Act 2006 (Qld)* s 19(3)(a).

<sup>89</sup> *Disability Services Act 2006 (Qld)* s 30. Service providers should also make available information that allows the quality of their services to be judged to a range of people including service users, their families, carers and advocates: s 31.

<sup>90</sup> The General Principles are discussed in Chapter 4 of this Report. See also n 92 below.

<sup>91</sup> *Disability Services Act 2006 (Qld)* s 19(3)(a).



14.69 This would be consistent with the Commission's recommended new General Principle 2 on the recognition of the adult's human rights and fundamental freedoms and General Principle 4 on the maintenance of existing supportive relationships and would emphasise the importance of recognising an adult's informal decision-makers.<sup>92</sup>

14.70 Ultimately, however, if an adult's informal decision-making arrangements are not working effectively, and that situation cannot be remedied, it may be necessary to apply for a formal appointment on the basis that the adult's needs are not being met.

## WHO MAY BE APPOINTED AS A GUARDIAN OR AN ADMINISTRATOR

### The law in Queensland

#### *The appointment of one or more guardians or administrators*

14.71 Section 14 of the *Guardianship and Administration Act 2000* (Qld) sets out the eligibility requirements for appointment as a guardian or an administrator. That section provides:

**14 Appointment of 1 or more eligible guardians and administrators**

- (1) The tribunal may appoint a person as guardian or administrator for a matter only if—
- (a) for appointment as a guardian, the person is—
    - (i) a person who is at least 18 years and not a paid carer, or health provider, for the adult; or
    - (ii) the adult guardian; and
  - (b) for appointment as an administrator, the person is—
    - (i) a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or

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See new General Principle 2 and General Principle 4 recommended in Chapter 4 of this Report. General Principle 2(1) states that the right of all adults to the same human rights and fundamental freedoms regardless of a particular adult's capacity must be recognised and taken into account. General Principle 2(2) sets out an inclusive list of the principles on which an adult's human rights and fundamental freedoms are based, and which should inform the way in which they are taken into account. General Principle 2 replaces General Principles 2(1), 3 and 4, and is consistent with the United Nations *Convention on the Rights of Persons with Disabilities* arts 3, 4(1). New General Principle 4(1), which restates existing General Principle 8, states that the importance of maintaining an adult's existing supportive relationships must be taken into account. General Principle 4(2) specifies that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis or both.

- (ii) the public trustee or a trustee company under the *Trustee Companies Act 1968*; and
- (c) having regard to the matters mentioned in section 15(1), the tribunal considers the person appropriate for appointment.
- (2) Despite subsection (1)(a)(ii), the tribunal may appoint the adult guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.
- (3) Subject to section 74, no-one may be appointed as a guardian for a special personal matter or special health matter.

*Editor's note—*

The tribunal may consent to particular special health care—see section 68 (Special health care).

- (4) The tribunal may appoint 1 or more of the following—
  - (a) a single appointee for a matter or all matters;
  - (b) different appointees for different matters;
  - (c) a person to act as appointee for a matter or all matters in a stated circumstance;
  - (d) alternative appointees for a matter or all matters so power is given to a particular appointee only in stated circumstances;
  - (e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;
  - (f) joint or several, or joint and several, appointees for a matter or all matters;
  - (g) 2 or more joint appointees for a matter or all matters, being a number less than the total number of appointees for the matter or all matters.
- (5) If the tribunal makes an appointment because an adult has impaired capacity for a matter and the tribunal does not consider the impaired capacity is permanent, the tribunal must state in its order when it considers it appropriate for the appointment to be reviewed.

*Editor's note—*

Otherwise periodic reviews happen under section 28.

### ***Persons eligible as guardians or administrators***

14.72 Section 14(1) lists the persons who are eligible for appointment as a guardian or an administrator.

14.73 A person may be appointed as guardian for a personal matter only if:<sup>93</sup>

- the person is either:
  - a person who is 18 years or older, is not a paid carer, or health provider, for the adult; or
  - the Adult Guardian;<sup>94</sup> and
- the Tribunal considers the person is appropriate for appointment.

14.74 A person may be appointed as administrator for a financial matter only if:<sup>95</sup>

- the person is either:
  - a person who is 18 years or older, is not a paid carer, or health provider, for the adult and not a bankrupt or taking advantage of Australian or foreign bankruptcy laws as a debtor; or
  - the Public Trustee<sup>96</sup> or a trustee company under the *Trustee Companies Act 1968* (Qld); and
- the Tribunal considers the person is appropriate for appointment.

14.75 The terms ‘paid carer’ and ‘health provider’ are defined in the *Guardianship and Administration Act 2000* (Qld).

14.76 A ‘paid carer’ for an adult is someone who performs services for the adult’s care and receives remuneration from any source for the services (other than a Government carer payment or other benefit for providing home care for the adult

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93 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i)–(ii), (c).

94 The Adult Guardian is an independent statutory official established under s 173 of the *Guardianship and Administration Act 2000* (Qld). The role of the Adult Guardian is to protect the rights and interests of adults with impaired capacity: *Guardianship and Administration Act 2000* (Qld) ss 174(1), 176. The Adult Guardian’s functions are wide-ranging and include acting as the adult’s guardian if appointed by the Tribunal: s 174(2). Other functions of the Adult Guardian include investigating complaints or allegations of neglect, exploitation or abuse of an adult and acting as an attorney for an adult under an enduring power of attorney or as an adult’s statutory health attorney: s 174(2). The Adult Guardian also has a number of protective powers in relation to adults: ch 8 pt 3. The functions and powers of the Adult Guardian are discussed in Chapter 23 of this Report.

95 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i)–(ii), (c).

96 The Public Trustee of Queensland is a corporation sole established under the *Public Trustee Act 1978* (Qld): *Public Trustee Act 1978* (Qld) ss 7–8. The Public Trustee’s role is to provide Queenslanders with a range of financial, trustee and legal services. These services include providing financial management for people with a disability. The role of the Public Trustee is discussed in Chapter 25 of this Report.

or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult's care).<sup>97</sup>

14.77 In considering the definition of 'paid carer', the Tribunal has distinguished between 'remuneration' and 'reimbursement'. In *Re BAI*,<sup>98</sup> the Tribunal considered that remuneration is a payment for services while reimbursement is a payment for expenses.

14.78 A health provider is a person who provides health care, or special health care, in the practice of a profession or in the ordinary course of business.<sup>99</sup>

### **Appointment of the Adult Guardian as guardian**

14.79 In the form in which it was originally enacted, section 14 gave no express priority to the appointment of an individual as a guardian. Section 14(2) was inserted in the *Guardianship and Administration Act 2000 (Qld)*<sup>100</sup> in 2007 to give legislative effect to the decision of the Supreme Court of Queensland in *Adult Guardian v Hunt*.<sup>101</sup> As a result of that amendment, section 14(2) of the Act now provides that the Tribunal may appoint the Adult Guardian as a guardian for a matter only if there is no other appropriate person available for appointment for the matter.

14.80 In *Adult Guardian v Hunt*, the Adult Guardian appealed against orders made by the Tribunal on a review of its appointment as guardian for the adult.<sup>102</sup> The orders appealed against were the removal of the Adult Guardian and the subsequent appointment of the adult's long-term de facto partner as her guardian. The Adult Guardian argued that the Adult Guardian was a primary candidate for appointment under section 14 and that 'the Act might suggest that, were there a doubt, the Tribunal should err in favour of appointing the Adult Guardian'. Chesterman J dismissed the appeal, noting that, where an adult has friends or family who are able and willing to provide the requisite support and assistance, it is

97 *Guardianship and Administration Act 2000 (Qld)* sch 4. The words 'remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult's care' refer to the principle established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161. See also *Re SG* [2002] QGAAT 4, in which the Tribunal held that the applicants, who had entered into a service agreement for the supply of in-house care for their son, were not his 'paid carers' because the remuneration sought for their services was remuneration for voluntary services performed for their son's care and paid for from damages awarded by a court.

98 [2007] QGAAT 81. In that case, the Tribunal was considering the definition of 'paid carer' in the *Powers of Attorney Act 1998 (Qld)*, which is in nearly identical terms. The Tribunal considered that the definition contemplated that the payment received would compensate the carer for the services provided. Further, the weekly payment of \$50 received by the adult's attorney for 'general assistance service' (the use of her own facilities for the adult's laundry and transport) to the adult was not remunerative in the circumstances and could be characterised as reimbursement of expenses.

99 *Guardianship and Administration Act 2000 (Qld)* sch 4. Section 14(1) of the Act disqualifies a health provider from appointment as a guardian or an administrator for an adult only if he or she is a health provider *for the adult*. It would not prevent the appointment of a close relative as a guardian or an administrator for an adult merely because he or she is a health provider by profession.

100 *Justice and Other Legislation Amendment Act 2007 (Qld)* s 75, which commenced on 28 September 2007.

101 [2003] QSC 297.

102 *Guardianship and Administration Act 2000 (Qld)* s 31 provides for the review of an appointment of a guardian or an administrator.

preferable that they be allowed to do so rather than be displaced by the Adult Guardian:<sup>103</sup>

The second submission is that the Tribunal erred in describing the appointment of the appellant 'as a matter of last resort'. The appellant submitted that the Tribunal 'misdirected itself by assuming that there was a significant presumption against the appropriateness of the Adult Guardian ... Section 14 ... recognises the Adult Guardian as a prime candidate to be appointed ... If anything the Act might suggest that, were there a doubt, the Tribunal should err *in favour* of appointing the Adult Guardian.'

The Tribunal may have overstated the point a little by saying that the appointment of the Adult Guardian is a matter of 'last resort when there is no other appropriate person for appointment', but the notion underlying that expression is, in my opinion, correct. The Adult Guardian is a functionary of the State which, very properly, endeavours to protect the helpless and defenceless. But where a person has friends or family who are able and willing to provide the requisite support and assistance it is, in my view, preferable that they be allowed to do so rather than be supplanted by a bureaucrat, no matter how well intentioned. To take any other view is to deny the expression of what is good in human nature.

### ***The manner of appointment of one or more appointees***

14.81 Section 14(4) of the *Guardianship and Administration Act 2000* (Qld) confers on the Tribunal a broad discretion to appoint one or more guardians, or administrators, for an adult. The Tribunal may appoint a single appointee for a matter or all matters or different appointees for different matters. Further, it may appoint joint or several, or joint and several, appointees for a matter or all matters. For example, the parents of an adult son or daughter with impaired capacity may be appointed, on a joint basis, to act as guardians or administrators or both for their child. The appointment of a person to act as an appointee may also be limited to a stated circumstance. The Tribunal may also appoint alternative or successive appointees, to whom power is given only in stated circumstances.

### ***Appropriateness considerations***

14.82 Section 15 of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to take into account numerous 'appropriateness considerations' in deciding whether a person is appropriate and competent to perform functions and exercise powers under an appointment order. That section provides:

#### **15 Appropriateness considerations**

- (1) In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters (***appropriateness considerations***)—
- (a) the general principles and whether the person is likely to apply them;

<sup>103</sup>

[2003] QSC 297, [29]–[30].

- (b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;
  - (c) the extent to which the adult's and person's interests are likely to conflict;
  - (d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;
  - (e) if more than 1 person is to be appointed—whether the persons are compatible;
  - (f) whether the person would be available and accessible to the adult;
  - (g) the person's appropriateness and competence to perform functions and exercise powers under an appointment order.
- (2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.
- (3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.
- (4) In considering the person's appropriateness and competence, the tribunal must have regard to the following—
- (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
  - (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or other person making a decision for someone else;
  - (c) if the proposed appointment is of an administrator and the person is an individual—
    - (i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; and
    - (ii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors under the *Bankruptcy Act 1966* (Cwlth), part 10 or a similar law of a foreign jurisdiction; and
    - (iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose

management, direction or control the person is or was involved.

(5) In this section—

**attorney** means—

- (a) an attorney under a power of attorney; or
- (b) an attorney under an advance health directive or similar document under the law of another jurisdiction.

**power of attorney** means—

- (a) a general power of attorney made under the *Powers of Attorney Act 1998*; or
- (b) an enduring power of attorney; or
- (c) a power of attorney made otherwise than under the *Powers of Attorney Act 1998*, whether before or after its commencement; or
- (d) a similar document under the law of another jurisdiction.

14.83 Before the appointment is made, an individual who has agreed to the proposed appointment as a guardian or an administrator is required to give written advice to the Tribunal about particular matters, which are largely the matters referred to in section 15.<sup>104</sup> The guardian or administrator is under a continuing duty to inform the Tribunal of anything which he or she has not previously advised the Tribunal; and of anything of which the guardian or administrator would be required to advise the Tribunal if the Tribunal were considering whether to appoint the guardian or administrator.<sup>105</sup> In addition, the Tribunal and the registrar have power to make inquiries about the appropriateness and competence of a person who has agreed to a proposed appointment or who is a guardian or an administrator.<sup>106</sup>

## The law in other jurisdictions

14.84 The eligibility provisions in each of the other jurisdictions vary in their requirements.<sup>107</sup> These provisions generally set out the eligibility criteria and appropriateness or suitability considerations for appointment. While many of these provisions have some commonality with the Queensland provisions, the Queensland provisions are the most comprehensive.

<sup>104</sup> *Guardianship and Administration Act 2000* (Qld) s 16.

<sup>105</sup> *Guardianship and Administration Act 2000* (Qld) s 17.

<sup>106</sup> *Guardianship and Administration Act 2000* (Qld) s 18.

<sup>107</sup> *Guardianship and Management of Property Act 1991* (ACT) ss 9–10; *Guardianship Act 1987* (NSW) s 15; *Adult Guardianship Act* (NT) s 14(4); *Guardianship and Administration Act 1993* (SA) ss 29, 35(2); *Guardianship and Administration Act 1995* (Tas) ss 21(1), 54; *Guardianship and Administration Act 1986* (Vic) ss 23(1), 47; *Guardianship and Administration Act 1990* (WA) ss 44(1), 68(1)–(2).

14.85 The legislation in each jurisdiction makes provision for an individual to be appointed as a guardian for personal matters.<sup>108</sup> Provision is also made for the appointment of the Adult Guardian (or its equivalent) as a guardian.<sup>109</sup> In the ACT, the Northern Territory, South Australia and Victoria, the Adult Guardian (or its equivalent) is the guardian of last resort.<sup>110</sup> In New South Wales, the appointment of the Public Guardian as a last resort applies only in relation to a continuing (final) guardianship order.<sup>111</sup>

14.86 The other jurisdictions also provide for an individual to be appointed as an administrator for financial matters.<sup>112</sup> Provision is also made for the appointment of the Public Trustee (or its equivalent) or a private trustee company as an administrator.<sup>113</sup> There is generally no preference for the appointment of an individual as an administrator. However, Western Australia provides for the appointment of an individual, a private trustee company and the Public Trustee, in that order.<sup>114</sup>

14.87 There is some variation between the jurisdictions in the appropriateness considerations for determining whether a person is suitable for appointment. In

108 *Guardianship and Management of Property Act 1991* (ACT) s 9; *Guardianship Act 1987* (NSW) s 6; *Adult Guardianship Act* (NT) s 14; *Guardianship and Administration Act 1993* (SA) s 31; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 44(1).

109 *Guardianship and Management of Property Act 1991* (ACT) s 10(3); *Guardianship Act 1987* (NSW) s 6; *Adult Guardianship Act* (NT) s 14; *Guardianship and Administration Act 1993* (SA) s 31; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 44(5).

110 *Guardianship and Management of Property Act 1991* (ACT) s 9(5); *Adult Guardianship Act* (NT) 14(4); *Guardianship and Administration Act 1993* (SA) s 29(4); *Guardianship and Administration Act 1986* (Vic) s 23(4).

111 *Guardianship Act 1987* (NSW) s 17(3). In New South Wales, a guardianship order must specify whether the order is continuing or temporary: *Guardianship Act 1987* (NSW) s 16(1)(b). *Guardianship Act 1987* (NSW) s 17(4) provides that the Public Guardian must be appointed as the guardian of a person the subject of a temporary guardianship order.

112 *Guardianship and Management of Property Act 1991* (ACT) s 9(2); *Guardianship Act 1987* (NSW) s 25E; *Adult Guardianship Act* (NT) s 16; *Guardianship and Administration Act 1993* (SA) s 35; *Guardianship and Administration Act 1995* (Tas) s 21; *Guardianship and Administration Act 1986* (Vic) s 47; *Guardianship and Administration Act 1990* (WA) s 68.

113 *Guardianship and Management of Property Act 1991* (ACT) s 9(2); *Guardianship Act 1987* (NSW) s 25E; *Guardianship and Administration Act 1993* (SA) s 35; *Guardianship and Administration Act 1995* (Tas) s 21; *Guardianship and Administration Act 1986* (Vic) s 47; *Guardianship and Administration Act 1990* (WA) s 68(2). In New South Wales, the Guardianship Tribunal may order that the estate of a protected person be subject to management under the *NSW Trustee and Guardian Act 2009* (NSW): *Guardianship Act 1987* (NSW) ss 25E, 25M. A suitable person may be appointed as manager of the protected person's estate or, alternatively, the Protective Commissioner may be appointed. In the Northern Territory, a guardian appointed for an adult is called the 'adult guardian'. If the court is satisfied that the adult guardian is competent to manage the adult's estate, the court may appoint the adult guardian as the manager of the estate: *Adult Guardianship Act* (NT) s 16(1)(a). An adult guardian who is appointed as manager has the power as well as the liability of a manager of a protected estate under the *Aged and Infirm Persons' Property Act* (NT): s 16(2). If the court is not satisfied that the adult guardian is competent to manage the adult's estate, the court may order the Public Trustee or some other person to make an application under the *Aged and Infirm Persons' Property Act* (NT) for a protection order: 16(1)(b).

114 *Guardianship and Administration Act 1990* (WA) s 68(4).



New South Wales, in deciding whether an adult is in need of a guardian, the Tribunal must take into account:<sup>115</sup>

- the views (if any) of:
  - the adult;
  - the adult’s spouse (if the relationship between the adult and the spouse is close and continuing); and
  - the person who has care of the adult;
- the importance of preserving the adult’s existing family relationships;
- the importance of preserving the adult’s particular cultural and linguistic environments; and
- the practicability of services being provided to the person without the need for the making of the order.

14.88 In the ACT, the Northern Territory, Tasmania, Victoria and Western Australia, the appropriateness considerations are the views of the adult and the importance of preserving the adult’s existing family relationship.<sup>116</sup> There are no appropriateness considerations provided for in the South Australian legislation.

### Persons eligible for appointment

14.89 As explained above, section 14(1) of the *Guardianship and Administration Act 2000* (Qld) specifies eligibility requirements for appointment as a guardian or an administrator.<sup>117</sup>

14.90 A person may be appointed as guardian for a personal matter only if:<sup>118</sup>

- the person is the Adult Guardian or a person who is 18 years or older and is not a paid carer, or health provider, for the adult; and
- the Tribunal considers the person is appropriate for appointment.

<sup>115</sup> *Guardianship Act 1987* (NSW) s 14(2).

<sup>116</sup> *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(a)–(b); *Guardianship Act 1987* (NSW) s 14(2)(a)(i)–(ii), (b); *Adult Guardianship Act* (NT) s 14(2)(a)–(b); *Guardianship and Administration Act 1995* (Tas) ss 21(2)(a)–(b), 54(2)(a); *Guardianship and Administration Act 1986* (Vic) ss 23(2)(a), (b), 47(2)(a)–(b); *Guardianship and Administration Act 1990* (WA) ss 44(2)(a), 68(3)(b).

<sup>117</sup> There are generally similar requirements for an attorney appointed under an enduring power of attorney: *Powers of Attorney Act 1998* (Qld) s 29. However, s 29 also includes a person who is not a service provider for a residential service where the principal is resident. The eligibility requirements for attorneys are considered in Chapter 14 of this Report.

<sup>118</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i)–(ii), (c).

14.91 A person may be appointed as administrator for a financial matter only if:<sup>119</sup>

- the person is the Public Trustee, a trustee company under the *Trustee Companies Act 1968* (Qld), or a person who is 18 years or older, is not a paid carer, or health provider, for the adult, and is not a bankrupt or taking advantage of Australian or foreign bankruptcy laws as a debtor; and
- the Tribunal considers the person is appropriate for appointment.

### Discussion Paper

14.92 In the Discussion Paper, the Commission raised the issue of whether the definition of a ‘paid carer’ for an adult under the *Guardianship and Administration Act 2000* (Qld) raises any problems in practice.<sup>120</sup> As mentioned previously, the definition of ‘paid carer’ under the Act covers a person who performs services for the adult’s care and receives remuneration from any source for the services. However, it does not apply to a person who receives a Government carer payment or other benefit for providing home care for the adult or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult’s care.<sup>121</sup> The primary rationale for making a paid carer ineligible for appointment is to ensure that there is no conflict of interest between a professional care provider for an adult and the adult.<sup>122</sup>

14.93 The legislation in South Australia, like Queensland, prohibits the appointment of a person who cares for an adult on a professional basis.<sup>123</sup> However, the eligibility provisions in New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia do not specifically exclude paid carers from appointment. In those jurisdictions, one of the eligibility requirements is that the appointee is not in a position where the appointee’s interests conflict or may conflict with the interests of the adult.<sup>124</sup>

119 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i)–(ii), (c).

120 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 64.

121 See [14.76] above.

122 In its original 1996 Report, the Queensland Law Reform Commission recommended that, because of the ‘inherent conflict of interest involved’, a professional care provider should not be eligible for appointment as a decision-maker: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 199. The Commission made no recommendation in relation to the disqualification of a health provider for the adult.

See also the *Disability Services Act 2006* (Qld) s 29, which provides that ‘services should be designed and implemented to ensure that no single service provider exercises control over all or most aspects of the life of a person with a disability’.

123 *Guardianship and Administration Act 1993* (SA) s 29(5). Section 29(5) excludes a person who cares for the adult on a professional basis.

124 *Guardianship Act 1987* (NSW) s 17(1)(b) (in relation to a guardian only); *Adult Guardianship Act* (NT) s 14(1)(b) (in relation to a guardian only); *Guardianship and Administration Act 1995* (Tas) ss 21(1)(b), 54(1)(d)(ii); *Guardianship and Administration Act 1986* (Vic) ss 23(1)(b), 47(1)(c)(ii); *Guardianship and Administration Act 1990* (WA) ss 44(1)(b), 68(1)(c).

14.94 The definition of ‘paid carer’ under the *Guardianship and Administration Act 2000* (Qld) may, in some circumstances, capture a member of the adult’s support network (for example, a close relative of the adult) who cares for the adult and receives remuneration for those services (other than a Government carer payment or other benefit for providing home care for the adult or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult’s care). If the remuneration received is a payment for services rather than a reimbursement of expenses, the person would fall within the definition of a paid carer for an adult and, therefore, be ineligible for appointment as a guardian or an administrator for the adult.<sup>125</sup>

14.95 The Act, amongst other things, requires the Tribunal, when considering whether a person is appropriate for appointment, to take into account the extent to which the adult’s and the person’s interests are likely to conflict.<sup>126</sup> It also recognises that the fact that a person is a relation of the adult does not, of itself, mean that the adult’s and the person’s interests are likely to conflict.<sup>127</sup> It may be that these provisions, by themselves, are sufficient to deal with the issue of a possible conflict of interest when a family member, who is also a paid carer for the adult, seeks appointment.

14.96 The Commission sought submissions in relation to whether the eligibility requirements in section 14(1) of the *Guardianship and Administration Act 2000* (Qld) are appropriate.<sup>128</sup> It also sought submissions about whether there are any difficulties in practice with the application of the eligibility requirements in section 14(1).<sup>129</sup>

### **Submissions**

14.97 The submissions that considered this issue did not consider that the *Guardianship and Administration Act 2000* (Qld) should be amended to enable paid carers to be eligible for appointment as guardians or administrators.

14.98 For example, Queensland Advocacy Incorporated supported the continued prohibition on a person who cares for an adult on a professional basis being appointed as a guardian or an administrator in order to avoid any conflicts of interest between the carer and the adult, the problem of the carer having little personal knowledge of the person and to reflect the principle set out in the *Disability Services Act 2006* (Qld) that no single service provider should exercise control over the life of a person with disability.<sup>130</sup>

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125 See [97] above.

126 *Guardianship and Administration Act 2000* (Qld) s 15(1)(c).

127 *Guardianship and Administration Act 2000* (Qld) s 15(2).

128 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 64.

129 Ibid.

130 Submission 162.

These conflicts of interest are more likely to skew decision-making so that the person's interests and well being do not remain paramount. Also the role of support services is to support ordinary life to continue to happen, not to replace it. The assumption also is that that the service provider is a constant in the person's life, which may not be the case. Service providers can change and in fact need to change, if the person's needs are not being met. By giving a paid service provider guardianship, the person is locked into that particular service for life, with the result that the service holds authority over the whole of the person's life. This is clearly in breach of the Disability Services Act which states [that] ... [s]ervices should be designed and implemented to ensure that no single service provider exercises control over all or most aspects of the life of a person with a disability.

14.99 Neither the Adult Guardian nor the Public Trustee was aware of any practical difficulties that arise from the eligibility requirements generally, or in relation to the exclusion of paid carers.<sup>131</sup> The Public Trustee considered that there should be no amendment to the eligibility requirements in section 14(1) of the Act.<sup>132</sup>

14.100 A respondent who is a long-term Tribunal member suggested that the definition of 'paid carer' should be broadened to include a former paid carer for the adult.<sup>133</sup> This respondent considered that this would provide an additional safeguard against financial abuse in particular.

### ***The Commission's view***

14.101 The Commission considers that that the current eligibility requirements in section 14(1) of the *Guardianship and Administration Act 2000* (Qld) for the appointment of a guardian or an administrator are satisfactory and need not be changed. These requirements constitute an important safeguard for the protection of the adult from abuse, neglect or exploitation.

14.102 One of these requirements is that the appointee must not be the 'paid carer' of the adult. The main reason for this restriction is that the person's interests may conflict with those of the adult. The Commission does not consider it desirable to enable a member of the adult's family who is also a paid carer for the adult to be appointed as the adult's guardian or administrator. This is because the commercial element of the relationship raises the issue of a conflict of interest. The Commission notes that the current eligibility requirements do not exclude a family member who receives a Government carer payment or other benefit for providing home care for the adult or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult's care from being eligible for appointment.

14.103 The Commission does not support the suggestion made by one respondent that a person who previously was a paid carer for an adult should be automatically disqualified from eligibility for appointment. Section 15 of the Act

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131 Submissions 156A, 164.

132 Submission 156A.

133 Submission 179.

provides that the Tribunal must, in deciding whether a person is appropriate for appointment as a guardian or an administrator, take into account a range of appropriateness considerations.<sup>134</sup> The Tribunal must also have regard to other relevant factors, including whether the person has a criminal history and the nature and circumstances of any refusal of, or removal from, appointment as a substitute decision-maker for someone else.<sup>135</sup> Section 16 of the Act requires that a person who has agreed to a proposed appointment for an adult must advise the Tribunal, before it makes an appointment order, of certain matters relating to the person's appropriateness and competence.<sup>136</sup> Section 18 of the Act also specifically empowers the Tribunal to make inquiries about the appropriateness and competence of a proposed appointee.

14.104 Given that the Tribunal has a high degree of oversight of the appointment process, including the ability to make its own inquiries about a person's appropriateness and competence, the Commission considers that it is neither necessary nor desirable to impose restrictions on the appointment of a person who previously was an adult's former paid carer for that reason alone. Instead, in keeping with the current legislative scheme for the appointment of a guardian or an administrator which requires the Tribunal to consider the person's appropriateness and competence for appointment in light of his or her past history, section 16 of the Act should be amended to provide that a person who has agreed to a proposed appointment for an adult must advise the Tribunal, before it makes an appointment order, whether the person was previously a paid carer for the adult. Section 15 of the Act should also be amended to provide that the Tribunal must, in considering the person's appropriateness and competence have regard to whether the person previously was a paid carer for the adult.

### Consent to an appointment

14.105 An issue for consideration is whether the eligibility provisions under the *Guardianship and Administration Act 2000* (Qld) should generally provide that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment. Section 14, which deals with who may be appointed,

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134 Section 15 is set out at [14.82] above. The appropriateness considerations include the extent to which the adult's and person's interests are likely to conflict and the person's appropriateness and competence to perform functions and exercise powers under an appointment order: *Guardianship and Administration Act 2000* (Qld) s 15 (1)(c), (g).

135 *Guardianship and Administration Act 2000* (Qld) s 15(4)(a), (b).

136 These matters are largely the matters referred to in s 15 which the Tribunal must take into account when deciding whether a person is appropriate for appointment. These include whether the person: is under 18 years; is a paid carer or health provider for the adult; has any criminal history; has been refused or removed from appointment as a substitute decision-maker for someone else, and certain matters relating to whether the person has been the subject of proceedings under the *Bankruptcy Act 1966* (Cth).

contains no such requirement.<sup>137</sup> However, rule 110(1)(a) of the QCAT Rules provides that an application for the appointment of a guardian or an administrator must include the proposed appointee's written agreement to the appointment.<sup>138</sup> It would appear that the effect of this provision is to ensure that a person (and, in particular an individual) who is proposed for appointment is aware of the application for appointment, and has given his or her consent to the appointment. That provision was previously contained in section 117 of the *Guardianship and Administration Act 2000* (Qld). It may be preferable to ensure that the consent of a proposed appointee is a substantive requirement for appointment under the *Guardianship and Administration Act 2000* (Qld).

14.106 A related issue is whether a requirement for consent should apply to the Adult Guardian or the Public Trustee.

14.107 As mentioned above, under the *Guardianship and Administration Act 2000* (Qld), the Public Trustee is eligible for appointment as an administrator for an adult. However, the Public Trustee's appointment is subject to the operation of section 27(3) of the *Public Trustee Act 1978* (Qld), which provides that, unless there is a specific exception made under the *Public Trustee Act 1978* (Qld) or any other Act, the Public Trustee's appointment to any office or capacity is subject to the Public Trustee's consent. The Commission understands that it is the policy of the Public Trustee not to refuse an appointment as an administrator for an adult.<sup>139</sup>

14.108 In most of the other jurisdictions, the eligibility provisions specify that a person cannot be appointed unless he or she has consented to the appointment.<sup>140</sup>

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However, the *Guardianship and Administration Act 2000* (Qld) contains a number of provisions that refer to an individual or a person who agrees, or has agreed, to an appointment. Section 15(4)(c) provides that, in deciding whether a person is appropriate for appointment, the Tribunal must consider certain circumstances in relation to the person if the proposed appointment is of an administrator who is an individual. Section 16 provides that an individual who has agreed to a proposed appointment must advise the Tribunal whether he or she satisfies the eligibility requirements. Section 18 empowers the Tribunal or the Registrar to make inquiries about the appropriateness and competence to perform functions and exercise powers under an appointment order of a person who has agreed to a proposed appointment or who is a guardian or an administrator. Section 20 provides that, unless the Tribunal orders otherwise, a person who agrees to a proposed appointment as an administrator must give a financial management plan to the Tribunal or its appropriately qualified nominee. The reference to a 'person' in ss 16 and 18 includes a corporation and would therefore apply to the Public Trustee and a trustee company: *Acts Interpretation Act 1954* (Qld) s 32D.

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*Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1448 repealed s 117 of the *Guardianship and Administration Act 2000* (Qld), which was in similar terms. The application form for the appointment of a guardian or an administrator does not require the Adult Guardian nor the Public Trustee to complete the relevant sections in the form which provide for the written agreement of a proposed appointee to the appointment: Queensland Civil and Administrative Tribunal, *Application for administration/guardianship appointment or review — Guardianship and Administration Act 2000*, <[http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10\\_Ap\\_admin.g\\_app\\_rw.pdf](http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10_Ap_admin.g_app_rw.pdf)> at 27 September 2010.

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Information provided by the Official Solicitor for the Public Trustee, 8 October 2009. This policy is open to review in exceptional circumstances: Information provided by the Official Solicitor for the Public Trustee, 8 October 2009.

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*Guardianship and Management of Property Act 1991* (ACT) s 10(1); *Guardianship Act 1987* (NSW) s 17(1)(c); *Adult Guardianship Act* (NT) s 14(1); *Guardianship and Administration Act 1993* (SA) s 51; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) ss 23(1), 47(1)(c); *Guardianship and Administration Act 1990* (WA) ss 44(1), 68(1).

In South Australia, the requirement for consent does not apply to the Public Advocate or the Public Trustee.<sup>141</sup>

14.109 An issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the consent of the Adult Guardian or the Public Trustee is not required for their appointment.

14.110 Both the Adult Guardian and the Public Trustee meet an important public need. The Adult Guardian is the statutory officer who is appointed as guardian if there is no other appropriate person available. The Office of the Adult Guardian is publicly funded for the delivery of its services and charges no fees. The Public Trustee provides a range of trustee, financial and related services to the community, including acting as an administrator for an adult when appointed under the *Guardianship and Administration Act 2000* (Qld). The Public Trustee is entitled to charge an adult for the costs of administration. In the absence of any application from another person who is appropriate to be appointed to the role, the Public Trustee is the alternative appointee considered by the Tribunal.<sup>142</sup> In this situation, the Public Trustee is, in effect, the de facto administrator who is appointed if there is no other appropriate appointee available.

14.111 If the *Guardianship and Administration Act 2000* (Qld) were amended to provide that the consent of the Adult Guardian or the Public Trustee is not required for their appointment, it would be consistent with both the Adult Guardian's statutory role and the Public Trustee's policy.

### **Discussion Paper**

14.112 In the Discussion Paper, the Commission sought submissions in relation to whether section 14 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment.<sup>143</sup> It also sought submissions about whether the Act should be amended to provide that the consent of the Adult Guardian or the Public Trustee is not required for their appointment.<sup>144</sup>

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141 *Guardianship and Administration Act 1993* (SA) s 51.

142 See *Re TAD* [2008] QGAAT 76, [180] in which the Tribunal observed that:

The Public Trustee is the alternative appointee considered by the Tribunal in the absence of any application from another private trustee company to be appointed to the role. The representative of TAD submitted that the appointment of the Public Trustee would not be in accordance with the views and wishes of TAD. The Public Trustee did not actively seek appointment to the role in this case but the Tribunal understands the policy of the Public Trustee is to accept appointment in all cases where the Tribunal considers the appointment is in the interests of the adult.

143 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 66.

144 *Ibid.*

## Submissions

### *A general requirement for consent*

14.113 A number of submissions considered that section 14 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment.<sup>145</sup>

14.114 The Public Trustee supported the inclusion of a general requirement for consent in the *Guardianship and Administration Act 2000* (Qld).<sup>146</sup> It also suggested that the appointment of a person without his or her consent would raise difficulties in practice:

It is of course difficult to conceive that in the absence of such an amendment or indeed Rule 110 that the Tribunal could form a view that a person was appropriate for appointment (in the absence of consent) in any event.

It would be difficult for the Tribunal to conclude for example that:

The person is likely to apply the general principles (evidence in relation to this could hardly be gleaned if the person has not agreed to accept appointment).

The person is compatible or appropriate and competent to perform the functions and powers under such an appointment — for a recalcitrant administrator is one which hardly would be appropriate to appoint ...

14.115 The Perpetual Group of Companies noted that it was unaware of any problems with the present system in practice and submitted that a requirement for consent may add to the practical difficulties of making appointments, for example if the proposed administrator wants to negotiate some conditions.<sup>147</sup> It suggested that it may be advantageous to provide that an individual or a trustee company may not be appointed if they refuse the appointment.

14.116 The former Acting Public Advocate noted that, in order to protect the rights and interests of adults with impaired capacity to the greatest possible extent, a guardian or an administrator must be willing to act in and serve the adult's interests.<sup>148</sup> The former Acting Public Advocate also noted that, while it is highly unlikely in practice that the appointment of a guardian or an administrator would occur where an individual is opposed to the appointment, it would be grossly inappropriate and undesirable if this could occur.

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145 Submissions 54A, 156A, 160, 163, 164.

146 Submission 156A.

147 Submission 155.

148 Submission 160.



*Consent of the Adult Guardian and the Public Trustee*

14.117 Most of the submissions that addressed these issues generally considered that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the consent of the Adult Guardian or the Public Trustee is not required for their appointment.<sup>149</sup>

14.118 The former Acting Public Advocate considered that, in order to protect the interests of vulnerable adults, the Adult Guardian and the Public Trustee should always be available for appointment where there is no appropriate individual available.<sup>150</sup>

The Adult Guardian's primary function is the protection of adults with [impaired decision-making capacity]. As the guardian of last resort, it would be inappropriate for the Adult Guardian to refuse to act as guardian for a vulnerable adult in circumstances where no one else is available or appropriate to do so, and would be contrary to its protective function.

For these reasons, the Public Trustee's discretion under section 27(3) of the *Public Trustee Act 1978* (Qld) to act as administrator for adults with [impaired decision-making capacity] subject to its consent should also be removed. It is acknowledged that the current policy of the Public Trustee is not to refuse an appointment as an administrator — the Public Trustee is commended for this policy position. However, policy is subject to change. If the Public Trustee's policy changed and its ability to refuse consent were acted upon, vulnerable adults would be disadvantaged.

At all times the rights and interests of adults with [impaired decision-making capacity] should take precedence. Where no individual is available, willing or appropriate to perform the significant role of guardian/administrator, statutory appointment must be available to protect the interests of vulnerable adults. Accordingly, it is considered that provisions should be enacted to the effect that the requirement for consent to appointment as a guardian or administrator does not apply to either the Adult Guardian or the Public Trustee.

14.119 Pave the Way expressed a similar view:<sup>151</sup>

However, as these agencies are by law (Adult Guardian) or in practice (Public Trustee) expected to take up appointments of last resort, it would be untenable if they were given an option to refuse an appointment.

14.120 It also commented on the importance of ensuring that the Adult Guardian and the Public Trustee are adequately funded to perform these roles:

If at any time they do not have the resources to perform their statutory functions, it is the role of government to provide adequate resources. It will often be the most vulnerable of people with decision-making incapacity who need to rely on the Adult Guardian and Public Trustee to carry out these roles

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149 Submissions 54A, 135, 163, 179.

150 Submission 160.

151 Submission 135.

and they should not be left without protection for want of adequate government resources.

14.121 On the other hand, the Public Trustee did not support the amendment of the *Guardianship and Administration Act 2000* (Qld) to provide that the consent of the Adult Guardian or the Public Trustee is not required for their appointment.<sup>152</sup>

14.122 The Public Trustee suggested that there is no justification for making a distinction between the position of the Public Trustee and the position of a private administrator in relation to the general requirement for consent.

14.123 The Public Trustee considered that the Public Trustee's role in acting as the administrator appointed by the Tribunal where there is no alternative appropriate appointee available is one of the Public Trustee's 'primary and essential' functions, and noted that the Public Trustee has never refused to consent to an appointment as administrator under the *Guardianship and Administration Act 2000* (Qld). Nonetheless, the Public Trustee considered that he ought to retain his general discretion to consent to or refuse an appointment in all circumstances:

The Public Trustee readily accepts the role and important task to act as administrator in cases where there are no other appropriate appointees (the administrator of last resort function).

The Public Trustee of course also accepts appointments when there are alternative administrators but in the circumstances it is determined either by the Court pursuant to section 245 of the [*Guardianship and Administration Act 2000* (Qld)] or the Tribunal that the Public Trustee is more appropriate.

The Public Trustee, like all other potential administrators, must have the capacity to consider (in those cases at least) whether to consent to an appointment.

14.124 The Public Trustee explained that, as a self-funding entity, the removal of the Public Trustee's discretion to refuse an appointment as administrator may limit his ability to carry out his range of statutory functions including the provision of financial administration services for adults with impaired capacity. Among other things, the Public Trustee explained that his ability to continue to provide administration services at no cost, or a reduced cost, depends on both the need for those services and his ability to fund them:

The Public Trustee sees as one of his core businesses and activities the delivery of social justice imperatives in the areas in which he functions. Importantly this includes the delivery of services to adults with incapacity in the area of financial administration.

The Public Trustee is entitled to charge fees for his services but close to sixty cents in every dollar that he is entitled to charge the Public Trustee does not; his fee regime is overlaid by community service obligations which are conceived to ensure that those with few resources (assets) pay very little or nothing for the services provided. 81.9% of clients in this area of activity receive services at a reduced fee (or no fee) as a consequence.

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Submission 156A.

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The majority of adults for whom the Public Trustee acts as administrator have assets valued at less than \$60,000, indeed last financial year 94.1% had less than \$60,000 in assets and on average held assets to a value of \$18,505.

The Public Trustee is self-funding — it does not draw from consolidated revenue and remains committed to the delivery of these community services obligations as a central service.

The capacity for the Public Trust Office to continue providing the extent of free or vastly reduced cost of services into the future is very much contingent upon the need for his services (which is forecast demographically to exponentially grow over the next ten years) and his capacity to fund those services.

...

Removing the capacity from the Public Trustee to determine the areas of activities or particular matters he accepts compromises potentially the capacity of the organisation to continue to deliver in respect of his essential social justice fiat.

14.125 Additionally, the Public Trustee noted that, under the *Public Trustee Act 1978* (Qld), the Public Trustee's consent is required for his appointment to a range of fiduciary positions, including those of administrator, trustee, executor, and liquidator. In these circumstances, the Public Trustee suggested that it is appropriate that he retain his discretion to consent to an appointment as administrator:

The Public Trustee may be appointed to act as a trustee, executor, administrator, next friend, guardian, agent, attorney, liquidator, receiver, manager or director or in any other office of a fiduciary nature (section 27 (1) of the *Public Trustee Act 1978*).

In no other circumstance has it been contended that the Public Trustee should not have the right to consent (or not) as to any office to which he might be appointed (but for this commission reference).

This is no doubt for good reason.

First, the appointment of the Public Trustee as a fiduciary of itself should attract agreement.

Second, as discussed above, the Public Trustee as a self-funding organisation properly requires a degree of flexibility in order to ensure that it discharges all of its statutory functions whilst maintaining a robust and effective organisation. A removal of choice of the Public Trustee's capacity to consent to appointments may limit that potential.

Third, should resources not be available to appropriately discharge all that which attends upon the Public Trustee — all of the potential appointments contemplated by section 27, discussed above (as well as those special functions of a public nature related in part 5 of the *Public Trustee Act 1978*) the determination properly should be the Public Trustee's as to how those resources are deployed and in what capacities the Public Trustee can properly act.

14.126 The Public Trustee also considered that there are some types of complex matters in relation to which it is appropriate for the Public Trustee to have the capacity to refuse appointment or at least raise that prospect. By way of illustration, he provided the following examples:

In one matter a private trustee company appointed as administrator for a period nearing 5 years had effectively exhausted the funds of the adult with an incapacity. After charging significant fees that trustee company then approached the Tribunal for leave to withdraw as administrator and promoted the Public Trustee's appointment.

On some occasions the nature of the proposed appointment of the Public Trustee is essentially unworkable. Often it is proposed to appoint the Public Trustee for only a particular legal matter of an adult with an incapacity (leaving the remainder of the financial matters of the adult without the benefit of decision-making by an administrator). In those circumstances, and in the absence of some control over decision-making as to all financial matters the Public Trustee has offered to the Tribunal that there is a need for broader appointment – a plenary order. It is not possible in legal matters where expenditure of funds are involved for the administrator not to have that decision-making capacity.

### ***The Commission's view***

14.127 The Commission considers that the general requirement that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment is a substantive one and should be contained in the *Guardianship and Administration Act 2000* (Qld) (as was formerly the case) rather than in the QCAT Rules (as is presently the case).

14.128 However, the general requirement for an appointee to give his or her consent to the appointment should not apply to the Adult Guardian or the Public Trustee. The Adult Guardian and the Public Trustee both perform an essential public function by providing guardianship and administration services to the community. The Adult Guardian is the statutory guardian who is appointed where there is no private appointee who is appropriate and available for appointment as guardian. The Public Trustee, in practice, fills a similar role in relation to being appointed as administrator. If the Adult Guardian or the Public Trustee were not always available for appointment, there would be a gap in the statutory scheme for the appointment of guardians and administrators.

14.129 Accordingly, the Commission considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the appointment of the Adult Guardian is not subject to the Adult Guardian's consent. This approach is consistent with the Adult Guardian's statutory function of acting as guardian for an adult if appointed by the Tribunal.<sup>153</sup>

14.130 The Commission also considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the appointment of the Public

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*Guardianship and Administration Act 2000* (Qld) s 174 (2)(e).

Trustee is not subject to the Public Trustee's consent.<sup>154</sup> This proposed amendment is consistent with the Public Trustee's general policy to not refuse an appointment as administrator for an adult. It also effectively removes the Public Trustee's residual discretion, conferred under section 27(3) of the *Public Trustee Act 1978* (Qld), to refuse an appointment as administrator.

14.131 The Commission acknowledges the concerns of the Public Trustee in relation to the effect of the removal of the Public Trustee's discretion to refuse to consent to an appointment but considers that to ensure the effectiveness of the scheme for the appointment of administrators under the *Guardianship and Administration Act 2000* (Qld), it is of paramount importance that a statutory appointee is always available for appointment as administrator.

14.132 The implementation of the Commission's recommendation to remove the current legislative requirement for the Public Trustee's consent to its appointment as administrator will confer a new statutory responsibility on the Public Trustee. Given that the Public Trustee already assumes this responsibility in practice, the Commission anticipates that the formalisation of this responsibility may not necessarily have an extensive impact on the Public Trustee's resources. However, to the extent that the implementation of the Commission's recommendations both in relation to the appointment of the Adult Guardian and the Public Trustee may have resource implications for these officers and their agencies, the Commission is nevertheless of the view that these measures are necessary in providing a comprehensive scheme for the appointment of guardians and administrators under the *Guardianship and Administration Act 2000* (Qld). If necessary, public funds should be made available for the Adult Guardian and the Public Trustee to satisfy their statutory obligations in this regard.

### Appropriateness considerations for appointment

14.133 Section 14(1)(c) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint a person as guardian or administrator for an adult only if, having regard to the matters mentioned in section 15(1) of the Act, the Tribunal considers that the person is 'appropriate' for appointment. Section 15(1) of the Act sets out the 'appropriateness considerations' the Tribunal must take into account in deciding whether a person is appropriate for appointment as a guardian or an administrator for an adult with impaired capacity. These include:<sup>155</sup>

- the General Principles and, if the appointment is for a health matter, the Health Care Principle, and whether the person is likely to apply them;<sup>156</sup>

<sup>154</sup> The Commission has also recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal may appoint the Public Trustee as administrator for a matter only if there is no other appropriate individual available for appointment for the matter: see Recommendation 14-13 of this Report.

<sup>155</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1).

<sup>156</sup> See now the new General Principles recommended in Chapter 4 of this Report and the new Health Care Principle recommended in Chapter 5 of this Report.

- the extent to which the adult's and the person's interests are likely to conflict;
- whether the adult and the person are compatible including, for example, whether the person's communication skills and cultural or social experience are appropriate;
- whether the person would be available and accessible to the adult; and
- the person's appropriateness and competence to perform the functions and exercise the powers conferred by an appointment order.

14.134 Subsections 15(2) and (3) of the Act provide that the fact that a person is a relation of the adult, or a beneficiary of the adult's estate on the adult's death, does not of itself mean that the adult's and the person's interests are likely to conflict.

14.135 Section 15(4) of the Act provides that, in considering a person's appropriateness and competence for appointment, the Tribunal is required to take into account, amongst other things, the nature and circumstances of any criminal history of the person, or any refusal of, or removal of, the person from appointment as a guardian, an administrator or an attorney in Queensland or elsewhere.

### **Discussion Paper**

14.136 In the Discussion Paper, the Commission sought submissions in relation to whether these considerations are appropriate and whether there are any difficulties with their application in practice.<sup>157</sup>

### **Submissions**

14.137 Several respondents, including the Adult Guardian and the Public Trustee, considered that the appropriateness considerations in section 15 of the *Guardianship and Administration Act 2000* (Qld) are adequate.<sup>158</sup> The Public Trustee suggested that section 15(1)(g), which refers to 'the person's appropriateness and competence to perform functions and exercise powers under an appointment order' is sufficiently inclusive and gives the Tribunal a broad scope in making appointments.<sup>159</sup>

14.138 The Adult Guardian was unaware of any difficulties arising in this area.<sup>160</sup> However, the Endeavour Foundation considered that there are some difficulties in

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<sup>157</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 67.

<sup>158</sup> Submissions 135, 156AA, 164.

<sup>159</sup> Submission 156A.

<sup>160</sup> Submission 164.

practice with the application of the appropriateness considerations in section 15, although it did not elaborate on what these are.<sup>161</sup>

14.139 Queensland Advocacy Incorporated considered that additional appropriateness factors should be included in section 15 ‘to strengthen the role of important people in the person’s life, as well as the recognition of their linguistic and cultural environment’.<sup>162</sup> It suggested the addition of the following factors, which are similar to those listed in the New South Wales legislation:

- the views (if any) of:
  - the adult;
  - the adult’s spouse (if the relationship between the adult and the spouse is close and continuing); and
  - the person who has care of the adult;
- the importance of preserving the adult’s existing family relationships; and
- the importance of preserving the adult’s particular cultural and linguistic environments.

14.140 Queensland Aged and Disability Advocacy Inc suggested that the impact of fees on an adult’s financial circumstances should be taken into account when the Tribunal is considering the appointment of an administrator.<sup>163</sup>

14.141 Carers Queensland raised an issue that concerns the requirement in section 14(1)(c) that the Tribunal may appoint a person as a guardian or an administrator only if, ‘having regard to the matters mentioned in section 15(1), the Tribunal considers the person appropriate for appointment’.<sup>164</sup>

Sometimes the Tribunal forms the view that a family member may not have sufficient skills to fulfil the role of guardian or administrator, or that the family member is reluctant to take on a large number of decision-making tasks. Carers Queensland considers that if support and guidance was offered to potential family guardians the skill sets required could be developed.

### ***The Commission’s view***

14.142 The Commission considers that the list of ‘appropriateness considerations’ set out in section 15(1) of the *Guardianship and Administration Act 2000* (Qld) are all relevant considerations for the Tribunal to consider when deciding whether a person is suitable for appointment as an adult’s guardian or administrator. These

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161 Submission 163.

162 Submission 162.

163 Submission 148.

164 Submission 146.

matters are sufficiently broad to cover the specific considerations suggested by various respondents to the Commission's review.

14.143 Amongst other things, section 15(1) requires the Tribunal to consider the General Principles and whether the person is likely to apply them.<sup>165</sup> The Tribunal itself is also required to apply the General Principles when exercising its power to make an appointment order.<sup>166</sup>

14.144 Additionally, the Tribunal is required to consider the person's appropriateness and competence to perform functions and exercise powers under an appointment order. The criterion gives the Tribunal a broad discretion to consider a range of factors relevant to the person's suitability for appointment. These might include, for example, the relationship between the adult and the person to the extent it appears relevant to the person's ability to perform functions and exercise powers under an appointment order and whether, in light of the adult's circumstances, the appointee has the requisite knowledge and skills to perform functions and exercise powers under an appointment order. In addition, if the proposed appointment is of an administrator, relevant factors may include whether the adult's property and financial affairs are of a substantial or complex nature and the impact of any administration fees on the adult's financial circumstances.

14.145 The appropriateness considerations in section 15(1) also include the extent to which the adult's and the person's interests are likely to conflict. The application of this subsection is qualified by section 15(2) and (3), which provide that the fact that a person is a relation of the adult, or a beneficiary of the adult's estate on the adult's death, does not of itself mean that the adult's and the person's interests are likely to conflict. These provisions reflect the view that the existence of close personal ties should not be assumed to create a position of conflict, since such an assumption would automatically disqualify many of the people who would be the most appropriate decision-makers.

14.146 The Commission is of the view that an additional qualification should be included in section 15 in relation to the existence of family conflict. Although family conflict is not mentioned specifically in section 15, the Tribunal has generally dealt with the existence of family conflict as a relevant factor in its consideration of the appropriateness of a proposed appointee — generally in the context of whether the person is likely to apply the General Principles (one of which requires the appointee to take into account the importance of maintaining the adult's existing supportive relationships), the person's compatibility with any other appointees and the person's appropriateness and competence for appointment.

14.147 An adverse finding about the appropriateness of a family member for appointment, based on the existence of family conflict, may result in the appointment of the Adult Guardian or the Public Trustee. In this regard, the

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If the appointment is for a health matter, the Tribunal is also required to consider the Health Care Principle, and whether the person is likely to apply it: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a). See now the new General Principles recommended in Chapter 4 of this Report and the new Health Care Principle recommended in Chapter 5 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 11(1).



Commission notes that there is a perception, among some of the respondents, that the appointment of the Adult Guardian or the Public Trustee is sometimes too readily made in situations of family conflict.<sup>167</sup>

14.148 The Commission considers that, while the existence of family conflict is a relevant issue in the appointment process, that fact, by itself, should not prevent a family member who is an otherwise appropriate appointee from being appointed as the adult's guardian or administrator. In considering the issue of a person's appropriateness for appointment, it is also relevant to note that the Commission has recommended that the General Principle which requires the appointee to take into account the importance of maintaining the adult's existing supportive relationships should be amended to clarify that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis.<sup>168</sup> That new principle encourages substitute decision-makers to engage in consultation where that is important to maintaining the adult's existing supportive relationships but does not impose on them a mandatory requirement to that effect.

14.149 Section 15 should therefore be amended to include a new subsection to the effect that the fact that a person who is a family member of the adult is in conflict with another family member does not, of itself, mean that the person is not appropriate for appointment as a guardian or an administrator for the adult. For the purposes of this proposed new provision, the a family member of the adult should be defined in terms of the new definition of 'relative', which the Commission has proposed should apply in relation to section 63 of the *Powers of Attorney Act 1998* (Qld).<sup>169</sup>

14.150 The appropriateness considerations in section 15(1) also include whether the appointee is compatible with and accessible to the adult.

14.151 In Chapter 30, the Commission has emphasised the importance of providing assistance and support to guardians and administrators in their appointed roles.<sup>170</sup> The Commission notes that the Adult Guardian conducts a free information service for private guardians to educate and assist them in

<sup>167</sup> See [14.178]–[14.181] below.

<sup>168</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 8. See now the new General Principle 4 recommended in Chapter 4 of this Report.

<sup>169</sup> See Recommendation 10-4, which is in the following terms:

For the purposes of section 63 of the *Powers of Attorney Act 1998* (Qld), the definition of 'relation' should be reformulated for the purpose of section 63 of the Act to include the following categories of person:

- (a) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship or a foster relationship;
- (b) for an Aboriginal person — includes a person who, under Aboriginal tradition, is regarded as a relative mentioned in the first paragraph;
- (c) for a Torres Strait Islander — includes a person who, under Island custom, is regarded as a relative mentioned in the first paragraph.

<sup>170</sup> See [30.167]–[30.168] above.

understanding their role as an appointed guardian.<sup>171</sup> The Office of the Public Guardian in New South Wales has a similar program.

### The effect of family conflict

14.152 Family conflict is an issue that commonly arises in the context of Tribunal proceedings relating to the appointment, or the review of an appointment, of a guardian or an administrator for an adult, particularly where the appointee, or proposed appointee, is a member of the adult's family or support network. In circumstances where family conflict is involved, the Tribunal has often appointed the Adult Guardian or the Public Trustee in preference to a family member on the basis that a statutory decision-maker has the ability to bring an 'independent and objective mind' to the decision-making process.<sup>172</sup>

14.153 As noted above, section 15 of the *Guardianship and Administration Act 2000* (Qld) sets out the 'appropriateness considerations' the Tribunal must take into account in deciding whether a person is appropriate for appointment as a guardian or an administrator for an adult with impaired capacity. It appears that the Tribunal has generally dealt with the existence of family conflict as a relevant circumstance in considering whether a family member is an 'appropriate' appointee.<sup>173</sup>

14.154 For example, in *Re BAH*, the Tribunal considered that family conflict is relevant in deciding whether a person is a suitable appointee to the extent that it may impact on the appointee's ability to apply the General Principles when making decisions for the adult:<sup>174</sup>

The Tribunal accepts the submissions of KW in relation to the circumstances of conflict. That is, it is not the fact of conflict per se which militates against a family appointee. However, if the fact of conflict impacts on a proposed appointee's ability to comply with the general principles in his or her decision-making process, then that circumstance is a matter to which the Tribunal must have regard.

Specifically, section 15 of the *Guardianship and Administration Act 2000* requires the Tribunal to consider the 'appropriateness considerations' when determining whether a person is appropriate for appointment. One of those

171 The service commenced in August 2010.

172 Eg *Re GA* [2004] QGAAT 15; *Re BL* [2006] QGAAT 23; *Re KAB* [2008] QGAAT 29, [80]; *Re SAF* [2008] QGAAT 73, [47]; *Re SAB* [2009] QGAAT 16, [47], [58].

173 *Guardianship and Administration Act 2000* (Qld) s 15 is set out at [14.82] above.

174 [2007] QGAAT 77, [32]–[33]. See also *Re BAJ* [2005] QGAAT 57, [42], [48]–[50]; *Re CRS* [2006] QGAAT 57, [90]. In deciding whether a person is appropriate for appointment as a guardian or an administrator for an adult, the Tribunal must consider, amongst other things, the General Principles and whether the person is likely to apply them: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a). See, for example, General Principle 8, which specifies that the importance of maintaining the adult's existing supportive relationships must be taken into account: *Guardianship and Administration Act 2000* (Qld) sch 1 s 8. See now the new General Principles recommended in Chapter 4 of this Report. New General Principle 4(1), which restates existing General Principle 8, states that the importance of maintaining an adult's existing supportive relationships must be taken into account. General Principle 4(2) specifies that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis or both.

considerations is whether the person is likely to apply the general principles, and in turn, one of the general principles is the maintenance of an adult's existing supporting relationships.

14.155 The Tribunal has also considered that family conflict is a relevant circumstance to the extent that it may affect the person's appropriateness and competence to perform the functions and exercise the powers under the appointment order.<sup>175</sup> For example, the Tribunal has observed that sometimes family conflict may discourage or prevent other members of the adult's family or support network from providing their views to, or, in the case of a joint appointee, consulting with, the guardian or administrator about decisions made for the adult.<sup>176</sup> The Tribunal has also observed that the existence of family conflict (particularly in relation to the adult's interests) may be detrimental to the adult's well-being.<sup>177</sup>

14.156 However, family conflict is not uncommon. Even though family conflict has the potential to complicate the process of substitute decision-making for an adult, it may be generally preferable, in some circumstances, to appoint a family member who has a personal and ongoing interest in the adult rather than a statutory office-holder.<sup>178</sup>

14.157 In some circumstances, the Tribunal has taken a proactive approach to facilitate the appointment of a family member despite the presence of family conflict.

14.158 For example, the Tribunal has adjourned the hearing of an application in order to give the adult's family members time to consider the alternatives and the prospect of them working together in the adult's interests.<sup>179</sup>

14.159 The Tribunal has also give directions to the appointees to do particular things in order to minimise the level of family conflict. For example, in *Re TAW*, the Tribunal considered it appropriate in the circumstances to continue the appointment of family members as administrators for the adult notwithstanding the existence of family conflict.<sup>180</sup> However, the Tribunal gave directions to the administrators to facilitate consultation with other family members:<sup>181</sup>

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175 In deciding whether a person is appropriate for appointment as a guardian or an administrator for an adult, the Tribunal must consider, amongst other things, the person's appropriateness and competence to perform the functions and exercise the powers under the appointment order: *Guardianship and Administration Act 2000* (Qld) s 15(1)(g). For example, a guardian, an administrator or an attorney, for an adult is required to consult regularly with other persons who are a guardian, an administrator or an attorney for the adult: *Guardianship and Administration Act 2000* (Qld) s 40.

176 See eg *Re JFR* [2006] QGAAT 49; *Re KAB* [2008] QGAAT 29, [74], [80]; *Re CRS* [2006] QGAAT 57.

177 *Re KAB* [2008] QGAAT 29, [79]–[80].

178 See eg *Adult Guardian v Hunt* [2003] QSC 297, [30]. See [14.80] above.

179 Eg *Re JAC* [2009] QGAAT 60, [41].

180 [2004] QGAAT 56.

181 *Ibid* [52]–[53].

The Tribunal does not accept that the conflict within this family is a reason to appoint an outside administrator such as the [Public Trustee] nor that Mrs A has breached her responsibilities as a current administrator.

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While this conflict is acknowledged, there is a depth of expertise and knowledge within this family that should not be sacrificed to the conflict that exists. Rather, directions should be made by the Tribunal to try to minimise the antagonism. Mr TAW has clearly and logically expressed firm views concerning these appointments and the Tribunal is bound under the General Principles to take his views into account in making this decision.

14.160 The Tribunal has also referred the parties involved in guardianship disputes to dispute resolution.<sup>182</sup> The role of dispute resolution processes in guardianship proceedings is discussed below.

### The role of dispute resolution processes

14.161 The QCAT Act makes general provision for the application of dispute resolution processes — compulsory conferences and mediation — which apply to active parties in Tribunal proceedings.<sup>183</sup> These proceedings include guardianship proceedings.<sup>184</sup>

14.162 Compulsory conferences and mediation have different purposes.

14.163 The purposes of a compulsory conference are to identify and clarify the issues in dispute in a proceeding, to promote a settlement of the dispute, to identify questions of fact and law to be decided by the Tribunal, to make orders and give directions about the conduct of the proceeding, and to make orders and to give directions to resolve the dispute.<sup>185</sup>

14.164 The purpose of mediation is to promote the settlement of the dispute which is the subject of the proceeding.<sup>186</sup> The mediator assists the participants to discuss their differences and to find a suitable solution to resolve their issues.

14.165 Both of these processes use a similar methodology.<sup>187</sup>

<sup>182</sup> See eg *WFM* [2006] QGAAT 54; *Re WAE* [2007] QGAAT 72. In these cases, the Tribunal referred the parties to mediation.

<sup>183</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 2 (compulsory conferences), div 3 (mediation). These provisions are discussed in Chapter 21 of this Report. Prior to the enactment of the QCAT Act, the *Guardianship and Administration Act 2000* (Qld) also made provision for referral of the parties in a guardianship proceeding to mediation: *Guardianship and Administration Act 2000* (Qld) ch 7 pt 4A, repealed by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1462.

<sup>184</sup> In New South Wales, the Guardianship Tribunal has a statutory obligation to conciliate matters in accordance with s 66 of the *Guardianship Act 1987* (NSW).

<sup>185</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 69.

<sup>186</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 77.

14.166 The nature of guardianship proceedings — which focus on the rights and interests of the adult rather than other persons involved in the proceedings — will necessarily guide the application of any dispute resolution process and its outcome.<sup>188</sup>

14.167 One limitation on the use of mediation in guardianship proceedings is that an order appointing a guardian or an administrator cannot be made by consent, because the matters before the Tribunal (including whether the adult has impaired capacity) are not capable of being decided independently by the parties to the proceedings.<sup>189</sup>

14.168 It has been suggested that, despite this limitation, the use of mediation in a guardianship proceeding may be helpful to determine if some or all of the differences between the parties may be resolved in a way that best meets the adult's needs:<sup>190</sup>

In all cases, it is essential that parties to proceedings that are referred to mediation appreciate that this is not a consent jurisdiction and that mediation is not for the purpose of settling the application, but rather to see if some or all of the differences between the parties can be resolved in a way that best meets the needs of the incapable person.

14.169 It has also been suggested that sometimes the outcome of a guardianship proceeding, and particularly an application in relation to the appointment of a guardian, may be better if it is based on an agreement reached between the parties who are involved in the adult's life:<sup>191</sup>

These circumstances will most commonly arise where the application concerns guardian issues. There is little scope for consensual and informal decision-making to obviate the need for the appointment of an administrator or to deal with concerns about the operation of an enduring power of attorney.

14.170 Numerous factors are relevant to determining whether or not the mediation process is suited to a particular guardianship issue or dispute.<sup>192</sup> It has been

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187 However, the compulsory conference process enables a wider range of consequential directions or orders to be made following the conference to ensure that the matter proceeds to a hearing in an orderly way.

188 For a discussion of mediation in guardianship proceedings see M Radford, 'Is the Use of Mediation Appropriate in Adult Guardianship Cases?' (2001–2002) 31 *Stetson Law Review* 611; R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75; R Carroll and A Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009) <<http://www.agac.org.au/images/stories/2009/Mediation%20in%20Guardianship%20Paper.pdf>> at 27 September 2010.

189 R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75, 85.

190 Ibid 92. See eg *Re WFM* [2006] QGAAT 54; *Re WAE* [2007] QGAAT 72.

191 R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75, 92.

192 Ibid 90.

suggested, for example, that the factors in favour of a beneficial outcome for mediation include where:<sup>193</sup>

- there is conflict between parties to the proceedings that is affecting their ability to cooperate and this is adversely affecting the adult;
- an agreement between the parties may result in a less restrictive alternative (for example, an informal process for deciding lifestyle matters) or a less restrictive order (for example, a decision about where the adult will live is made by consensus thereby avoiding the need for a guardian to be appointed to make that decision even though a guardian may be needed for other purposes); and
- mediation has the potential to improve communication and to improve relations between the parties and the adult will benefit from this improvement.

14.171 It has also been suggested that factors that weigh against mediation in guardianship proceedings include where:<sup>194</sup>

- the conflict between the parties relates to matters that are not amenable to such proceedings (for example, debts or legal disputes between family members);
- the need for a decision-maker (if established) may be met only by an appointment of a guardian or an administrator;<sup>195</sup> and
- delay would be adverse to the interests of the adult.

14.172 The involvement of an adult with impaired capacity may also present additional challenges for dispute resolution in guardianship matters.

14.173 The Commission understands that dispute resolution processes are not commonly used by the Tribunal in guardianship matters because in most applications, the Tribunal needs to make a determination about the adult's

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<sup>193</sup> Ibid. The authors suggest that other factors in favour of a beneficial outcome for mediation include where the adult will benefit from this improvement, (for example, where the existing level of conflict and lack of cooperation between the parties is impacting adversely on the adult); and there is scope for consensus on conflicting expert evidence (for example, medical opinions as to capacity).

<sup>194</sup> R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75, 90. The authors suggest that other factors that would weigh against mediation are that the issues are not capable of resolution by agreement between the parties, including the questions of capacity, need for appointment and who to appoint (although mediation can be used for consensus building on these questions) and that the disclosure of information to the parties that will be necessary for effective mediation (but which would not be disclosed in a hearing) will result in unjustifiable loss of privacy for the person the subject of the application (although this might determine who is present at the mediation, rather than whether the matter is referred to mediation).

<sup>195</sup> While this factor may potentially rule out referring any application for appointment of guardian or an administrator to mediation, one could argue that this is only the case if, on the evidence available to the tribunal, there is no likely prospect of a less restrictive alternative or order resulting from mediation.

capacity.<sup>196</sup> Notwithstanding this limitation, the Tribunal generally has used dispute resolution processes in relation to guardianship proceedings which involve disputes between a family member and a substitute decision-maker or between substitute decision-makers.<sup>197</sup>

### **Discussion Paper**

14.174 In the Discussion Paper, the Commission noted that it had received a number of submissions during the course of the review that have referred to situations where, because of some level of family conflict, the Adult Guardian, or the Public Trustee, rather than a family member, has been appointed as the adult's substitute decision-maker.<sup>198</sup> In particular, the former Public Advocate has commented, in relation to both the Adult Guardian and the Public Trustee:<sup>199</sup>

It is suggested that the Tribunal may have been too readily prepared to appoint the Adult Guardian and the Public Trustee to the roles of guardian and administrator where there is family conflict. A family member or close friend who knows the adult and their preferences well, and who sees the person on a regular basis, although they may be inexperienced as a substitute decision-maker, is generally better placed to carry out the role. However, support for them to do so is lacking in the current system. This could be overcome. Providing support to private guardians and administrators is likely to represent the less expensive option for Government than providing extensive guardianship and administration services by statutory bodies/appointees. Family conflict is evident in family breakdowns between husbands and wives and their families. However, rarely is decision-making about the children taken out of the hands of one or both parents. Barring child protection issues, although a child representative may be appointed to represent the interest of the child/ren, a parent will be appointed. More resources spent on hearings may well result in more satisfactory longer term arrangements. Placing the intimate affairs of an adult in the hands of a statutory body/officer, might be expected to frequently cause difficulty/aggravation for the adult and/or members of their support network.

14.175 Accordingly, the Commission sought submissions about how the existence of family conflict should be dealt with in proceedings for the appointment of a guardian or an administrator.<sup>200</sup>

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196 Information provided by Ms Clare Endicott, Senior Member, Queensland Civil and Administrative Tribunal 11 May 2010.

197 See [14.157]–[14.160] above. The Tribunal has used dispute resolution in guardianship proceedings involving disputes between attorneys or disputes between family members and a substitute decision-maker: Information provided by Ms Clare Endicott, Senior Member, Queensland Civil and Administrative Tribunal 11 May 2010. See eg *CM* [2009] QCAT 2, [7]–[8] which involved an application by a family member of the adult for directions to an administrator. In that case, the Tribunal referred the parties to mediation in an endeavour to have them reach their own solution in relation to decisions being made by an administrator which were under challenge.

198 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 70, citing Submissions C78A, C110, C147, 94; Forum C1.

199 Correspondence from the Public Advocate dated 12 June 2009.

200 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 70.

## Submissions

### *The effect of family conflict*

14.176 The Public Trustee noted that the Tribunal takes a flexible approach in managing the issue of family conflict in guardianship proceedings. As a consequence, he considered that there was no necessity for legislative reform in this area.<sup>201</sup>

14.177 The Adult Guardian also commented that the Tribunal deals with family conflict in a manner which is generally appropriate.<sup>202</sup>

Prior to my appointment as Adult Guardian I practised for 20 years as a Family Lawyer. The analogy of disputation in this arena to family law is not strictly relevant and I am uncertain that a view or system that sought to replicate the family law system within adult guardianship would be desirable. The fact that decision making is not frequently taken from the parents of children is, in part, a reflection of the lack of alternatives other than in the most extreme of cases. And other than the five percent of matters that ultimately go hearing, most matters are settled by consent between the parties.

In adult guardianship, the experience of this office is that the family disputation is often longstanding and fuelled by old grievances where the adult has become the latest battleground. They are often the latest manifestation of years of disputation that have fluctuated more or less unmanaged through the family for lengthy periods of time. There is often a financial motivation in being the decision maker and we frequently see abuse or neglect as a manifestation of the dispute. The disputation has frequently been occurring for decades, and in adult guardianship unlike family law, there is no point at which the child will become an adult and assume their own decision making and so end the disputation.

Our experience is that we are appointed as a last resort ie usually the tribunal appoints one or other of the family members and provides them with advice about how to manage issues. It is only in those matters where the family members are unable to make decisions based on the needs of the adult in the context of the general principles that the Adult Guardian is appointed. The frequency of appointment of the Adult Guardian by the tribunal in Queensland is among the lowest in the country.

The requirement that the tribunal give reasons when appointing decision makers will assist all parties to understand why the tribunal has decided to appoint a particular decision maker and allow some scrutiny of the level of appointments in the context of family disputation. The experience of this office is that appointments are made relatively rarely and only in the most extreme cases.

14.178 However, the former Acting Public Advocate commented that the presence of family conflict has often resulted in the appointment of the Adult

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201 Submission 156A.

202 Submission 164.



Guardian as guardian and the Public Trustee as administrator for an adult. The former Acting Public Advocate considered that:<sup>203</sup>

wherever possible, a family member or close friend with a continuing personal relationship with and ongoing interest in the adult is generally better placed to perform the role of a substitute decision-maker. Where family conflict exists, more time and resources spent on hearings in which the conflict issues are discussed, and if possible, resolution achieved may enable less statutory appointments and result in better decision-making outcomes for adults. Support for guardians and administrators in this regard is crucial.

14.179 Pave the Way commented that it was 'aware of many situations where the Tribunal appoints either the Adult Guardian or the Public Trustee because of perceived conflict within a family when there is merely a robust difference of opinion'.<sup>204</sup> It proposed that the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify certain issues in conflict situations:

We submit that the legislation should spell out that a difference of opinion between interested parties does not in itself amount to a conflict of interest; that the Tribunal be required to determine whether the conflict is manageable or not; and that some degree of manageable conflict does not mean a person is necessarily not an 'appropriate' appointee.

14.180 Pave the Way also considered that the 'increased emphasis' on mediation and dispute resolution under the new QCAT regime may help to resolve these issues.

14.181 Queensland Aged and Disability Advocacy Inc concurred with the former Acting Public Advocate's view that sometimes the Tribunal too readily appoints the Adult Guardian or the Public Trustee in preference to a family member in cases of perceived conflict within the adult's family.<sup>205</sup> Queensland Aged and Disability Advocacy Inc considered that greater resources should be deployed to resolve family conflict:

Through QADA's case work we support many adults where there is conflict within the family. QADA believes that conflict could be more often managed through mediation, allowing the least restrictive practice to the adult and to maintain maximum input into decision making. Where family conflict is likely to lead to the formal appointment of the Adult Guardian or the Public Trustee the Tribunal ought to inform the Adult and family of the existence of the mediation process. Unless delay would be detrimental to the Adult, the Tribunal ought to give family members the opportunity to have recourse to the mediation process before making a final decision.

14.182 Queensland Advocacy Incorporated also considered it desirable that the Act acknowledge and reinforce that the person with impaired decision-making

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203 Submission 160. The former Acting Public Advocate also canvassed the issue of the adequacy of support and information for guardians, administrators and attorneys. This issue is discussed in Chapter 30 of this Report.

204 Submission 135.

205 Submission 148.

capacity is 'the most vulnerable party concerned in any proceedings'. It explained that:<sup>206</sup>

Regardless of any conflict in family relations, the person's best interests must be the central concern. It could be considered immoral to decide lifestyle issues on the basis of conflicts and injustices that may have stemmed from family behaviour without examining how these decisions may impact upon the person.

This will mean that the Tribunal will need to make tough decisions when there is family conflict and name a particular guardian/s, having considered the full range of options for appointment. This also will mean that defaulting to the most restrictive option as a first priority will be avoided. The Tribunal can also give directions to appointees to do particular things in order to minimise the level of family conflict and consider how support might be given to ensure the best interest of the person is upheld. Obviously if an appointment is clearly not working in the person's best interest, then it can be reviewed and the decision changed.

14.183 Queensland Advocacy Incorporated noted that family conflict 'may not necessarily mean that the best interests of the person could not still be upheld, with for example, both or either parent caring greatly for their son or daughter and wanting the best for them'.

14.184 Queensland Advocacy Incorporated noted that the decision to appoint the Adult Guardian or Public Trustee when there is family conflict may also be fuelled by services not knowing who they should be talking with or by getting conflicting information from different family members. It suggested that the situation may also be inappropriately manipulated when the service provider agrees with one party and wants to exclude another because they are seen as interfering or challenging the practices of workers, or are advocating on behalf of the person.

14.185 Queensland Advocacy Incorporated also commented that it would be desirable to encourage mediation before a hearing as it may prevent matters from progressing to the Tribunal.<sup>207</sup> It also noted that, if matters do proceed to the Tribunal, mandatory mediation as part of the hearing process could produce a resolution without the need for a full hearing. Queensland Advocacy Incorporated considered this may have a number of advantages, including reducing conflict between the parties and helping to avoid the appointment of a statutory decision-maker, assisting families to remain involved with decision-making thereby producing a less restrictive outcome for the adult and easing the strain on Tribunal resources.

14.186 Queensland Advocacy Incorporated therefore proposed that the Adult Guardian should develop its capacity to deliver mediation services to relevant people to prevent matters proceeding to the Tribunal. It considered that, once a

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206 Submission 162.

207 The powers and functions of the Adult Guardian under s 174 of the *Guardianship and Administration Act 2000* (Qld) include 'mediating and conciliating between attorneys, guardians, administrators and others'. Section 75 of the QCAT Act also provides that the Tribunal or the Principal Registrar may refer the subject matter, or part of the subject matter, of a proceeding for mediation by a mediator appointed by the Tribunal or Principal.

matter is before the Tribunal, mediation should be compulsory, with the exception of:

- applications for urgent interim orders;
- the Registrar, having consulted the parties, reasonably considering that there is no prospect of the application being resolved by mediation; or
- no conflict situations.

#### *The role of dispute resolution*

14.187 Queensland Parents of People with a Disability Inc submitted that.<sup>208</sup>

People see the role of the [Tribunal] as sorting out family disputes and each party expects to win, as they see they are the reasonable person who has a reasonable complaint. ... There is an overwhelming sense that this process doesn't treat people fairly and fails to make reasonable decisions in the best interest of the person with a disability.

14.188 To overcome this perception, it suggested that the Tribunal must ensure that its processes are transparent:

People need to know what will happen and why and (then it needs to be done), and how it was done needs to be evaluated to ensure an organisational culture of continuous improvement emerges within [the Tribunal].

14.189 Queensland Parents of People with a Disability Inc also suggested that there should be the introduction of a mediation process that requires all the parties to attend mediation to resolve complaints before the finalisation of the appointment of a guardian or an administrator.

14.190 The NSW Guardianship Tribunal observed that there are a number of issues which arise when conciliation or mediation processes are utilised in a protective jurisdiction, most notably, the issue of how a person with a cognitive incapacity is able effectively and equitably to engage in such a process and be on a par with other parties who do not have cognitive impairments.<sup>209</sup> It therefore considered that careful consideration should be given as to how such processes can be tailored to meet the specific needs of people with cognitive disabilities who may not be capable of negotiating or agreeing to a 'settlement' or resolution of proceedings.

#### ***The Commission's view***

14.191 One of the eligibility requirements for appointment as guardian or administrator under the *Guardianship and Administration Act 2000* (Qld) is that the Tribunal considers that the person is 'appropriate' for appointment. In deciding whether a potential appointee is appropriate for appointment, the Tribunal is

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208 Submission 167.

209 Submission 147.

required to take into account the range of factors set out in section 15 of the Act. These include whether the person is likely to apply the General Principles (one of which requires the appointee to take into account the importance of maintaining the adult's existing supportive relationships),<sup>210</sup> whether the appointee is compatible with any other appointees and the person's appropriateness and competence for appointment.

14.192 On an application for the appointment or the review of the appointment of a guardian or an administrator for an adult, an adverse finding about the appropriateness of a family member for appointment, based on the existence of family conflict, may have the result that the Adult Guardian or the Public Trustee or both, are appointed instead of a family member. In these circumstances, the Adult Guardian and the Public Trustee are appointed as neutral and independent appointees.

14.193 However, the fact that a person is a family member of the adult and is in conflict with another family member does not, of itself, mean the person is not appropriate for appointment as a guardian or an administrator for the adult. Earlier in this Chapter, the Commission has recommended that a provision to this effect should be included in section 15 of the Act.<sup>211</sup> While, in some cases, the degree of family conflict may preclude the appointment of a family member, in other cases, it may be preferable to appoint a family member, despite the existence of family conflict, because the appointment is overall in the adult's interests. If an appointment is made where there is, or has been, family conflict, the Tribunal may always review the appointment within a short timeframe.

14.194 The Tribunal has several options for addressing issues of family conflict before, during or after guardianship proceedings.

14.195 The Tribunal, which has informal and inquisitorial processes, may attempt to resolve or manage the issue of family conflict without resort to formal dispute resolution processes. For example, it may adjourn the proceedings to allow the parties to determine if they can work collaboratively in the adult's interests,<sup>212</sup> or, if an appointment order is made, it may give directions to the parties to facilitate the smooth operation of the appointment order.

14.196 The Tribunal may also refer a proceeding to a compulsory conference or mediation. The nature of the guardianship jurisdiction will necessarily guide the application of these dispute resolution processes in guardianship proceedings, especially applications for the appointment of a guardian or an administrator or the review of an appointment. For example, as mentioned above, one of the main

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*Guardianship and Administration Act 2000* (Qld) sch 1 s 8. See now the new General Principles recommended in Chapter 4 of this Report. New General Principle 4(1), which restates existing General Principle 8, states that the importance of maintaining an adult's existing supportive relationships must be taken into account. General Principle 4(2) specifies that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis or both.

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See [14.146]–[14.148] above.

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Eg *Re JAC* [2009] QGAAT 60, [41].

limitations on the use of dispute resolution in guardianship proceedings is that the guardianship jurisdiction is not a consent jurisdiction — this means that an order appointing a guardian or an administrator cannot be made by consent, because the matters before the Tribunal (including whether the adult has impaired capacity) are not capable of being decided independently by the parties to the proceedings. Other relevant considerations include the adult's ability to participate in the process and agree to an outcome and the impact of time pressures on the Tribunal's ability to undertake dispute resolution in each case.

14.197 However, aside from these limitations, conflict that results in an application regularly involves the adult's family members. In appropriate circumstances, dispute resolution may help to resolve or manage family conflict before, during or after the hearing of an application for the appointment or review of the appointment of a guardian or an administrator.<sup>213</sup> For example, mediation may assist those involved in a proceeding to focus on the interests of the adult and to make decisions in a collaborative way.

14.198 The Commission considers that it would be unwise to attempt to prescribe in either the QCAT Act or the *Guardianship and Administration Act 2000* (Qld) how and when the dispute resolution provisions should be used in guardianship proceedings, but considers that there are many benefits to be gained from a greater use of dispute resolution processes in suitable cases.

14.199 These benefits include the resolution or management of the conflict resulting in a less restrictive alternative than the appointment of a guardian or an administrator (for example, the implementation of an informal process for deciding lifestyle matters).<sup>214</sup> They also include where an agreement between the parties results in a less restrictive appointment order (for example, where a decision about where an adult is to live is made by consensus thereby avoiding the need for a guardian to be appointed to make that decision, although a guardian may be needed for other purposes) or otherwise helps to ensure the efficient operation of any appointment order that has been made.<sup>215</sup> Each of these outcomes is ultimately in the adult's interests.

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213 For a discussion of mediation in guardianship proceedings see M Radford, 'Is the Use of Mediation Appropriate in Adult Guardianship Cases?' (2001–2002) 31 *Stetson Law Review* 611; R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75; R Carroll and A Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009) <<http://www.agac.org.au/images/stories/2009/Mediation%20in%20Guardianship%20Paper.pdf>> at 27 September 2010.

214 R Carroll and A Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009) 90 <<http://www.agac.org.au/images/stories/2009/Mediation%20in%20Guardianship%20Paper.pdf>> at 27 September 2010.

215 Ibid.

14.200 It is important that the Tribunal ensures that guardianship proceedings which involve family conflict are identified at an early stage in the proceedings and assessed for their suitability for referral to dispute resolution.<sup>216</sup>

14.201 It is also essential that the Tribunal ensures that family members who are involved in guardianship proceedings are provided with sufficient information about the possible outcomes of proceedings involving family conflict and the options available for resolving or managing family conflict before, during and after a guardianship proceeding. In some instances, family members may make a greater effort to resolve their differences if, either before or at an early stage of proceedings, they are made aware of the possibility that the existence of family conflict may result in the appointment of the Adult Guardian or the Public Trustee. This is especially important where the parties involved have the potential to resolve or manage their dispute in a way that results in a better outcome in terms of meeting the needs of the adult.

14.202 Mediation may also be appropriate in the context of a dispute between one or more of the members of the adult's family and a service provider for the adult. In this regard, the Commission has received a number of submissions which raise concerns that, in some cases, applications for the appointment of the Adult Guardian or the Public Trustee are being made by service providers as a strategy for dealing with family members with whom they are in dispute.<sup>217</sup>

14.203 In the context of a dispute between the adult's family members or between an adult's family member and a service provider for an adult, it is also important that the Tribunal inform the adult's family members who are not already active parties to the application about the option of making their own application for appointment. Such a step may facilitate the appointment of a family member in circumstances where the Tribunal may otherwise appoint the Adult Guardian or the Public Trustee or both because there is no other appropriate applicant seeking appointment.

14.204 In addition, greater awareness within the community of the benefits of mediation, access to quality mediation services (either through the Tribunal, or alternatively, a publicly funded dispute resolution service provider such as the Dispute Resolution Centre) and the willingness of family members to use mediation all have an important role to play in diverting suitable matters to mediation instead of, or in addition to, applications to the Tribunal for appointment orders.

14.205 To the extent that the provision of dispute resolution services by the Tribunal or a publicly funded dispute resolution service provider may have resource

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In this regard, the Commission notes that the application for the appointment or review of the appointment of a guardian or an administrator asks the applicant to describe the appropriateness of the adult's current decision-making arrangements. The applicant may respond by ticking one or more response boxes, including one that states, in relation to financial and legal decision-making, that 'there is conflict between decision-makers or family members' and, in relation to personal decisions, 'there is conflict between decision-makers': Queensland Civil and Administrative Review Tribunal, *Application for administration/guardianship appointment or review — Guardianship and Administration Act 2000* 8, 12 <[http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10\\_Ap\\_admin.g\\_app\\_rw.pdf](http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10_Ap_admin.g_app_rw.pdf)> at 27 September 2010.

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See n 57 above. This also raises the issue of who may make an application in a guardianship proceeding. That issue is considered in Chapter 21 of this Report.

implications for those bodies, the Commission considers that these services are nevertheless necessary to ensure that the scheme for the appointment of guardians and administrators, which requires the application of the least restrictive approach and provides for the making of an appointment order as a last resort, operates effectively. However, the Commission envisages that the proper use of dispute resolution processes in guardianship disputes may reduce costs in other areas of the guardianship system, for example by reducing the number or limiting the scope of the appointments made in favour of the Adult Guardian and Public Trustee, as well as consequentially reducing the number of reviews of appointment or appeals from Tribunal decisions.

## THE APPOINTMENT OF THE ADULT GUARDIAN OR THE PUBLIC TRUSTEE

14.206 The *Guardianship and Administration Act 2000* (Qld) provides various options for who may be appointed as a guardian or an administrator. Individuals and the Adult Guardian are eligible for appointment as guardians, while individuals, the Public Trustee and trustee companies are eligible for appointment as administrators.

14.207 There are competing arguments in favour of the appointment of the Adult Guardian or the Public Trustee, on the one hand, or a family member, on the other hand.

14.208 It has been suggested that the primary advantage of appointing the Adult Guardian or the Public Trustee lies in the fact that they are independent and objective decision-makers.<sup>218</sup> These features are perceived as beneficial in situations where family members are in dispute or where there may be a conflict of interest between the adult and a family member. Another advantage is that they have considerable professional experience in substitute decision-making. Additionally, the Adult Guardian is the statutory guardian who is appointed where there is no individual who is appropriate and available to act for the adult.

14.209 However, it has been suggested that one of the key advantages of appointing a family member is that, in contrast to the Adult Guardian or the Public Trustee, the family member often has a close and continuing personal relationship with the adult.<sup>219</sup> The existence of such a relationship has been said to enable the family member to bring to his or her role as appointee the additional elements of

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R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 199; B Carter, 'Professional Guardianship in Australia: Is guardianship a profession and who cares anyway?' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009 <<http://www.agac.org.au/images/stories/2009/Mediation%20in%20Guardianship%20Paper.pdf>> at 27 September 2010. See also *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242, in which Kirby J discussed the competing advantages of appointing a family member or the Protective Commissioner to manage the estate of a protected person.

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R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 199; B Carter, 'Professional Guardianship in Australia: Is guardianship a profession and who cares anyway?' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009 <<http://www.agac.org.au/images/stories/2009/Mediation%20in%20Guardianship%20Paper.pdf>> at 27 September 2010. See also *Adult Guardian v Hunt* [2003] QSC 297, [30] (in relation to the Adult Guardian); *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242, in which Kirby J discussed the competing advantages of appointing a family member or the Protective Commissioner to manage the estate of a protected person.

love and affection, emotional support and practical assistance for the adult.<sup>220</sup> A family member's personal knowledge of the adult and his or her estate may also be beneficial when making decisions for the adult.<sup>221</sup> For example, where an adult has a small estate, the administration of the estate by a family member, who is familiar with and readily able to manage the estate may have a relatively cost-efficient outcome.<sup>222</sup>

14.210 The Adult Guardian is appointed as guardian in the substantial majority of applications for the appointment of a guardian or for the review of an appointment.<sup>223</sup> Similarly, the Public Trustee is appointed in the substantial majority of applications for the appointment of an administrator or for the review of an appointment.<sup>224</sup> The Tribunal has noted that, in many cases, these bodies are appointed because 'there are no family or friends or appropriate applicants seeking appointment'.<sup>225</sup>

14.211 The appointment of the Adult Guardian or the Public Trustee has implications for the financial and other resources of these bodies, which may impact on their ability to deliver services.<sup>226</sup> It has been suggested that the potential disadvantages of such an appointment are 'the reduced personal attention due to the generally heavy caseloads of the officers who act as case managers and a discontinuity of relationships when one case manager is replaced by another'.<sup>227</sup>

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Ibid.

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B Carter, 'Professional Guardianship in Australia: Is guardianship a profession and who cares anyway?' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009, <<http://www.agac.org.au/index.php/Conference-Papers/2009-Conference-Papers.html>> (at 6 October 2009).

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*Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242 (Kirby J).

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During 2008-09, the Tribunal made guardianship appointments (following an application for appointment or for the review of an appointment) for 1069 adults. Of these appointments, 71 per cent were made in favour of the Adult Guardian, 26.3 per cent were made in favour of a family member and the remaining 1.9 per cent were made in favour of someone other than the Adult Guardian or a family member: Guardianship and Administration Tribunal, *Annual Report 2008-2009* (2009) 41.

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During 2008-09, the Tribunal made administration orders, (following an application for appointment or for the review of an appointment) for 2116 adults. Of these appointments, 78 per cent were made in favour of the Public Trustee, 19.6 per cent were made in favour of a family member and the remaining 2.2 per cent of administration orders were made in favour of someone other than the Public Trustee or a family member: Guardianship and Administration Tribunal, *Annual Report 2008-2009* (2009) 19.

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Guardianship and Administration Tribunal, *Annual Report 2008-2009* (2009) 19, 41.

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For example, in the 2007-08 reporting year, the Adult Guardian, who is publicly funded, reported that a substantial yearly increase in the number of orders appointing the Adult Guardian resulted in 'a further increase in guardian's time and resources in order to make the most appropriate decisions for adults': Office of the Adult Guardian, *Annual Report 2007-08* (2008) 29. In the 2008-09 reporting year, the Adult Guardian reported that, notwithstanding a 39% increase in the number of guardianship appointments over the previous year, there was a decrease in the average caseloads of guardians for general guardianship clients due to the provision of funding for additional staff: Adult Guardian, *Annual Report 2008-09* (2008) 14.

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R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 199.



## The appointment of the Public Trustee as administrator

14.212 Section 14(2) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.

14.213 In its original 1996 report, the Queensland Law Reform Commission recommended that both the Adult Guardian and the Public Trustee should be available as decision-makers of last resort.<sup>228</sup> It is noted, however, that neither the Commission's draft legislation which was included in that report nor the *Guardianship and Administration Act 2000* (Qld), as it was originally enacted, contained an express order of priority of persons eligible for appointment.

14.214 If the Act were amended to provide expressly that the Public Trustee may be appointed as an administrator only if there is no other appropriate person available for appointment, that provision would be consistent with section 14(2), which provides for the appointment of the Adult Guardian for personal matters as a last resort. It would also be consistent with the Commission's recommendation in its original 1996 report.

14.215 It has been suggested that the role of an administrator is becoming increasingly complex. This is partly due to the nature and extent of the adult's financial or property affairs (which may involve shares, superannuation and other financial investments), and which necessarily entails significant accountability and risk factors.<sup>229</sup> The Act also imposes additional obligations on administrators which are not imposed on guardians.<sup>230</sup> For these reasons, it is arguable that the Tribunal should not be required to exhaust all possibilities for the appointment of an administrator before the Public Trustee may be appointed.

## Discussion Paper

14.216 The Commission sought submissions about whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide expressly that the Public Trustee may be appointed as an administrator only if there is no other appropriate person available for appointment.<sup>231</sup>

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228 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 183–4. These recommendations formed the basis of cl 85(a)(iii), 87(a) of the Draft Assisted and Substituted Decision Making Bill 1996 which was included in vol 2 of that report.

229 Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 19.

230 For example, an administrator is required to keep records that are reasonable in the circumstances, and produce those records if ordered by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 49. An administrator is also required to submit a financial management plan to the Tribunal for approval: *Guardianship and Administration Act 2000* (Qld) s 20. The Tribunal may also require an administrator to file a summary of receipts and expenditure or accounts and order that the summary or accounts filed be audited: *Guardianship and Administration Act 2000* (Qld) s 153.

231 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 72.

## Submissions

14.217 Most of the submissions that addressed this issue considered that the *Guardianship and Administration Act 2000* (Qld) should be amended so that the Public Trustee may be appointed as an administrator only if there is no other individual who is appropriate and available for appointment.<sup>232</sup>

14.218 The former Acting Public Advocate generally considered that, where a family member or other individual who is close to the adult and has an ongoing personal relationship and interest in the adult is appropriate and available to act as an administrator, that individual should be appointed in preference to the Public Trustee.<sup>233</sup> He observed that, in practice, the Public Trustee will be appointed if there is no-one in the adult's support network who is appropriate and available for appointment:

In practice however the Public Trustee is effectively the administrator of last resort. Often members of the adult's support network may resist appointment for a variety of reasons including lack of expertise to carry out financial administration, a desire to separate financial decision-making from their personal relationship with the adult, or perceived complexity associated with administration. Advantages therefore in the availability of the Public Trustee to act as administrator without the designation of administrator of last resort are flexibility, professional expertise in financial administration, and in many cases better management of an adult's financial affairs than what is able to be provided by an individual administrator.

14.219 Queensland Advocacy Incorporated commented that the adult may be made more vulnerable by the appointment of the Adult Guardian or the Public Trustee due to the marginalisation of the adult's family:<sup>234</sup>

If the Adult Guardian or Public Trustee is appointed when family members do care about the person's best interests, this could increase the vulnerability of the person, by driving family members further from involvement in the person's life. As family conflict is not uncommon, the work of the Office of the Adult Guardians and that of the Public Trustee is also likely to increase dramatically if this practice continues to be widely upheld.

14.220 Queensland Advocacy Incorporated also noted the limitations of having the role of guardian or administrator carried out by a public officer. For example, because that person has intermittent involvement with the adult, they may not:

- know the [adult] well;
- know the [adult's] history;
- know what the [adult] needs and therefore what might be in the person's best interest;

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<sup>232</sup> Submissions 20B, 54A, 135, 141, 146, 148, 162.

<sup>233</sup> Submission 160.

<sup>234</sup> Submission 162.

- be able to act spontaneously; and
- stay around in the [adult's] life and develop an enduring commitment to the [adult].

14.221 Queensland Advocacy Incorporated also noted that a public officer who acts as a guardian or an administrator may:

have many conflicts of interest, as they are in situations where they have competing concerns, such as:

- loyalty to their State employer;
- compliance with the political agenda and red tape of the day;
- ease of management and expediency in the work place;
- conflicting policy and practice where the service could function to serve its own interests; and
- the effects of limited time and economic rationalism.

This is why the intent and spirit of the Act sets up and reinforces the Adult Guardian as the last resort. The same should also apply to the Public Trustee.

Also the Tribunal must remain vigilant that inappropriate appointments are not made on the basis of the perceived ability of the Adult Guardian to be able to access support funding more easily than a family member. Such a statement has been made to families in Tribunal hearings. As funding is only one component of support, such thinking and action can make the person very vulnerable over time, if the family has lost the ability to safeguard the person and is out of the picture in relation to all other guardianship and decision-making roles.

14.222 Queensland Advocacy Incorporated proposed that, 'to maintain consistency with the spirit of the Act, and in keeping with other Acts and common practice about the natural authority of informal supports in childhood and adulthood, the appointment of the Adult Guardian and Public Trust should remain the option of last resort'. It considered this approach should apply generally, including in situations where there is family conflict.

14.223 The Public Trustee and the Seniors Legal and Support Service did not consider that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Public Trustee may be appointed only where there is no other individual who is appropriate and available for appointment.<sup>235</sup>

14.224 The Public Trustee submitted that because there are significant differences between the role of an administrator and a guardian, the appointment of

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Submissions 138, 156A.

an administrator will necessarily give rise to different considerations to those involved in the appointment of a guardian.<sup>236</sup>

14.225 The Public Trustee explained that the role of an administrator as a financial decision-maker has become increasingly complex and involves additional obligations which are not imposed on a guardian (including the requirement to keep records and the requirement to invest only in authorised transactions). In particular, he considered that the requirement to invest only in authorised transactions has introduced ‘a significant complexity and considerable responsibility which distinguishes that role from that of a guardian’.

14.226 The Public Trustee also contended that ‘the very personal nature of the guardian’s role distinguishes it from an administrator’. The Public Trustee suggested that it was this personal nature of the decision-making of a guardian that ‘perhaps was at the heart of the decision’ in *Adult Guardian v Hunt*<sup>237</sup> and which ‘favours that the Adult Guardian be positioned naturally as a guardian of last resort’.

The Public Trustee said that the decision *Adult Guardian v Hunt* (which was given statutory effect in section 14(2) of the Act) reflected the position that often an individual, (particularly a family member) who is able to provide support and assistance to the adult, would be invariably more appropriate and competent than the Adult Guardian to perform the role of guardian.

14.227 The Public Trustee expressed concern that, if the Act were amended to provide that the Public Trustee may be appointed as administrator only where there is no other individual who is appropriate and available for appointment, it would ‘necessarily result in the appointment of less appropriate administrators’:

This must naturally follow — if (without the amendment foreshadowed) the Public Trustee is appointed as an administrator it must be the case that the Public Trustee has been determined by a properly constituted Tribunal to be appropriate, and indeed more appropriate than any alternatives offered the Tribunal.

After the amendment called for (for the same matter) the Public Trustee will not be appointed where there is an alternative administrator who is competent because of the statutory constraint and that administrator or administrators must otherwise be less appropriate than the Public Trustee.

When dealing with financial matters this seems not to be an appropriate legislative position to adopt.

This again reflects the distinction between the role of a guardian and an administrator; that which underlies the amendment to section 14(2) and indeed Justice Chesterman’s decision in *Hunt* is that a close family member or another natural person supporting the adult is more likely to be more appropriate than is a ‘bureaucrat’.

For financial matters the same does not necessarily follow.

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236 Submission 156A.

237 [2003] QSC 297. The decision of *Adult Guardian v Hunt* is discussed at [14.80] above.

14.228 The Public Trustee also noted that family members, or the adults themselves, will sometimes seek the appointment of the Public Trustee and highlighted the many advantages of appointing a statutory body as administrator, including independence, neutrality and extensive experience in financial management.<sup>238</sup>

14.229 The Perpetual Group of Companies also submitted that the Tribunal or the Court should retain the flexibility to decide in each case who is the most appropriate administrator or guardian, without more prescriptive provisions than at present.<sup>239</sup>

### **The Commission's view**

14.230 The appointment of the Adult Guardian as guardian is limited by the application of section 14(2) of the *Guardianship and Administration Act 2000* (Qld), which provides that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter. This reflects the policy that where there are family or friends who are able and willing to provide the requisite decision-making support and assistance for an adult, it is preferable that they be allowed to do so rather than be displaced by the Adult Guardian.<sup>240</sup>

14.231 In contrast, the Act does not expressly limit the circumstances in which the Tribunal may appoint the Public Trustee as administrator for a matter. As a consequence, the Tribunal may appoint the Public Trustee as administrator not only where there is no other appropriate appointee available but also where there is another appropriate appointee available.

14.232 The Commission considers that, notwithstanding that there are differences between the decision-making roles and responsibilities of a guardian and an administrator, the same policy considerations that guide the appointment of the Adult Guardian (who is a statutory officer) should also guide the appointment of the Public Trustee (who is a corporation sole) — that is, where there is a person mentioned in section 14(1)(b)(i) of the Act (for example, a family member or close friend of the adult) who is suitable and available to act as administrator, it is preferable to appoint that person rather than the Public Trustee.<sup>241</sup>

14.233 The Public Trustee has suggested that if the Act were amended so that the Public Trustee is unable to be appointed where there is another appropriate appointee available, it might sometimes result in the appointment of a 'less appropriate' appointee. Where the alternative appointee is an individual, the

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In relation to the judicial recognition of the advantages of the appointment of the Public Trustee or a similar body as administrator, the Public Trustee referred to *Holt v The Protective Commissioner* (1993) 31 NSWLR 277, 243 (Kirby J); *Hayes v Furner* (Unreported, Supreme Court of Queensland, Derrington J, 20 August 1999) [10]; *Kirk v Kirk* [2002] QSC 310, [16]–[17] (White J).

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Submission 155.

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Explanatory Notes, Justice and Other Legislation Amendment Bill 2007 (Qld) 17.

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*Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i) provides that a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction, is eligible for appointment as administrator for the adult.

relevant issue is simply whether the alternative appointee is appropriate for appointment.<sup>242</sup> This is a question of fact, the answer to which will always depend on the personal attributes of the individual and the adult's particular circumstances.

14.234 The Commission therefore considers that section 14 of the Act should be amended to provide that the Tribunal may appoint the Public Trustee as administrator for a matter only if there is no person mentioned in section 14(1)(b)(i) of the Act who is appropriate and available for appointment as administrator for the matter. This proposed test does not limit the appointment of the Public Trustee where the only other potential appointee is a private trustee company<sup>243</sup> because the test is not intended to have the effect, in a contest for appointment between a private trustee company and the Public Trustee, of creating a statutory preference in favour of the private trustee company.

14.235 The Commission does not consider it necessary to amend the Act to require the Tribunal, if appointing the Public Trustee, to make a specific finding that no available individual is appropriate for appointment. This is because the Tribunal is required to explain in its reasons for decision how it has applied the statutory criteria in sections 14 and 15 of the Act.<sup>244</sup>

### The appointment of the Adult Guardian as guardian

14.236 Section 14(2) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Adult Guardian as guardian only if there is no other appropriate person available for appointment. This provision was inserted in the Act in 2007 to give legislative effect to the Supreme Court decision in *Adult Guardian v Hunt*.<sup>245</sup> According to the Explanatory Notes for the amending legislation, section 14(2) requires 'the Tribunal to consider and exhaust as possibilities the range of available and appropriate family members before the Adult Guardian is appointed'.<sup>246</sup>

14.237 In the ACT, the Northern Territory, South Australia and Victoria, the Adult Guardian (or its equivalent) is the guardian of last resort.<sup>247</sup> Although there is some variation between the wording of these provisions and the Queensland provision,

<sup>242</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1) sets out a range of appropriateness considerations which the Tribunal must consider when deciding whether a person is appropriate for appointment. These include factors such as whether the person is likely to apply the General Principles, is compatible with the adult and other substitute decision-makers and is appropriate and competent to perform the functions and exercise the powers under the appointment order.

<sup>243</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

<sup>244</sup> In Chapter 21 of this Report, the Commission has recommended a general legislative amendment to the effect that, when the Tribunal gives its reasons for decisions in guardianship matters, the Tribunal must set out any principles of law it has applied in the proceeding and the way in which it has applied the principles of law to the facts.

<sup>245</sup> Explanatory Notes, Justice and Other Legislation Amendment Bill 2007 (Qld) 17.

<sup>246</sup> *Ibid.*

<sup>247</sup> See [14.85] above. In New South Wales, the appointment of the Public Guardian as a last resort applies only in relation to a continuing guardianship order: *Guardianship Act 1987* (NSW) s 17(3).

the test for the appointment of the Adult Guardian as a last resort is generally similar.<sup>248</sup>

14.238 Section 15 of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal, in deciding whether a person is appropriate for appointment as a guardian or an administrator, to take into account various appropriateness considerations, including whether the person is likely to apply the General Principles and, if relevant, the Health Care Principle.<sup>249</sup> In particular, the existing General Principles provide that the importance of maintaining the adult's existing supportive relationships must be taken into account.<sup>250</sup> Although this principle does not specifically require decision-makers to consult with members of the adult's support network or to take account of their views, it may be necessary for a decision-maker to engage in consultation where that is important in maintaining the adult's existing supportive relationships. The General Principles also require that a person or entity (including the Tribunal) in performing a function or exercising a power under the *Guardianship and Administration Act 2000* (Qld) must do so in the way least restrictive of the adult's rights and in a way consistent with the adult's care and protection.<sup>251</sup>

14.239 In addition to these considerations, the *Guardianship and Administration Act 2000* (Qld) also specifies that, if there are two or more people who are guardian, administrator or attorney for the adult, these persons must consult regularly with each other to ensure that the adult's interests are not prejudiced by a breakdown in communication between them.<sup>252</sup>

14.240 In its original 1996 report, the Queensland Law Reform Commission acknowledged the significant role that family and close friends often play in an

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In the ACT, the Public Advocate must not be appointed as a person's guardian if an individual who is otherwise suitable has consented to be appointed: *Guardianship and Management of Property Act 1991* (ACT) s 9(4). In the Northern Territory and Victoria, the Public Guardian (in the Northern Territory) or the Public Advocate (in Victoria) may be appointed if no other person fulfils the requirements for appointment: *Adult Guardianship Act* (NT) 14(4); *Guardianship and Administration Act 1986* (Vic) s 23(4). In South Australia, the Public Advocate may be appointed only if the Board considers that no other order would be appropriate: *Guardianship and Administration Act 1993* (SA) s 29(4).

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*Guardianship and Administration Act 2000* (Qld) s 15(1)(a)–(b). See now the new General Principles recommended in Chapter 4 of this Report and the new Health Care Principle recommended in Chapter 5 of this Report.

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*Guardianship and Administration Act 2000* (Qld) sch 1 s 8. See now new General Principle 4 recommended in Chapter 4 of this Report. New General Principle 4(1), which restates existing General Principle 8, states that the importance of maintaining an adult's existing supportive relationships must be taken into account. General Principle 4(2) specifies that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis or both.

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*Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c), (5). The Commission has also recommended that these two principles should be incorporated into one principle which refers to the adult's rights, interests and opportunities. See now the new General Principle 7 recommended in Chapter 4 of this Report. Section 5(d) of the Act also acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.

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*Guardianship and Administration Act 2000* (Qld) s 40(1). However, failure to comply with s 40(1) does not affect the validity of an exercise of power by a guardian, administrator or attorney: *Guardianship and Administration Act 2000* (Qld) s 40(2).

adult's life.<sup>253</sup> However, the Commission recognised that there is sometimes a need for a decision-maker of last resort.<sup>254</sup>

This need may arise, for example, because a person with a decision-making disability does not have a relative or close friend who is willing and able to act as a person's decision-maker. It may also arise because there is a dispute among the person's family members which cannot be resolved without outside intervention, or because inappropriate decisions have been made for the person.

14.241 As mentioned previously, the Commission then recommended that both the Adult Guardian and the Public Trustee should be available as decision-makers of last resort.<sup>255</sup>

*The current test in section 14(2)*

14.242 The appointment of an appropriate person as a guardian or an administrator under section 14 of the *Guardianship and Administration Act 2000* (Qld) involves a number of considerations. The proposed appointee must satisfy the various eligibility requirements set out in section 14(1), including that the Tribunal must be satisfied that the person is appropriate for appointment — a process which requires the Tribunal to weigh up various 'appropriateness factors' under section 15(1) and to decide which proposed appointee is the most appropriate for appointment.

14.243 In addition, section 14(2) provides that, if there is no other appropriate person who is available for appointment, the Tribunal may appoint the Adult Guardian. As mentioned above, the principle embodied in that section is that the Adult Guardian should not be appointed in preference to an individual unless there is no other available 'appropriate' person.<sup>256</sup>

**Discussion Paper**

14.244 Section 14(2) was inserted in the Act in 2007. In the Discussion Paper, the Commission sought submissions in relation to whether the test in section 14(2) is appropriate, or whether it should be changed in some way.<sup>257</sup> The Commission noted that, if it is considered that the test in section 14(2) needs to be strengthened, one approach may be to require the Tribunal to make a specific finding that no available person is appropriate for appointment.<sup>258</sup>

253 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 182.

254 Ibid 411.

255 See [14.213] above.

256 See eg *Re CAF* [2007] QGAAT 63, [34]–[36]; cf *Re MAA* [2009] QGAAT 9, [6]–[7].

257 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [5.95].

258 Ibid.



## Submissions

### *The application of the test in section 14(2)*

14.245 Pave the Way commented that it was unaware of any problems in practice with the Adult Guardian being the appointment of last resort.<sup>259</sup> The Adult Guardian made a similar comment.<sup>260</sup> She also noted that the rate of appointment of the Adult Guardian by the tribunal in Queensland is among the lowest rates in Australia.

14.246 The Public Trustee, although unable to be appointed as a guardian, offered the following general comment in relation to the operation of section 14(2).<sup>261</sup>

The discussion paper concludes that section 14(2) 'appears to apply only where the Adult Guardian has not already been appointed'.

The Public Trustee's view is that this is not a likely interpretation of section 14(2).

First in section 31(2) (the review process) the legislature distinguished between 'a new application for an appointment' to that of a review in respect of an appointment.

Section 14(2) does not distinguish between appointments on review and 'new' appointments — it provides clearly that the Adult Guardian is to be appointed only if there is no other person available for appointment.

Further, a similar interpretative approach might be adopted as that of the Court in *Bucknall v Guardianship and Administration Tribunal & Ors (No. 1)* [2009] QSC 128 in respect of the application of the presumption of capacity upon a review of an appointment.

As the Court said in respect of that presumption—

'It would be distinctly odd if the presumption applies in a section 31 review but does not in proceedings under section 146 for a declaration about capacity. And there is no indication that such a difference was envisaged'.

By analogy it would be distinctly odd if the role of the Adult Guardian were to be different under a review process then it is for a 'new' application.

### *A requirement to make a specific finding*

14.247 Pave the Way supported the amendment of the *Guardianship and Administration Act 2000* (Qld) to provide that, when applying section 14(2) of the

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259 Submission 135.

260 Submission 164.

261 Submission 156A.

Act, the Tribunal should be required to make a specific finding that no other appropriate person is available for appointment.<sup>262</sup>

14.248 However, the Adult Guardian disagreed with that view. The Adult Guardian specifically commented that:<sup>263</sup>

The Adult Guardian would be very concerned if the tribunal were obliged to make a finding that there is no available person suitable for appointment. That finding may seriously impact family relationships. Families are not static and sometimes after a period of our appointment, a family member may be appointed. Findings such as that proposed may impact upon the willingness of family members to engage with the further process or to put themselves into a position where they are able to undertake the appointment. Families should be encouraged and supported to have the maximum ongoing involvement in an adult's life to the extent that it does not result in abuse, neglect or exploitation, and all agencies within this sector should maintain a focus on that outcome.

### **The Commission's view**

14.249 The test under section 14(2) of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to be satisfied that, having regard to the appropriateness considerations set out in section 15 of the Act, there is 'no other appropriate person who is available for appointment for the matter'.<sup>264</sup> This reflects the view that a person who is close to an adult and in a position to know his or her wishes is often better placed than a statutory agency to make decisions of a personal nature for the adult.

14.250 The Commission endorses this approach and considers that the test in section 14(2) of the *Guardianship and Administration Act 2000* (Qld) for the appointment of the Adult Guardian as guardian is appropriate. However, for the sake of consistency with the Commission's proposed test for the appointment of the Public Trustee, the Commission considers that section 14(2) should be amended by deleting the words 'another appropriate person' and replacing it with the words 'a person mentioned in section 14(1)(a)(i)'.

14.251 In order to appoint the Adult Guardian as guardian, the Tribunal must consider that there is no other appropriate person available. The issue of appropriateness is therefore a threshold issue which affects the application of the test in section 14(2) in practice. In this Chapter, the Commission has made a number of recommendations in relation to matters that may affect the Tribunal's findings about whether a person is appropriate for appointment. For example, the Commission has recommended that section 15 of the Act should be amended to include a new subsection to the effect that the fact that a person who is a family member of the adult is in conflict with another family member does not, of itself, mean that the person is not appropriate for appointment as a guardian or an

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262 Submission 135.

263 Submission 164.

264 Apart from the Adult Guardian, the only other 'person' eligible for appointment as guardian under s 14(1)(a) of the *Guardianship and Administration Act 2000* (Qld) will always be an individual (for example, a family member or close friend of the adult).

administrator for the adult.<sup>265</sup> It has also made recommendations in relation to the use of dispute resolution in guardianship proceedings involving family conflict and the provision of relevant information to the adult's family members to facilitate the resolution or management of a dispute which may otherwise result in a finding that one or more of them is not appropriate for appointment.<sup>266</sup> The Commission has also noted that the Adult Guardian conducts a free information service for private guardians to educate and assist them in understanding their role as an appointed guardian.<sup>267</sup>

14.252 The Commission does not consider it necessary to amend the Act to require the Tribunal, if appointing the Adult Guardian, to make a specific finding that there is no other appropriate person who is available for appointment for the matter. This is because when the Tribunal gives its reasons for decision in relation to the making of an appointment, it must demonstrate that it has applied the statutory requirements set out in sections 14(2) and 15 of the Act.<sup>268</sup>

## REVOCAION, CONTINUATION OR CHANGE OF AN APPOINTMENT

### The law in Queensland

#### *Automatic revocation of an appointment*

14.253 The appointment of a guardian or an administrator for an adult will end automatically if:<sup>269</sup>

- the guardian or administrator becomes a paid carer, or health provider, for the adult;
- the guardian or administrator becomes the service provider for a residential service where the adult is a resident;
- the guardian or administrator and the adult are married at the time of the appointment and the marriage is dissolved;
- the guardian or administrator, or the adult the subject of the appointment, dies; or

<sup>265</sup> See [14.146]–[14.148] above.

<sup>266</sup> See [14.200]–[14.205] above.

<sup>267</sup> See [14.151] above.

<sup>268</sup> In Chapter 21 of this Report, the Commission has recommended a general legislative amendment to the effect that, when the Tribunal gives its reasons for decisions in guardianship matters, the Tribunal must set out any principles of law it has applied in the proceeding and the way in which it has applied the principles of law to the facts.

<sup>269</sup> *Guardianship and Administration Act 2000* (Qld) s 26. If an appointment as a guardian or an administrator ends under these circumstances, the former guardian or administrator must advise the Tribunal in writing of the ending of the appointment: *Guardianship and Administration Act 2000* (Qld) s 26(3).

- in relation to an appointment as an administrator, the administrator becomes bankrupt or insolvent.

14.254 If the appointment of a guardian or an administrator for a matter ends in these circumstances, and the guardian or administrator was a joint guardian or administrator for the matter, any remaining guardians or administrators may exercise power for the matter.<sup>270</sup>

### ***Withdrawal of a guardian or an administrator***

14.255 An appointment as a guardian or an administrator for an adult for a matter ends if, with the Tribunal's leave, the guardian or administrator withdraws as guardian or administrator for the matter.<sup>271</sup> The Tribunal may appoint someone else to replace the withdrawing person as guardian or administrator for the matter.<sup>272</sup>

### ***Revocation, continuation or change of appointment on review by the Tribunal***

14.256 The appointment of a guardian or an administrator may be revoked, continued or changed by the Tribunal on a review of the appointment.<sup>273</sup>

14.257 Section 31 of the *Guardianship and Administration Act 2000* (Qld) sets out the process for the review of an appointment of a guardian or an administrator.<sup>274</sup> It provides:

#### **31 Appointment review process**

- (1) The tribunal may conduct a review of an appointment of a guardian or administrator (an appointee) for an adult in the way it considers appropriate.
- (2) At the end of the review, the tribunal must revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an appointment were to be made.

<sup>270</sup> *Guardianship and Administration Act 2000* (Qld) s 26(4)(a). If two or more guardians for a matter are remaining, they are required to exercise their power jointly: *Guardianship and Administration Act 2000* (Qld) s 26(4)(b).

<sup>271</sup> *Guardianship and Administration Act 2000* (Qld) s 27(1).

<sup>272</sup> *Guardianship and Administration Act 2000* (Qld) s 27(2)(a). If notice of an administrator's appointment was given to the Registrar of Titles under s 21 of the Act, the Registrar of the Tribunal must take reasonable steps to advise the Registrar of Titles of the withdrawal of the administrator: s 27(2)(b).

<sup>273</sup> The Tribunal is required to review the appointment of a guardian or a private administrator at least every five years or such shorter period as stated in the order: *Guardianship and Administration Act 2000* (Qld) s 28. The Tribunal may also review an appointment on its own initiative or on application: s 29. The review of the appointment of a guardian or an administrator is discussed in Chapter 22 of this Report.

<sup>274</sup> For a review of an appointment, the Tribunal may require the guardian or administrator to advise it of any matters about his or her appropriateness or competence which the guardian or administrator has not previously advised, and would be required to advise, the Tribunal if it were considering whether to appoint him or her: *Guardianship and Administration Act 2000* (Qld) s 30. The grounds for making an application to review the appointment of a guardian or an administrator are discussed in Chapter 22 of this Report.

- (3) If the tribunal is satisfied there are appropriate grounds for an appointment to continue, it may either—
  - (a) continue its order making the appointment; or
  - (b) change its order making the appointment, including, for example, by—
    - (i) changing the terms of the appointment; or
    - (ii) removing an appointee; or
    - (iii) making a new appointment.
- (4) However, the tribunal may make an order removing an appointee only if the tribunal considers—
  - (a) the appointee is no longer competent; or
  - (b) another person is more appropriate for appointment.
- (5) An appointee is no longer competent if, for example—
  - (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
  - (b) the appointee has neglected the appointee's duties or abused the appointee's powers, whether generally or in relation to a specific power; or
  - (c) the appointee is an administrator appointed for a matter involving an interest in land and the appointee fails to advise the registrar of titles of the appointment as required under section 21(1); or
  - (d) the appointee has otherwise contravened this Act.
- (6) The tribunal may include in its order changing or revoking the appointment of an administrator a provision as to who must pay the fee payable to the registrar of titles for advice of the change or revocation.

14.258 Section 31 requires the Tribunal to revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an order were to be made.<sup>275</sup> Section 31(3) specifies that, if the Tribunal is satisfied that the appointment should continue, it may continue its order making the appointment with no change or, alternatively, change the appointment order. The order may be changed, for example, by changing the terms of the appointment, making an additional appointment or replacing an existing appointee.

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Section 12 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian or an administrator for an adult for a matter. The Tribunal may make an appointment order only if it is satisfied that each of the three grounds set out in s 12(1) of the *Guardianship and Administration Act 2000* (Qld) is established.

14.259 Section 31(4) sets out two grounds on which the Tribunal may order the removal of an appointee.

14.260 The first ground is that the appointee is *no longer competent*. By way of guidance, section 31(5) provides several examples of when an appointee may be no longer competent to act as a guardian or an administrator, including that a relevant interest of the adult has not been, or is not being, adequately protected, or that the appointee has neglected the appointee's duties or abused the appointee's powers (whether generally or in relation to a specific power).

14.261 The second ground for the removal of an appointee — that another person is *more appropriate* for appointment — deals with the replacement of an existing appointee with a new appointee.

14.262 Section 14, which sets out the eligibility requirements for appointment, and section 15, which sets out the considerations the Tribunal must take into account when deciding whether a person is appropriate for appointment, are also relevant when the Tribunal is deciding, on a review, whether to make an additional appointment or to replace an existing appointee.

14.263 The operation of section 31(4)(b) was considered by the Supreme Court in *Adult Guardian v Hunt*.<sup>276</sup> In that case, the Adult Guardian appealed against orders made by the Tribunal under section 31(4)(b) to remove the Adult Guardian as guardian for the adult, and to appoint, in her place, the adult's long-term de facto partner as her guardian. Chesterman J observed that section 31(4)(b) confers on the Tribunal 'a broad general discretion' to remove an existing guardian and to appoint a new one.<sup>277</sup>

The only restriction [in section 31(4)(b)] is that the Tribunal must consider that the new appointee is more appropriate. The word encompasses every relevant attribute and characteristic which someone appointed to be guardian of another's affairs should manifest. Such a broad discretion is difficult to challenge.

14.264 As mentioned previously, the Adult Guardian argued in that case that the Adult Guardian was a primary candidate for appointment under section 14 and that 'the Act might suggest that, were there a doubt, the Tribunal should err in favour of appointing the Adult Guardian'. Chesterman J dismissed the appeal, noting that, where an adult has friends or family who are able and willing to provide the requisite support and assistance, it is preferable that they be allowed to do so rather than be supplanted by the Adult Guardian.<sup>278</sup> Section 14(2) was subsequently inserted in the *Guardianship and Administration Act 2000* (Qld) to give legislative effect to the decision in *Adult Guardian v Hunt*.<sup>279</sup> As a result of that amendment, section 14(2) of the Act now provides that the Tribunal may appoint

<sup>276</sup> [2003] QSC 297. See the discussion of *Adult Guardian v Hunt* at [14.80] above.

<sup>277</sup> Ibid [19].

<sup>278</sup> Ibid [30].

<sup>279</sup> See [14.79] above.

the Adult Guardian as a guardian for a matter only if there is no other appropriate person available for appointment for the matter.

### ***Notification of change, revocation or ending of appointment***

14.265 If the Tribunal changes or revokes the appointment of a guardian or an administrator, or the Tribunal is given advice of the ending of an appointment, the registrar of the Tribunal is required to take reasonable steps to advise the adult and any remaining guardians and administrators of the change, revocation or ending of the appointment.

### **The law in other jurisdictions**

14.266 In each of the other jurisdictions, the legislation makes specific provision for the review of an order for the appointment of a guardian or an administrator.<sup>280</sup> These provisions generally provide for the variation or revocation of an order on review. In the other jurisdictions, except the ACT, there are no specified grounds for the removal of a guardian or an administrator. In the ACT, the grounds for removal are that the guardian or administrator:<sup>281</sup>

- is no longer suitable;
- is no longer competent;
- has failed to exercise his or her powers; or
- has contravened a provision of the legislation.

### **Discussion Paper**

#### ***The replacement of an existing appointee on the review of an appointment***

14.267 As mentioned above, section 31 of the *Guardianship and Administration Act 2000* (Qld) sets out the process for the review of an appointment of a guardian or an administrator.

14.268 Section 31(4)(b) gives the Tribunal a wide discretion to remove an existing guardian and to appoint a new guardian. This provision specifically requires the Tribunal to consider whether another person is more appropriate for appointment.<sup>282</sup>

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*Guardianship and Management of Property Act 1991* (ACT) s 19; *Guardianship Act 1987* (NSW) ss 25-25C, 25N-25P; *Adult Guardianship Act* (NT) s 23; *Guardianship and Administration Act 1993* (SA) ss 30, 36; *Guardianship and Administration Act 1995* (Tas) ss 67-68; *Guardianship and Administration Act 1986* (Vic) ss 61-63; *Guardianship and Administration Act 1990* (WA) ss 84-90.

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*Guardianship and Management of Property Act 1991* (ACT) s 31.

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Section 15 of the *Guardianship and Administration Act 2000* (Qld) sets out the 'appropriateness considerations' the Tribunal must consider in deciding whether a person is appropriate for appointment as a guardian or an administrator. The Tribunal must also be satisfied that a new appointee satisfies the eligibility requirements in s 14 of the *Guardianship and Administration Act 2000* (Qld).

14.269 The application of this test is relatively straightforward where both the existing appointee and a proposed new appointee are individuals. However, the position is less clear where the Adult Guardian is the existing appointee and the proposed new appointee is an individual. Section 14(2) provides that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person who is available for appointment for the matter. Although section 14(2) was enacted to give legislative effect to the decision in *Adult Guardian v Hunt*,<sup>283</sup> on one view, it applies only where the Adult Guardian has not already been appointed. It is unclear whether, on a review of an appointment under section 31, section 14(2) would apply to require the Tribunal to prefer the appointment of an individual where the Adult Guardian is an existing appointee.

14.270 The Adult Guardian is the statutory guardian of last resort.<sup>284</sup> Where the Adult Guardian is an existing appointee, it may be difficult in practice for an individual to show that he or she is a 'more appropriate' appointee.

14.271 In the Discussion Paper, the Commission sought submissions in relation to whether section 31 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Adult Guardian is the existing appointee, the appointment of the Adult Guardian may be continued only if there is no other appropriate person available for appointment for the matter.<sup>285</sup>

## Submissions

14.272 Several submissions considered that section 31 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Adult Guardian is the existing appointee, the Tribunal may continue the appointment of the Adult Guardian only if there is no other appropriate person available for appointment for the matter.<sup>286</sup>

14.273 The former Acting Public Advocate commented that:<sup>287</sup>

Such an amendment would ensure consistency with section 14(2) of the [*Guardianship and Administration Act 2000* (Qld)] and the Adult Guardian's role as the guardian of last resort. It would also reflect Justice Chesterman's decision in *Adult Guardian v Hunt*.

14.274 Queensland Aged and Disability Advocacy Inc expressed the view that the *Guardianship and Administration Act 2000* (Qld) should expressly provide that both the Adult Guardian and the Public Trustee are appointments of last resort during

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<sup>283</sup> [2003] QSC 297. See the discussion of *Adult Guardian v Hunt* at [14.80] above.

<sup>284</sup> Section 14(2) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.

<sup>285</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 80.

<sup>286</sup> Submissions 54A, 148, 162, 164.

<sup>287</sup> Submission 160.



the review process as well as for new applications.<sup>288</sup> It also suggested that section 31 of the Act should be amended to reflect the view that where a more appropriate person is able and willing to carry out the functions of guardian or administrator, and where that person is likely to remain available and accessible to the adult then such a person should be the preferred appointee.

14.275 The Adult Guardian commented that, in her experience, ‘upon review family members are sometimes appointed as guardian in lieu of the Adult Guardian’.<sup>289</sup> She further commented that:

Family arrangements are not static and although it may have been the case when originally appointed that the Adult Guardian was the only suitable appointment over time that does change and is reflected in the decisions of the tribunal.

14.276 The Endeavour Foundation expressed the view that, in practice, the appointment of the Adult Guardian is continued only if there is no other appropriate person available for appointment for the matter.<sup>290</sup>

### The Commission’s view

14.277 The Commission considers that section 31 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Adult Guardian is the existing appointee for a matter, the Tribunal may continue the appointment of the Adult Guardian as guardian for the matter only if there is no person mentioned in section 14(1)(a)(i) of the Act who is appropriate and available for appointment for that matter.

14.278 The Commission also considers that a similar amendment to section 31 should be made in relation to the appointment of the Public Trustee as administrator — that is, if the Public Trustee is the existing appointee for a matter, the Tribunal may continue the appointment of the Public Trustee for the matter only there is no person mentioned in section 14(1)(b)(i) of the Act who is appropriate and available for appointment for that matter. This recommendation is consistent with the Commission’s recommendation about the circumstances in which the Public Trustee may be appointed as administrator on an initial appointment.

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288 Submission 148.

289 Submission 164.

290 Submission 163.

## RECOMMENDATIONS

### *The grounds for making an appointment under section 12(1) of the Guardianship and Administration Act 2000 (Qld)*

- 14-1 Section 12(1) of the *Guardianship and Administration Act 2000* (Qld), which sets out the grounds for making an appointment order, is appropriate and should not be amended.
- 14-2 The principles in the *Disability Services Act 2006* (Qld) should be revised to take account of the principles in the *United Nations Convention on the Rights of Persons with Disabilities* and the relevant General Principles under the guardianship legislation, and to specify that supporting the person to achieve quality of life by supporting the person's family unit and the person's full participation in society (under Human Rights Principle 19(3)(a)) may involve consultation with either or both of the following:
- (a) persons who have an existing supportive relationship with the person;
  - (b) members of the person's support network who are making decisions for the adult on an informal basis.

### *Persons eligible for appointment*

- 14-3 Section 16 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person who has agreed to a proposed appointment for an adult must advise the Tribunal, before it makes an appointment order, whether the person was previously a paid carer for the adult.
- 14-4 Section 15 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal must, in considering the person's appropriateness and competence have regard to whether the person previously was a paid carer for the adult.

### *Consent to an appointment*

- 14-5 The general requirement that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment is a substantive one and should be contained in the *Guardianship and Administration Act 2000* (Qld) rather than in the QCAT Rules.
- 14-6 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the appointment of the Adult Guardian is not subject to the Adult Guardian's consent.

**14-7** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the appointment of the Public Trustee is not subject to the Public Trustee's consent.

**14-8** To the extent that the implementation of recommendations 14-5 and 14-7 above may have resource implications for the Adult Guardian and the Public Trustee, the Adult Guardian and the Public Trustee should, if necessary, be given funding to satisfy their statutory obligations in this regard.

***Appropriateness considerations for appointment***

**14-9** Section 15 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include a new subsection to the effect that the fact that a person who is a family member of the adult is in conflict with another family member does not, of itself, mean that the person is not appropriate for appointment as a guardian or an administrator for the adult. For the purposes of that new subsection, a family member of the adult should be defined in terms of the new definition of 'relative', which the Commission has proposed should apply in relation to section 63 of the *Powers of Attorney Act 1998* (Qld).

***The effect of family conflict***

**14-10** The Tribunal should ensure that family members who are involved in guardianship proceedings are provided with sufficient information about the possible outcomes of proceedings involving family conflict and the options available for resolving or managing family conflict before, during and after a guardianship proceeding. The Tribunal should also ensure that guardianship proceedings which involve family conflict are identified at an early stage in the proceedings and assessed for their suitability for referral to dispute resolution.

**14-11** In the context of a dispute between the adult's family members or between an adult's family member and a service provider for an adult, the Tribunal should ensure that the adult's family members who are not already active parties to the application are informed about the option of making their own application for appointment.

***Appointment of the Adult Guardian as guardian***

14-12 Section 14(2) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no person mentioned in subparagraph (1)(a)(i) who is appropriate and available for appointment as guardian for the matter.

***Appointment of the Public Trustee as administrator***

14-13 Section 14 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal may appoint the Public Trustee as administrator for a matter only if there is no person mentioned in subparagraph (1)(b)(i) who is appropriate and available for appointment as administrator for the matter.

***Revocation, continuation or change of an appointment***

14-14 Section 31 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Adult Guardian is the existing appointee for a matter, the Tribunal may continue the appointment of the Adult Guardian for the matter only if there is no person mentioned in subparagraph (1)(a)(i) who is appropriate and available for appointment as guardian for the matter.

14-15 Section 31 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Public Trustee is the existing appointee for a matter, the Tribunal may continue the appointment of the Public Trustee for the matter only if there is no person mentioned in subparagraph (1)(b)(i) who is appropriate and available for appointment as administrator for the matter.

# Chapter 15

## The powers and duties of guardians and administrators

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### INTRODUCTION

15.1 The Commission's terms of reference direct it to review decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act*

1998 (Qld) including, but not limited to, the scope of the powers of guardians and administrators.<sup>291</sup>

15.2 In reviewing the legislation the Commission is to have regard to a number of specified matters, including ‘the need to ensure that the powers of guardians, administrators and other officers or bodies established by the legislation are sufficiently extensive to protect the interests of an adult with impaired capacity’.

15.3 This chapter gives an overview of the powers and duties of guardians and administrators under the Queensland guardianship legislation and under the comparative legislation in other jurisdictions. It also makes some recommendations for reform. This chapter does not deal with the powers and duties of guardians for restrictive practice matters under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).<sup>292</sup>

## BACKGROUND

15.4 The *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian or an administrator to make substitute decisions for an adult with impaired capacity.<sup>293</sup> A guardian can be appointed for a personal matter, including a health matter (but not a special health matter).<sup>294</sup> Personal matters relate to personal, health care, lifestyle and some legal decisions.<sup>295</sup> An administrator can be appointed for a financial matter.<sup>296</sup> Financial matters relate to an adult’s financial or property affairs.<sup>297</sup> However, the Act does not allow substitute decision-makers (including guardians and administrators) or the Tribunal

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291 The terms of reference are set out in Appendix 1.

292 Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with the use of restrictive practices for managing the challenging behaviour of certain adults. These procedures apply only in relation to adults with an intellectual or cognitive disability who receive disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. Although the Commission is not generally reviewing ch 5B of the *Guardianship and Administration Act 2000* (Qld), Chapter 19 of this Report considers a number of specific issues that have been raised in relation to the use of restrictive practices.

293 *Guardianship and Administration Act 2000* (Qld) ss 12(1), 82(1)(c).

294 *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 2 s 2.

295 The scope of personal matters is discussed in Chapter 6 of this Report. Examples of personal matters specifically listed in the definition are matters relating to where and with whom the adult lives; the adult’s employment, education and training; day-to-day issues such as the adult’s diet and dress; the adult’s health care (other than special health care); and legal matters that do not relate to the adult’s financial or property matters.

296 *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 2 s 1.

297 The scope of financial matters is discussed in Chapter 6 of this Report. Examples of financial matters included in the definition are matters relating to buying and selling property (including land); paying the adult’s expenses, rates, insurance, taxes and debts; conducting a trade or business on behalf of the adult; making financial investments; performing the adult’s contracts; and all legal matters relating to the adult’s financial or property matters.

to exercise power for ‘special personal matters’, including voting, consenting to marriage or making a will.<sup>298</sup>

15.5 There are various circumstances in which it may be necessary to appoint a guardian or an administrator for an adult with impaired capacity. For example, a formal appointment may be necessary if informal decision-making is not working well or if an attorney appointed under an enduring power of attorney is not acting in the adult’s interests.

15.6 The appointment of a guardian or an administrator for an adult will inevitably involve some loss of the adult’s decision-making autonomy. The Act confers potentially broad decision-making powers on guardians and administrators, and also imposes a number of concomitant and other duties on them to ensure that these powers are exercised in the adult’s interests. The legislative provisions which deal with powers and duties given to guardians and administrators establish the limits of their decision-making authority.

## THE LAW IN QUEENSLAND

15.7 Chapter 4 of the *Guardianship and Administration Act 2000* (Qld) sets out the main functions, powers and duties of guardians and administrators. There are a number of general powers and duties which guardians and administrators have in common. However, there are particular powers and duties which relate only to administrators. These various powers and duties are discussed below.

### Powers of guardians and administrators

#### *General powers of guardians and administrators*

15.8 The Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, for an adult, on such terms it considers appropriate.<sup>299</sup>

15.9 Unless the Tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian’s appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the

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The scope of special personal matters is discussed in Chapter 6 of this Report. Special personal matters relate to voting; consenting to marriage; consenting to the adoption of a child; and making or revoking a will, a power of attorney, an enduring power of attorney, or an advance health directive. These matters are regarded as being of such an intimate or personal nature that it would be inappropriate for another person to be given the power to make a decision about them on behalf of an adult.

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*Guardianship and Administration Act 2000* (Qld) s 12(1)–(2). The guardianship legislation does not allow substitute decision-makers to exercise power for certain types of matters called ‘special personal matters’: see, for example, *Caltabiano v Electoral Commission of Queensland* [2009] QSC 294, [174]. The Tribunal may also impose requirements, including a requirement about giving security, on a guardian or an administrator or a person who is about to become a guardian or an administrator: *Guardianship and Administration Act 2000* (Qld) s 19. The appointment of guardians and administrators is discussed in Chapter 14 of this Report.

matter when the power was exercised.<sup>300</sup> An administrator is conferred with similar authority in relation to a financial matter.<sup>301</sup>

15.10 If necessary or convenient for the exercise of power given to the guardian or administrator, a guardian or an administrator may, in his or her own name, execute an instrument or do any other thing.<sup>302</sup> Any instrument executed or thing done by the guardian or administrator is as effective as if executed by the adult.<sup>303</sup>

### **Particular powers of administrators**

15.11 An administrator has limited powers to give away the adult's property. Any gift or donation must be of the same nature that the adult made when he or she had capacity or that the adult might reasonably be expected to make, and the value of the gift must be reasonable in the circumstances.<sup>304</sup>

15.12 An administrator may make provision from the adult's estate for a dependant of the adult. Unless the Tribunal orders otherwise, the provision must be no more than is reasonable having regard to all the circumstances, including the adult's financial circumstances.<sup>305</sup>

15.13 Generally, if an administrator has been given the power to invest, he or she may invest only in 'authorised investments'.<sup>306</sup> The legislation includes the following definition of 'authorised investment':<sup>307</sup>

**authorised investment** means—

- (a) an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973*, part 3; or
- (b) an investment approved by the tribunal.

15.14 The first limb of this definition allows a wide range of investments. In 2000, Part 3 of the *Trusts Act 1973* (Qld) was amended to abolish the statutory list of authorised investments and to replace it with the 'prudent person' doctrine, which

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300 *Guardianship and Administration Act 2000* (Qld) s 33(1). See also s 36.

301 *Guardianship and Administration Act 2000* (Qld) s 33(2). See also s 36.

302 *Guardianship and Administration Act 2000* (Qld) s 45(1). If the Tribunal gives a guardian or an administrator power to do a thing, the guardian or administrator is given power to execute a deed to do a thing: *Guardianship and Administration Act 2000* (Qld) s 46.

303 *Guardianship and Administration Act 2000* (Qld) s 45(3).

304 *Guardianship and Administration Act 2000* (Qld) s 54.

305 *Guardianship and Administration Act 2000* (Qld) s 55.

306 *Guardianship and Administration Act 2000* (Qld) s 51(1)–(2).

307 *Guardianship and Administration Act 2000* (Qld) sch 4.



enables a trustee to invest trust funds in any form of investment.<sup>308</sup> The Act specifies a lengthy list of matters to which trustees must have regard when exercising a power of investment,<sup>309</sup> including the purposes of the trust and the needs and circumstances of the beneficiaries, the desirability of diversifying trust investments, and the nature of, and risk associated with, existing trust investments and other trust property.<sup>310</sup>

15.15 The limitation of investing only in authorised investments does not apply if, when the administrator is appointed, the adult had investments that were not authorised. In that situation, the administrator may continue the investments, ‘including by taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult’s existing shareholding’.<sup>311</sup>

### Duties of guardians and administrators

15.16 Given the broad powers that are conferred on guardians and administrators, the *Guardianship and Administration Act 2000* (Qld) imposes strict requirements on the exercise of their powers.<sup>312</sup> In some cases, the failure to comply with a particular requirement is an offence.<sup>313</sup>

### General duties of guardians and administrators

15.17 When exercising power for a matter for an adult, a guardian or an administrator must do the following things:

- apply the General Principles contained in the legislation (and the Health Care Principle, if relevant);<sup>314</sup>

<sup>308</sup> See *Trusts Act 1973* (Qld) ss 21, 22. In exercising a power of investment, a trustee must, if the trustee is a professional trustee or is in the profession or business of investing money for other persons, exercise the care, diligence and skill that a prudent person engaged in that profession or business would exercise in managing the affairs of other persons. If the trustee’s profession, business or employment does not include acting as a trustee or investing money for other persons, the trustee must exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

<sup>309</sup> *Trusts Act 1973* (Qld) s 24(1).

<sup>310</sup> *Trusts Act 1973* (Qld) s 24(1)(a)–(c).

<sup>311</sup> *Guardianship and Administration Act 2000* (Qld) s 51(3).

<sup>312</sup> The appointment of a guardian or a private administrator is also subject to regular review. The review of the appointment of a guardian or an administrator is discussed in Chapter 22 of this Report.

<sup>313</sup> There are varying maximum penalties for different offences under the Act. For example, the maximum penalty for breaching s 50 (Keep property separate) is 300 penalty units (\$30 000); the maximum penalty for breaching s 19 (Comply with other tribunal requirement) or s 35 (Act honestly and with reasonable diligence) is 200 penalty units (\$20 000); and the maximum penalty for breaching s 49 (Keep records) is 100 penalty units (\$10 000). See, in relation to the value of penalty units for offences: *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

<sup>314</sup> *Guardianship and Administration Act 2000* (Qld) s 34. Guardians must apply the Health Care Principle whenever they are called upon to make a decision about health care: *Guardianship and Administration Act 2000* (Qld) s 11, sch 1 s 12. The General Principles and the Health Care Principle are considered in Chapters 4 and 5 of this Report.

- exercise his or her power honestly and diligently;<sup>315</sup>
- act jointly if more than one (unless the Tribunal orders otherwise), and act unanimously if joint;<sup>316</sup>
- consult regularly with other persons who are a guardian, an administrator or an attorney (including a statutory health attorney) for the adult;<sup>317</sup> and
- exercise his or her power as required by the terms of the appointment order.<sup>318</sup>

### **Particular duties of administrators**

15.18 The guardianship legislation imposes a number of additional duties on administrators. For example, an administrator is required to keep records that are reasonable in the circumstances, and to produce those records if ordered by the Tribunal.<sup>319</sup> Generally, an administrator is also required to submit a financial management plan to the Tribunal for approval.<sup>320</sup> The Tribunal may also require an administrator to file a summary of receipts and expenditure or accounts, and may order the summary or accounts to be audited.<sup>321</sup>

15.19 An administrator must keep the administrator's property separate from the adult's property (unless the subject property is jointly owned).<sup>322</sup>

15.20 In addition, an administrator is under an obligation to avoid conflict transactions.<sup>323</sup> The Tribunal has a corresponding power to authorise a conflict transaction, a type of conflict transaction or conflict transactions generally.<sup>324</sup>

315 *Guardianship and Administration Act 2000* (Qld) s 35. The maximum penalty for a breach of this duty is a fine of \$20 000: *Guardianship and Administration Act 2000* (Qld) s 35; *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

316 *Guardianship and Administration Act 2000* (Qld) ss 38, 39.

317 *Guardianship and Administration Act 2000* (Qld) s 40. If a guardian, an administrator or an attorney for an adult disagrees with another person who is a guardian, an administrator or an attorney for an adult about the way a power for a matter, other than a health matter, should be exercised and the Adult Guardian cannot resolve the dispute, an application for directions may be made to the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 41. If there is a disagreement about a health matter for an adult, and the Adult Guardian cannot resolve the disagreement by mediation, the Adult Guardian may exercise power for the health matter: *Guardianship and Administration Act 2000* (Qld) s 42(1).

318 *Guardianship and Administration Act 2000* (Qld) s 36. The maximum penalty for a breach of this duty is a fine of \$20 000: *Guardianship and Administration Act 2000* (Qld) s 36; *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

319 *Guardianship and Administration Act 2000* (Qld) s 49. The maximum penalty for a breach of this duty is a fine of \$10 000: *Guardianship and Administration Act 2000* (Qld) s 49; *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

320 *Guardianship and Administration Act 2000* (Qld) s 20.

321 *Guardianship and Administration Act 2000* (Qld) s 153. The Adult Guardian also has power to require an administrator to file a summary of receipts and expenditure or accounts with the Adult Guardian: s 182. The maximum penalty for non-compliance with the notice is a fine of \$10 000: *Guardianship and Administration Act 2000* (Qld) s 182(3); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

322 *Guardianship and Administration Act 2000* (Qld) s 50.

## Other provisions related to the exercise of powers

### *The right of guardians and administrators to information*

15.21 A guardian or an administrator who has power for a matter for an adult has a right to all the information that the adult would have been entitled to if the adult had capacity and which is necessary to make an informed exercise of the power.<sup>325</sup> A person who has custody or control of the information is required to give the information to the guardian or administrator on request, unless the person has a reasonable excuse. If the person does not comply with such a request, the Tribunal can order the person to give the information to the guardian or administrator.

### *Remuneration and reimbursement of professional administrators*

15.22 If an administrator is a professional administrator, the Tribunal may order the payment of remuneration from the adult.<sup>326</sup> Otherwise, any guardian or administrator for an adult is entitled to reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator.<sup>327</sup>

### *Relationship between an appointment and an enduring document*

15.23 The *Guardianship and Administration Act 2000* (Qld) includes particular provisions about the situation in which the Tribunal has appointed a guardian or an administrator for a matter without knowledge of an existing enduring document which gives power for the matter to an attorney for the adult and the guardian or administrator becomes aware of the existence or purported existence of the enduring document. In this situation, the guardian or administrator is required to give written advice to the Tribunal about the document, and his or her powers for the matter are suspended pending the review of his or her appointment.<sup>328</sup>

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323 *Guardianship and Administration Act 2000* (Qld) s 37. A similar provision, which applies to attorneys, is included in the *Powers of Attorney Act 1998* (Qld) s 73. Conflict transactions are discussed in Chapter 17 of this Report.

324 The Tribunal's power to authorise a conflict transaction is discussed in Chapter 17 of this Report. The Supreme Court of Queensland has held that the Tribunal's power to authorise a conflict transaction includes the power to give retrospective authorisation: *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, [78], [79].

325 *Guardianship and Administration Act 2000* (Qld) s 44. A health provider who is treating, or has treated, an adult must, upon request, give information to the adult's guardian, statutory health attorney or attorney who has power for a health matter for the adult, about the nature of the adult's condition and details about the health care, its effects, risks and alternatives: *Guardianship and Administration Act 2000* (Qld) s 76. The right of guardians, administrators and other substitute decision-makers to information is discussed in Chapter 30 of this Report.

326 *Guardianship and Administration Act 2000* (Qld) s 48. The remuneration of professional administrators is discussed in Chapter 29 of this Report.

327 *Guardianship and Administration Act 2000* (Qld) s 47.

328 *Guardianship and Administration Act 2000* (Qld) s 23.

### **Liability**

15.24 If the Tribunal has given power for a matter to a guardian or an administrator and the power is changed, a guardian or an administrator who, without knowing of the change, purports to exercise power for the matter does not incur any liability to the adult or anyone else because of the change.<sup>329</sup> Such a change may arise, for example, where the power for the matter is suspended or the guardian or administrator is removed.<sup>330</sup> In addition, a transaction between a guardian or an administrator who purports to exercise a power and any other person who does not know of the change is, in favour of the person, valid as if the power had not been changed.<sup>331</sup>

### **Compensation and protection for non-compliance with the requirements of the Act**

15.25 A guardian or an administrator may be ordered by a court or the Tribunal to pay compensation to an adult for a loss caused by the failure of the guardian or administrator to comply with the requirements of the Act in the exercise of a power.<sup>332</sup>

15.26 A court in which a guardian or an administrator is prosecuted for a failure to comply with certain provisions of the Act may excuse the failure if the court considers the guardian or administrator 'has acted honestly and reasonably and ought fairly to be excused for the failure'.<sup>333</sup>

## **THE POSITION IN OTHER JURISDICTIONS**

15.27 The legislation in each of the other Australian jurisdictions makes provision for the appointment of a substitute decision-maker for an adult who lacks capacity to manage his or her personal or financial affairs.

15.28 As mentioned in Chapter 14, in each of the other jurisdictions, like Queensland, a guardian or an administrator may be appointed for all matters (sometimes called a plenary or full order), or particular matters only (sometimes called a limited order). There are some differences in terminology between the jurisdictions. In South Australia, Tasmania, Victoria and Western Australia, like

<sup>329</sup> *Guardianship and Administration Act 2000* (Qld) s 56(1)–(2).

<sup>330</sup> *Guardianship and Administration Act 2000* (Qld) s 56(4).

<sup>331</sup> *Guardianship and Administration Act 2000* (Qld) s 56(3). In certain circumstances, a guardian, who exercises a power for a matter without knowing that the adult has made a direction about the matter in an advance health directive prior to the guardian's appointment, does not incur any liability because of the direction being included in the directive: *Guardianship and Administration Act 2000* (Qld) s 25.

<sup>332</sup> *Guardianship and Administration Act 2000* (Qld) s 59. See also s 60 of the Act, which provides that, if a person's benefit in the adult's estate is lost because of a sale or other dealing with the adult's property by an administrator, the Supreme Court may order that the person or the person's estate be compensated out of the adult's estate, as the court considers appropriate, up to the value of the lost benefit. A similar provision to s 59 of the *Guardianship and Administration Act 2000* (Qld) is included in the *Powers of Attorney Act 1998* (Qld): s 106.

<sup>333</sup> *Guardianship and Administration Act 2000* (Qld) s 58. A similar provision is included in the *Powers of Attorney Act 1998* (Qld): s 105. The latter section provides for the court to relieve an attorney from all or part of the attorney's personal liability for a breach of the *Powers of Attorney Act 1998* (Qld).

Queensland, an ‘administrator’ is appointed to make decisions about the control and management of an adult’s property, while in the ACT, New South Wales and the Northern Territory, the equivalent term is a ‘manager’.<sup>334</sup> In each of the jurisdictions, a ‘guardian’ is a person appointed to make decisions for an adult for personal matters.<sup>335</sup>

15.29 The legislation in the other jurisdictions provides for an individual to be appointed as a guardian for personal matters.<sup>336</sup> Provision is also made for the appointment of the Adult Guardian (or its equivalent) as a guardian.<sup>337</sup> The legislation also confers broad powers on administrators (or managers) to manage the adult’s financial or property affairs.<sup>338</sup>

15.30 The legislation in the other jurisdictions confers broad decision-making powers on guardians and administrators for some or all matters, subject to any limitations specified in the terms of appointment.<sup>339</sup>

15.31 The South Australian legislation gives administrators the power, in some circumstances, to avoid dispositions and contracts entered into by the adult during the period of administration.<sup>340</sup> There is no similar provision in Queensland.

334 In the Northern Territory, an application may be made under the *Aged and Infirm Persons’ Property Act* (NT) for a protection order for the management of an adult’s estate. A person appointed under a protection order is called a ‘manager’: *Adult Guardianship Act* (NT) s 13.

335 In the Northern Territory, a guardian may be appointed to exercise power for personal matters, and, in some circumstances, financial matters: *Adult Guardianship Act* (NT) s 16(1)(a), (2). If the court is satisfied that the guardian is competent to manage the adult’s estate, the court may appoint the guardian to manage the adult’s estate on such terms and conditions as it thinks fit. The guardian has the powers of a manager of a protected estate under s 17 of the *Aged and Infirm Persons’ Property Act* (NT) and subject to s 21(2) of that Act, the liability of a manager under s 21(1) of that Act. Generally, the *Aged and Infirm Persons’ Property Act* (NT) provides for the appointment of a manager of a protected estate: *Aged and Infirm Persons’ Property Act* (NT) s 17.

336 *Guardianship and Management of Property Act 1991* (ACT) s 9; *Guardianship Act 1987* (NSW) s 6; *Adult Guardianship Act* (NT) s 14; *Guardianship and Administration Act 1993* (SA) s 29; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 44.

337 *Guardianship and Management of Property Act 1991* (ACT) s 9; *Guardianship Act 1987* (NSW) ss 16–17; *Adult Guardianship Act* (NT) s 14; *Guardianship and Administration Act 1993* (SA) s 29; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 44(5). In the ACT, New South Wales, the Northern Territory, South Australia, Victoria and Western Australia, the Public Advocate or Public Guardian is the guardian of last resort: *Guardianship and Management of Property Act 1991* (ACT) s 11; *Guardianship Act 1987* (NSW) s 17(3); *Adult Guardianship Act* (NT) s 14(4); *Guardianship and Administration Act 1993* (SA) s 29(4); *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23(4); *Guardianship and Administration Act 1990* (WA) s 44(5).

338 *Guardianship and Management of Property Act 1991* (ACT) s 8; *Guardianship Act 1987* (NSW) ss 16, 21; *Aged and Infirm Persons’ Property Act* (NT) ss 17–18; *Guardianship and Administration Act 1993* (SA) ss 29, 31; *Guardianship and Administration Act 1995* (Tas) ss 25–26; *Guardianship and Administration Act 1986* (Vic) s 24(2); *Guardianship and Administration Act 1990* (WA) s 69.

339 *Guardianship and Management of Property Act 1991* (ACT) ss 7(2)–(3), 8(2)–(3); *Guardianship Act 1987* (NSW) ss 16, 21; *Adult Guardianship Act* (NT) ss 17–18; *Guardianship and Administration Act 1993* (SA) ss 29, 31; *Guardianship and Administration Act 1995* (Tas) ss 25–26; *Guardianship and Administration Act 1986* (Vic) ss 24–25; *Guardianship and Administration Act 1990* (WA) ss 45(2), 69, 71–72.

15.32 Generally, the legislation in the other jurisdictions contains fewer provisions about the duties of guardians and administrators than the legislation in Queensland. The legislation in the ACT requires guardians and administrators to exercise their powers in accordance with statutory decision-making principles.<sup>341</sup> The legislation in Tasmania, Victoria and Western Australia requires an appointee to exercise power in the adult's best interests.<sup>342</sup> Like Queensland, the ACT imposes specific requirements on administrators to avoid conflict transactions and to keep the adult's property separate.<sup>343</sup> The legislation in the ACT, South Australia, Tasmania, Victoria and Western Australia contains reporting requirements for administrators.<sup>344</sup>

15.33 South Australia, Tasmania and Victoria also make provision for the remuneration of professional administrators.<sup>345</sup>

## THE SCOPE OF THE POWERS OF GUARDIANS AND ADMINISTRATORS

15.34 The *Guardianship and Administration Act 2000* (Qld) seeks to balance the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support in decision-making. It is important to ensure that the powers given to a guardian or an administrator are adequate and appropriate to satisfy the needs of the adult for whom they are exercised. It is also important to ensure that the powers are exercised in a way that preserves and, where possible, enhances the adult's autonomy.

15.35 When exercising his or her power for an adult for a matter, a guardian or an administrator is not required to apply the presumption that the adult has capacity for the matter. This is because the guardian or administrator is entitled to rely on

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340 *Guardianship and Administration Act 1993* (SA) s 42. In the Northern Territory, Victoria and Western Australia, the legislation restricts the powers of an adult with impaired capacity to enter into contracts while he or she is subject to an administration order: *Aged and Infirm Persons' Property Act 1979* (NT) s 20(1) (leave of the Supreme Court); *Guardianship and Administration Act 1986* (Vic) s 52(1); *Guardianship and Administration Act 1990* (WA) s 77(1)–(3). The legislation in those jurisdictions further provides that any contracts made by a person whose property is being managed are void and of no effect and any money or property the subject of the transaction is recoverable by the administrator in any court of competent jurisdiction: *Aged and Infirm Persons' Property Act 1979* (NT) s 20(2), (3); *Guardianship and Administration Act 1986* (Vic) s 52(2); *Guardianship and Administration Act 1990* (WA) s 77(1)–(3). Contracts entered into by adults with impaired capacity are discussed in Chapter 30 of this Report.

341 *Guardianship and Management of Property Act 1991* (ACT) s 4. The predominant principle for consideration is that any decision should interfere to the least extent with the lifestyle of the adult. That involves adopting, wherever possible, the patterns of decision-making of the adult (the substituted judgment principle). However, if the adult's views or wishes on a matter are not capable of being discovered, the decision-maker's decision must be the one which best protects the adult's interests.

342 *Guardianship and Administration Act 1995* (Tas) ss 27, 57; *Guardianship and Administration Act 1986* (Vic) ss 28, 49; *Guardianship and Administration Act 1990* (WA) ss 51, 70.

343 *Guardianship and Management of Property Act 1991* (ACT) s 14(1)(a)–(b).

344 *Guardianship and Management of Property Act 1991* (ACT) s 26; *Guardianship and Administration Act 1993* (SA) ss 44–45; *Guardianship and Administration Act 1995* (Tas) s 63; *Guardianship and Administration Act 1986* (Vic) s 58; *Guardianship and Administration Act 1990* (WA) s 80.

345 *Guardianship and Administration Act 1993* (SA) s 46; *Guardianship and Administration Act 1995* (Tas) s 55; *Guardianship and Administration Act 1986* (Vic) s 47A(1)–(2).

the Tribunal's finding, in making the appointment order, that the presumption that the adult has capacity for the matter has been rebutted.<sup>346</sup>

15.36 The Act authorises a guardian or an administrator to do anything in relation to a matter for which he or she is appointed that the adult could have done if the adult had capacity for the matter. These broad powers must be exercised in accordance with the terms of the appointment.<sup>347</sup>

15.37 As outlined above, the Act also confers on administrators a number of specific powers in relation to the management of the adult's financial and property affairs. These powers include the power to give away, or make a gift or donation of, the adult's property and the power to maintain an adult's dependants. They also include the power to make investments, if authorised by the Tribunal to do so.<sup>348</sup> These powers must be exercised in accordance with certain requirements set out in the Act.<sup>349</sup>

## Discussion Paper

15.38 In the Discussion Paper, the Commission sought submissions in relation to whether the powers conferred on guardians and administrators under the *Guardianship and Administration Act 2000* (Qld) are appropriate or whether they should be changed in some way.<sup>350</sup>

## Submissions

15.39 The Adult Guardian and one other respondent considered the powers that may be exercised by an appointee generally to be appropriate.<sup>351</sup> In addition, a number of respondents, while not commenting generally on the whether the scope of powers that may be conferred on a guardian or an administrator is appropriate,

<sup>346</sup> See *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402, [21]–[25] in which the Supreme Court of Queensland observed that, if a formally appointed substitute decision-maker (in that case, an administrator), whose appointment depends upon the Tribunal's determination that the presumption of capacity had been rebutted, is required to apply the presumption in making substitute decisions, it would be inconsistent with the Tribunal's determination and would also 'frustrate the very object of the appointment'. The application of the presumption of capacity by formally appointed substitute decision-makers or other persons or entities who perform a function or exercise a power under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) is discussed in Chapter 7 of this Report.

<sup>347</sup> *Guardianship and Administration Act 2000* (Qld) ss 33, 36.

<sup>348</sup> *Guardianship and Administration Act 2000* (Qld) s 51.

<sup>349</sup> The power to make a gift or donation is subject to the requirement that any gift or donation must be of the same nature that the adult made when he or she had capacity or that the adult might reasonably be expected to make, and the value of the gift must be reasonable in the circumstances: *Guardianship and Administration Act 2000* (Qld) s 54. The power to maintain an adult's dependants is subject to the requirement that the provision must be no more than is reasonable having regard to the all the circumstances, including the adult's financial circumstances: s 55. Generally, if an administrator has been given the power to invest, he or she may invest only in 'authorised investments', as defined under the Act: s 51(1)–(2).

<sup>350</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 92.

<sup>351</sup> Submissions 164, 165. The Adult Guardian also raised the issue of the enforceability of the decisions made in her capacity as the adult's guardian. This issue is discussed in Chapter 20 of this Report.

addressed the adequacy of specific powers. These submissions are dealt with later in this chapter.

### The Commission's view

15.40 Subject to one particular exception, the Commission considers that the scope of powers that may be conferred on a guardian or an administrator under the *Guardianship and Administration Act 2000* (Qld) is generally appropriate. That exception relates to the exercise of power by a guardian or an administrator for an adult who has fluctuating capacity. In order to give greater recognition under the Act to the rights and interests of adults who have fluctuating capacity, the Commission has made a series of recommendations later in this chapter in relation to orders that may be made by the Tribunal which limit the exercise of power by a guardian or an administrator to periods when the adult has impaired capacity.

### DELEGATION OF DECISION-MAKING POWERS

15.41 An issue that was not specifically raised in the Commission's Discussion Paper is the delegation of decision-making power by guardians and administrators.

15.42 The Act provides that, if the Adult Guardian has power for a personal matter for an adult (for example, when acting as guardian for an adult), the Adult Guardian may delegate the power to make day-to-day decisions about the matter to one of the following:<sup>352</sup>

- an appropriately qualified carer of the adult;
- a health provider of the adult;
- an attorney under an enduring document;
- one of the persons who could be eligible to be the adult's statutory health attorney.

15.43 The *Guardianship and Administration Act 2000* (Qld) does not, however, provide for the Public Trustee to delegate any of its powers when acting as an administrator appointed under that Act.<sup>353</sup>

15.44 There is no express provision in the *Guardianship and Administration Act 2000* (Qld) for the delegation of the powers of guardians and administrators who are individuals.

15.45 Section 33(1) of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian is authorised to do, in accordance with the terms of the

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<sup>352</sup> *Guardianship and Administration Act 2000* (Qld) s 177(4).

<sup>353</sup> The *Powers of Attorney Act 1998* (Qld) does not provide for the Public Trustee to delegate any of its powers when acting as an attorney under that Act. The delegation of the powers of the Public Trustee is discussed in Chapter 25 of this Report.



guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised. Section 33(2) confers on an administrator similar authority in relation to financial matters.

15.46 An issue for consideration is whether the guardianship legislation should be amended to provide that a guardian or an administrator who is an individual may delegate his or her powers to another person.

15.47 In this context, the former Acting Public Advocate has commented that.<sup>354</sup>

The Public Advocate has received reports of arrangements entered into by formal and informal substitute decision-makers in which power for personal and financial decision-making in relation to some adults with [impaired decision-making capacity] has been 'delegated' to paid carers providing accommodation support for adults.

...

It is not known whether the intent of section 33(2) [of the *Guardianship and Administration Act 2000* (Qld)] is to provide power for an administrator (other than the Public Trustee of Queensland) to delegate financial decision-making to another person or entity. Further, if that section could be read to provide for delegation of decision-making power, it is not known whether the protections and obligations that attach to a Tribunal-appointed administrator (other than the Public Trustee) also flow to the delegated administrator (if the power so exists).

Clarification of the Public Trustee's delegation of decision-making power as an administrator, and the ability of other guardians/administrators to delegate decision-making power, is also required.

15.48 The former Acting Public Advocate, further noted that a paid carer is expressly prohibited by the *Guardianship and Administration Act 2000* (Qld) from being appointed as a guardian or an administrator for an adult with impaired capacity, considered that there should be a legislative prohibition on the exercise of decision-making power by, and the delegation of such power to, a paid carer.<sup>355</sup>

### The Commission's view

15.49 The powers conferred on a guardian or an administrator who is an individual should not be delegable to a third party. A person is appointed as a guardian or an administrator on the basis that he or she is appropriate to exercise decision-making powers for the adult. In these circumstances, it would not be appropriate for the guardian or administrator to delegate his or her decision-making powers to another person.

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354 Submission 160.

355 Submission 160.

## ANCILLARY POWERS

15.50 As mentioned above, a guardian is authorised to do, in accordance with the terms of appointment, anything in relation to a personal matter for which he or she is appointed that the adult could have done if the adult had capacity for the matter.<sup>356</sup> An administrator has similar powers in relation to a financial matter for which he or she is appointed.<sup>357</sup>

15.51 Consequently, a guardian has no power to make decisions about financial or property matters. A similar limitation applies to administrators in relation to decisions about personal matters. A person may have authority to exercise powers for both personal and financial matters for an adult if he or she is appointed as both guardian and administrator for the adult.<sup>358</sup>

15.52 Some types of decisions invariably involve both personal and financial decision-making. For example, ‘lifestyle decisions’, which include decisions about matters such as where the adult lives, or whether the adult will go on holidays and where, fall within the category of ‘personal matters’.<sup>359</sup> However, these types of decisions often have a financial dimension as well.

15.53 The Act acknowledges the potential overlap between these different types of decision. It requires guardians and administrators to exercise power ‘in a way that is appropriate to the adult’s characteristics and needs’.<sup>360</sup> This may include consideration of the adult’s lifestyle and social needs by an administrator, and consideration of the adult’s financial circumstances by a guardian.<sup>361</sup> In addition, the Act requires different substitute decision-makers (for example, guardians and administrators) who are appointed for an adult to consult regularly with each another to ensure the adult’s interests are not prejudiced by a breakdown in communication.<sup>362</sup> However, notwithstanding this requirement, decision-makers might disagree with each other about the way a particular decision should be made.

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356 *Guardianship and Administration Act 2000* (Qld) s 33(1). See also s 36.

357 *Guardianship and Administration Act 2000* (Qld) s 33(2). See also s 36.

358 Other avenues for substitute decision-making include acting as an attorney for one or more financial, personal and health matters under an enduring power of attorney and acting as a statutory health attorney for health matters.

359 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2; *Powers of Attorney Act 1998* (Qld) sch 2 s 2. See now the new General Principle 3(b)(iii) recommended in Chapter 4 of this Report.

360 *Guardianship and Administration Act 2000* (Qld) sch 1 s 10; *Powers of Attorney Act 1998* (Qld) sch 1 s 10.

361 The Commission has considered the application of the General Principles (which substitute decision-makers are required to apply when exercising powers under the Act) in Chapter 4 of this Report. The scope of a statutory health attorney’s powers is discussed in Chapter 10 of this Report.

362 *Guardianship and Administration Act 2000* (Qld) s 40. The requirement to consult with other guardians, administrators or attorneys is discussed at [15.132]–[15.144] below.

In the event of such a disagreement, there is an avenue under the Act for the resolution of the disagreement.<sup>363</sup>

15.54 The Australian Law Reform Commission, in its Report on the guardianship and management of property in the ACT, recommended that the Tribunal have power to appoint a guardian as a manager of an adult's property, with specified management powers, if the Tribunal is satisfied that the powers are necessary to ensure that the guardian can exercise the powers he or she has as guardian:<sup>364</sup>

In many cases a person subject to a guardianship order will also experience day-to-day difficulties in such matters as handling money, dealing with banks and entering tenancy agreements. In such cases, if the guardianship order is to be properly exercised and the person's health and welfare to be adequately protected, the guardian will need incidental management powers. It should therefore be open to the Tribunal to appoint the guardian as a manager with the powers necessary to perform the guardianship duties adequately. This would not preclude the Tribunal from appointing the guardian as a full manager, if one were required, or from appointing another manager to deal with more complex property transactions such as share dealing or real estate management.

## Discussion Paper

15.55 In the Discussion Paper, the Commission referred to a submission made by the Guardianship and Administration Reform Drivers ('GARD') which suggested that lifestyle decisions with only a minor financial impact should be decided by a guardian rather than by an administrator:<sup>365</sup>

There are very few decisions in modern society which do not have monetary consequences. It is considered that there are many circumstances where such decisions would more accurately be described as 'lifestyle decisions' than 'financial decisions', albeit that they involve minor monetary transactions. Presently where both a guardian and administrator are appointed, the administrator can effectively compromise the guardian's lifestyle decision-making by refusing to fund the consequences of the decisions. GARD believes this restriction should be removed from guardians in relation to lifestyle decisions with only minor financial implications by clarifying in the Act that such decisions are 'lifestyle decisions' rather than financial decisions. An example of this is where an impaired person is in receipt of a pension, the impaired

<sup>363</sup> The *Guardianship and Administration Act 2000* (Qld) provides for the resolution of disagreements between a guardian, an administrator and an attorney under an enduring document about the way the power for a matter should be exercised. If the disagreement cannot be resolved by mediation by the Adult Guardian, the Adult Guardian or the guardian, administrator or attorney, may apply for directions to the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 41. See n 317 above.

<sup>364</sup> Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.42]. That recommendation was included as cl 4(5) in that Commission's draft *Guardianship and Management of Property Bill 1989*: Appendix A, 55. However, cl 4(5) was not enacted in the *Guardianship and Management of Property Act 1991* (ACT).

<sup>365</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [6.43] referring to Submission C24. GARD is an informal alliance of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents of People with Disability Inc, Speaking Up For You Inc, Carers Queensland, and Queenslanders with Disability Network. The GARD submission was first made to the Attorney-General and Minister for Justice and was later submitted to the Queensland Law Reform Commission in response to its review.

person's guardian should manage the person's financial affairs, rather than the Public Trustee, to allow for greater flexibility for spending on lifestyle needs.

15.56 The Commission raised for consideration the issue of whether the Act should authorise a guardian to exercise a financial power if the financial matter is ancillary or incidental to a personal matter for which the guardian has power.<sup>366</sup> It also raised the related issue of whether an ancillary power should be exercisable in limited circumstances only — for example, where the financial decision has only a minor financial impact.<sup>367</sup> The Commission noted that, in circumstances where a decision has more than a minor financial impact, it is arguable that the decision should be made by an administrator. It also noted that it may also be difficult for a guardian to assess the relative meaning of a 'minor' financial impact and, therefore, to determine the limits of his or her decision-making power. It further noted that another or an alternative limitation may be that an ancillary financial power should be exercised by a guardian only where there is no administrator appointed. Conversely, the Commission noted that it may not be appropriate for ancillary financial powers to be conferred on a guardian, given that an administrator may be appointed if there is a need for a financial decision to be made.<sup>368</sup>

15.57 The Commission therefore sought submissions about whether the *Guardianship and Administration Act 2000* (Qld) should be amended to enable a guardian to exercise an ancillary financial power for a personal matter.<sup>369</sup>

15.58 The Commission also sought submissions in relation to whether, if the *Guardianship and Administration Act 2000* (Qld) were amended to enable a guardian to exercise an ancillary financial power for a personal matter, the exercise of such a power should be limited in one or more of the following ways:<sup>370</sup>

- where the financial decision has only a minor financial impact;
- where there is no administrator appointed;
- in some other way.

## Submissions

15.59 Pave the Way considered that 'it would make practical sense for the Tribunal to have the power to confer on private guardians limited power for financial

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<sup>366</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [6.43].

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid 94.

<sup>370</sup> Ibid 94–5.

matters, ancillary to their powers as guardian'.<sup>371</sup> However, it considered that the Adult Guardian should not be granted such an ancillary power.

15.60 Queensland Advocacy Incorporated commented that, if a separate guardian and administrator are appointed, everyday lifestyle decisions about what the person needs to live their life can become 'a series of requests, explanations and justifications'.<sup>372</sup>

Whilst a prudent approach to the use of a person's money is important, the outcome should not result in austerity or in having to justify the ordinary expenses of living at a standard which is typical of an ordinary Queenslanders with the capacity to spend a certain defined amount each year.

15.61 Queensland Advocacy Incorporated proposed that.<sup>373</sup>

a more holistic approach to decision-making could be taken with the Act clarifying that ordinary every day decisions about a person's lifestyle which have financial implications remain lifestyle decisions and [can] be made by a guardian, rather than being classified as financial decisions to be made by an administrator. This could be assisted by an annual budget allocation within the person's financial capacity, which the guardian then oversees. Clear direction would need to be given to an administrator not to interfere in this role without good reason.

15.62 The Perpetual Group of Companies submitted that, in principle, it may be sensible to permit minor financial decisions ancillary to lifestyle decisions to be made by a guardian.<sup>374</sup> However, it also considered that the additional responsibility conferred on a guardian under such an approach may affect the appropriateness of a particular candidate as guardian. It also said that it would be difficult to satisfactorily 'delimit what decisions would fall within the purview of the guardian and the administrator respectively, except by limiting the power to where no administrator has been appointed'.

15.63 Several submissions considered that it was unnecessary to amend the *Guardianship and Administration Act 2000* (Qld) to enable a guardian to exercise an ancillary, or incidental, power for a financial matter.<sup>375</sup>

15.64 The Adult Guardian expressed concern about how the issue of whether a financial matter is ancillary or incidental would be determined.<sup>376</sup> A similar concern

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371 Submission 135. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

372 Submission 162. Speaking Up For You Inc, an individual advocacy organisation for people with a disability who live in Brisbane and the Moreton Region, also adopted the recommendations made by Queensland Advocacy Incorporated in its submission.

373 This respondent also suggested that 'the guardian in the lead role would also need to ensure that any decisions made on behalf of the person are congruent with the General Principles of the Act. This would also apply to any major lifestyle decisions that have financial implications such as where a person lives'.

374 Submission 155.

375 Submissions 156A, 164, 165, 179.

376 Submission 164.

was raised by a respondent who is a long-term Tribunal member.<sup>377</sup>

15.65 The Public Trustee commented that he considers his role as administrator is to decide whether the lifestyle or decision is affordable (that is, the adult with the incapacity has sufficient money to meet the proposed enterprise or decision) and then (assuming that there are sufficient funds) the administrator ought to facilitate that decision.<sup>378</sup> He considered that this necessarily involves appropriate communication between administrators and guardians, as required under section 40 of the *Guardianship and Administration Act 2000* (Qld). To that extent, the Public Trustee considered it unnecessary to amend the Act. However, if the Act were amended, the Public Trustee considered that the amendment should reflect that the exercise of the incidental power should have only a minor financial impact as well as being ancillary to the guardian's role.

15.66 One respondent suggested that, if the adult does not have complex financial affairs, the appointment of the same person as both the adult's guardian and administrator should be preferred.<sup>379</sup> This respondent considered that otherwise a guardian should be able to exercise ancillary powers over financial matters if no administrator is appointed.

### The Commission's view

15.67 The Commission does not consider that the *Guardianship and Administration Act 2000* (Qld) should be amended to enable a guardian to exercise an ancillary, or incidental, financial power for a personal matter. While it may appear that the provision of such a power has some practical benefits, it may also create some uncertainties. For example, it may be difficult for a guardian to determine the parameters of what constitutes an 'ancillary' financial decision and the circumstances in which the power should be exercised.

15.68 In addition, a guardian for an adult may be appointed by the Tribunal only if the guardian is competent to make decisions about personal matters for the adult. An administrator is appointed on a similar basis in relation to decisions about financial matters. It is appropriate that the powers for these different types of matters are exercised by substitute decision-makers who have been appointed on the basis of their relative competencies. The Commission also notes that there is nothing in the Act to prevent a person from being appointed as both a guardian and an administrator.

15.69 The *Guardianship and Administration Act 2000* (Qld) imposes a number of restrictions on the exercise of powers by guardians and administrators. These include a requirement to exercise their powers appropriately given the adult's characteristics and needs,<sup>380</sup> and a requirement for a guardian, an administrator or

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377 Submission 179.

378 Submission 156A.

379 Submission 177.

380 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2; *Powers of Attorney Act 1998* (Qld) sch 2 s 2. See now the new General Principle 3(b)(iii) recommended in Chapter 4 of this Report.

an attorney for an adult to consult with any other guardian, administrator or attorney for the adult.<sup>381</sup> An administrator who acts unreasonably in the performance of his or her duties (for example, by unreasonably refusing a request by a guardian in relation to a decision with a financial implication) may be removed on the review of the appointment.

## THE EXERCISE OF POWER FOR AN ADULT WHO HAS FLUCTUATING CAPACITY

15.70 The Queensland guardianship legislation uses the functional approach to defining capacity.<sup>382</sup> This approach is broad enough to recognise both partial capacity (where a person may have capacity for some decisions, but not for others) and fluctuating capacity (where a person's capacity may fluctuate, depending on factors such as his or her mental and physical health,<sup>383</sup> personal strengths, the quality of services and the types and amount of any other support he or she receives).

15.71 The variable nature of decision-making capacity is specifically recognised in the guardianship legislation. The *Guardianship and Administration Act 2000* (Qld) acknowledges that the capacity of an adult with impaired capacity to make decisions may differ depending on:<sup>384</sup>

- the nature and extent of the impairment;
- the type of decision to be made, including its complexity; and
- the support available from members of the adult's existing support network.

15.72 The appointment of a guardian or an administrator for an adult who has fluctuating capacity raises complex and difficult issues.

15.73 The Tribunal's determination of an application for an appointment order may be complicated if the adult has fluctuating capacity. Section 12 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal, in specified circumstances, to appoint a guardian for a personal matter, or an administrator for a financial matter, on terms it considers appropriate. One of the grounds of which the Tribunal must be satisfied before it makes an appointment order is that the adult has impaired capacity for the matter.<sup>385</sup> Consequently, the

381 *Guardianship and Administration Act 2000* (Qld) s 40.

382 Capacity, for a person for a matter, means the person is capable of understanding the nature and effect of decisions about the matter, freely and voluntarily making decisions about the matter and communicating the decisions in some way: *Guardianship and Administration Act 2000* (Qld) sch 4.

383 For example, an adult's capacity to make certain decisions may be impaired at times when he or she is under the influence of, or stops taking, certain medications.

384 *Guardianship and Administration Act 2000* (Qld) s 5(c).

385 *Guardianship and Administration Act 2000* (Qld) s 12(1)(a). The *Guardianship and Administration Act 2000* (Qld) provides that an adult is presumed to have capacity for a matter: sch 1 s 1. The Tribunal may not appoint a guardian or an administrator unless it is satisfied, on the balance of probabilities, that the presumption of capacity is rebutted.

Tribunal's jurisdiction to make an appointment order for an adult who has fluctuating capacity will depend on whether the Tribunal considers that the adult lacks capacity for the matter at the time of the hearing: if the adult has capacity for the matter at the time of the hearing, the Tribunal cannot make the order.<sup>386</sup>

15.74 In addition, while the Tribunal has power to appoint a guardian or an administrator on the terms it considers appropriate,<sup>387</sup> its ability to do so in a way that appropriately takes account of an adult's fluctuating capacity will be limited by the nature and sufficiency of the evidence before it. This may especially be the case where the relevant decisions will need to be made on an ongoing basis for some time into the future.

15.75 If the Tribunal has made an appointment order for an adult, the appointed person is entitled to rely on the Tribunal's finding (in making the order) that the presumption of capacity has been rebutted.<sup>388</sup> Subject to the terms of the appointment order, the appointed person is authorised to do anything in relation to a personal or financial matter (as the case may be) that the adult could have done if he or she had capacity for the matter when the power was exercised.<sup>389</sup> While the making of an appointment order ensures that the appointed person has the legal authority to make relevant decisions for the adult when he or she has impaired capacity, it also deprives the adult of his or her decision-making autonomy for the duration of the order (including during periods when the adult regains capacity). However, the appointed person, when exercising his or her powers under the order, is required to apply the General Principles which, amongst other things, recognise the adult's right to participate in the decision-making process to the greatest extent practicable.<sup>390</sup>

15.76 If the adult has capacity at the time of the hearing, the Tribunal cannot make an appointment order under section 12 of the *Guardianship and Administration Act 2000* (Qld).<sup>391</sup> The lack of an appointment order may pose difficulties if the adult, during a period of incapacity, makes decisions detrimental to his or her health or well-being or financial position. While it may be possible to bring a fresh application for an appointment order during a period when the adult has lost capacity, this approach carries a risk that the adult may have already made

<sup>386</sup> See eg *Re WAE* [2007] QGAAT 72, [22]; *Re SWV* [2005] QGAAT 68, [40]. In *Re SWV*, the Tribunal dismissed an application for administration in relation to an adult who had capacity for the relevant matters at the time of the hearing.

<sup>387</sup> *Guardianship and Administration Act 2000* (Qld) s 12(2). A guardian or an administrator must exercise power as required by any such terms: *Guardianship and Administration Act 2000* (Qld) s 36. Also see s 33 as to the scope of a guardian's or an administrator's authorisation.

<sup>388</sup> *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402, [21]–[26]. See n 346 above.

<sup>389</sup> *Guardianship and Administration Act 2000* (Qld) s 33(1), (2).

<sup>390</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(1). For example, the adult must be given any necessary support and access to information to enable the adult to participate in decisions affecting the adult's life; to the greatest extent possible, the adult's views and wishes must be taken into account; and a person exercising power for the adult must do so in a way least restrictive of the adult's rights: *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3). See now the new General Principles 3(b)(iii), 7-9 recommended in Chapter 4 of this Report.

<sup>391</sup> See eg *Re SWV* [2005] QGAAT 68, [40], in which the Tribunal dismissed an application for administration in relation to an adult who had capacity for the relevant matters at the time of the hearing.



a decision to his or her detriment prior to the application being heard. It may also be necessary in these circumstances to ensure that there is a formal mechanism in place to facilitate or expedite the application process. One option to address these difficulties is for the adult, when he or she has the requisite capacity, to appoint an attorney under an enduring power of attorney to exercise power for one or more of the adult's financial, personal or health matters.<sup>392</sup>

15.77 The nature and extent of problems arising in practice in relation to adults who experience fluctuating capacity raise questions about the circumstances in which guardianship and administration orders for an adult with fluctuating capacity are appropriate and whether the exercise of power by a guardian or an administrator for an adult who has fluctuating capacity should be limited in some way. One option for reform is to adopt the approach taken under the *Powers of Attorney Act 1998* (Qld), which provides that the power for a personal matter under the enduring power of attorney is exercisable by an attorney only during a period when the principal (the adult) has impaired capacity.<sup>393</sup>

15.78 If the Act were amended to provide for such a limitation, a question that arises is whether that limitation should apply to the appointment of both guardians and administrators or to the appointment of guardians only. The appointment of an administrator or a guardian in this way may pose some difficulties in practice. Under such an order, the appointee's power would be enlivened only during a period when the adult lacks the requisite capacity. This raises the issues of who should bear the responsibility for proving the issue of capacity in particular circumstances, and how, and in what circumstances, capacity should be assessed. It may also be difficult for third parties to determine, at any given time, whether the appointee, or the adult, has the legal authority to make decisions. There may be particular difficulties associated with the appointment of an administrator due to the formal, and often legal, nature of some financial decisions. For example, a financial institution may be uncertain about whether the administrator or the adult has the legal authority to make financial decisions at any particular time. These are difficulties, however, which may also arise in relation to the operation of some enduring powers of attorney.

15.79 The practical difficulties associated with the application of guardianship legislation to adults with fluctuating capacity have been recognised by other law reform bodies.<sup>394</sup> The Australian Law Reform Commission considered that 'the

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In an enduring power of attorney, a principal may assign to his or her nominated attorney or attorneys decision-making power for some or all financial or personal matters, including health matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). A principal cannot, however, give power to an attorney for 'special health matters' or 'special personal matters': *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

An attorney may exercise his or her assigned power with respect to personal matters only during a period when the principal no longer has capacity for the particular matter: *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3). The power for financial matters becomes exercisable either at the time or in the circumstance the principal nominates in the document, or otherwise, once the enduring power of attorney is made: *Powers of Attorney Act 1998* (Qld) s 33(1), (2).

However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000* (Qld) s 66.

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See n 392 above.

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Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) 66; Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.32].

solution lies in the Tribunal fashioning an order which is appropriate to the circumstances'.<sup>395</sup> That Commission also noted that a guardian or a manager, faced with implementing an order which attempts to cater for fluctuating capacity, may always come back to the Tribunal for advice or for a modification to the terms of the order.<sup>396</sup>

15.80 On that view, it may be unnecessary to make special provision under the Act to limit the powers exercisable by a guardian or an administrator who is appointed for an adult with fluctuating capacity. The Tribunal may make an appointment on such terms as it considers appropriate.<sup>397</sup> In addition to this broad discretion, the Act specifically provides that the Tribunal may appoint 'a person to act as appointee for a matter or all matters in a stated circumstance'.<sup>398</sup>

## Discussion Paper

15.81 In the Commission's Discussion Paper, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, the Commission sought submissions on the nature and extent of any problems arising in practice in relation to adults who experience fluctuating or episodic capacity.<sup>399</sup>

15.82 The Commission subsequently sought submissions on whether:<sup>400</sup>

- the *Guardianship and Administration Act 2000* (Qld) should provide for the exercise of the power by a guardian or an administrator for an adult with fluctuating capacity to be limited in some way and, if so, whether the powers should be exercisable only during a period the adult has impaired capacity; and
- if the *Guardianship and Administration Act 2000* (Qld) were amended to provide for such orders, whether those orders should apply to the appointment of both guardians and administrators or to the appointment of guardians only.

## Submissions

15.83 A number of submissions considered that fluctuating capacity poses problems in practice.<sup>401</sup>

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395 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.32].

396 Ibid.

397 *Guardianship and Administration Act 2000* (Qld) s 12(2).

398 *Guardianship and Administration Act 2000* (Qld) s 14(4)(c).

399 Queensland Law Reform Commission, *Shaping Queensland's Guardianship System: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 136.

400 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 97.

401 Submissions 1A, 9, 12, 14, 24, 42, 45, 52, 53, 64, 69, 70, 71, 73, 81, 91.

15.84 The former Public Advocate commented on the practical difficulties of making substitute decisions for an adult who has fluctuating capacity.<sup>402</sup>

A person with dementia, especially in the earlier stages, will probably have capacity at some times for some decisions. For example, some adults will be generally cognitively higher functioning at particular times in the day, often the morning. Some may function better in their own environment rather than at unfamiliar places. Should attempts be made to have all decisions made in the mornings when the adult may have capacity?—inevitably this will not always be possible. Although it would best respect the rights of the adult, to appoint a guardian/administrator who can only act in the afternoons presents some practical difficulties for the adults affected, their [substitute decision-makers] and those third parties with whom they deal.

15.85 Queensland Alliance commented that an adult who is subject to an appointment order may regain capacity while the order is in force.<sup>403</sup>

Fluctuating capacity raises the possibility that an adult could be under guardianship when they have re-attained capacity in the area that it has been taken away. A finding of a lack of capacity should be time limited and the review process as simple as possible for adults to initiate and expedient in its timeframes.

15.86 The Endeavour Foundation considered that fluctuating capacity is a complex issue. It suggested that the legislation should provide for the following distinct categories of decision-making capacity.<sup>404</sup>

- lifetime impaired capacity (to enable ongoing guardianship);
- diminishing capacity (for example, as in the case of dementia), which would require a re-assessment of a person's capacity over time; and
- fluctuating capacity (for example, in some mental health instances), which would necessitate activation of an 'interim' guardianship order in particular circumstances.

15.87 The Queensland Law Society commented that one of the practical challenges faced by practitioners is assessing the fluctuating capacity of their clients and the significant task of constantly seeking medical opinions in situations of doubt. Nevertheless, the Queensland Law Society also considered that 'the issue of assessing capacity in a fluctuating adult is appropriate for the development of specific guidance for legal practitioners and is best dealt with by education and materials rather than reform of the legislation'.<sup>405</sup>

15.88 A number of respondents considered that the *Guardianship and Administration Act 2000* (Qld), as it is currently drafted, is flexible enough to deal

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402 Submission 91.

403 Submission 64A.

404 Submission 163.

405 Submission 168.

with the appointment of a guardian or an administrator for an adult who has fluctuating capacity.<sup>406</sup>

15.89 The Adult Guardian considered that the practical issues involved would make it difficult to fashion a specific legislative response to the issue of fluctuating capacity. She suggested that it was an issue that ‘needs to be managed by the appointment of an appropriate decision-maker and, to the extent that it is able, by the order including appropriate terms of appointment’. The Adult Guardian also commented that:<sup>407</sup>

Within our practice the Adult Guardian manages this issue by trying to engage with adults during times that they have capacity to allow them, to the extent possible, to make their own decisions. The role of the guardian in that context is to ensure implementation of those decisions and, where possible, a consistent approach in other decision-making when the adult does not have capacity.

15.90 The Adult Guardian also commented that, if the Act were amended to provide for special orders in relation to adults with fluctuating capacity, there would seem to be no basis for discriminating between guardians and administrators in this context.

15.91 The Public Trustee considered that there is already sufficient scope under the Act for the Tribunal to fashion an order appropriate in the circumstances where an adult suffers fluctuating capacity. For various reasons, the Public Trustee considered it undesirable to amend the Act to make special provision in these circumstances.<sup>408</sup>

It would be a burdensome requirement for administrators and guardians to determine before exercising powers, that the adult at any particular juncture where a decision needed to be made did or did not have capacity.

A general position giving scope to administrators’ powers only when there is an incapacity in these circumstances will indeed concern third parties with whom the adult needs to transact business — banking institutions in particular.

The Tribunal has broad discretion to fashion appropriate orders and it also lies in the Public Trustee’s views at the suit of the administrator or guardian to visit on the Tribunal an application for review should the existing appointment not recognise the capacity or likely capacity of an adult.

15.92 On the other hand, several respondents considered that the *Guardianship and Administration Act 2000* (Qld) should be amended to make special provision for such limited orders.<sup>409</sup> The Endeavour Foundation submitted that limited orders should apply to the appointment of both guardians and administrators.<sup>410</sup> Another

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406 Submissions 5, 19, 90, 91, 156A, 164.

407 Submission 164.

408 Submission 156A.

409 Submissions 163, 165, 177.

410 Submission 163.

respondent considered that they should apply only to guardians, given the practical issues involved for adults who have fluctuating capacity in dealing with financial institutions.<sup>411</sup>

15.93 The former Public Advocate commented that, despite the practical difficulties involved, there is an argument that it should be possible to appoint a guardian to exercise powers for an adult who has fluctuating capacity, similar to the way in which an attorney may be appointed under an enduring power of attorney to exercise powers for a personal matter for an adult during periods of incapacity.<sup>412</sup>

However, it is noted that the [*Powers of Attorney Act 1998* (Qld)], which provides for an attorney/s for personal matters to act only when capacity is impaired, requires [a substitute decision-maker] to re-assess the capacity of the adult before acting on any occasion under an EPA. This being so, as inconvenient and practically difficult as it may be, there are arguments that in the case of fluctuating capacity guardians could/should be appointed to act only during periods when the adult has impaired capacity. What justification is there for adults with attorneys to be placed in a different position than those adults with appointed guardians?

15.94 As an alternative option, the former Public Advocate suggested that the current regime for appointing guardians and administrators may be sufficient if a 'longitudinal view' of capacity is taken:

The alternative is for a longitudinal view to be taken of capacity in the case of a degenerative illness such as dementia, so that if the adult has impaired capacity for significant periods throughout a day, they are considered to have impaired capacity. This is arguably less respectful of the adults' rights (since even during periods when the adults have capacity, the [substitute decision-maker] can make decisions for them) but probably more practically workable. If the adult's views and wishes were often determinative of the decisions made (as has been argued in this submission should be the case), then there may be less basis for concern.

Regarding persons who have impaired capacity as a result of mental illness, it is often the case that the adult will be acutely unwell for a time until medication is changed, adjusted or reaches therapeutic levels. Once the episode of illness is resolved, the adult may regain capacity for all decision-making. However, there are delays in having guardians and administrators appointed and similarly reviewing the appointments after a period of illness has been resolved. Accordingly, by the time a hearing occurs and [a substitute decision-maker] is appointed, a significant portion of the time for which [a substitute decision-maker] is required may have passed and by the time a review of the appointment is listed, the adult may have had capacity for all matters for some time. Similar comments may be made regarding persons who experience a brain injury (for example, a stroke or a car accident) for whom significant recovery of function may occur over the months following the injury.

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411 Submission 177.

412 Submission 91.

### The Commission's view

15.95 As mentioned above, the making of an appointment order for an adult who has fluctuating capacity, and its effect into the future, raises complex and difficult issues. On the one hand, it involves a consideration of the adult's basic human rights and, in particular, the right to decision-making autonomy, and, on the other, a consideration of the adult's other interests and needs, including the need to safeguard the adult against neglect (including self-neglect), abuse or exploitation.

15.96 Section 12 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian or an administrator for an adult for a matter only if the Tribunal is satisfied, amongst other things, that the adult has impaired capacity for the matter. The Commission understands that the Tribunal has sometimes made an appointment order if it is established that the adult has a history of intermittent periods of impaired capacity.<sup>413</sup> The application of this approach, however, will largely depend on both the nature and extent of the adult's condition and the nature and sufficiency of the evidence before the Tribunal about the adult's condition. It also raises issues about the extent to which it is appropriate to make a finding of impaired capacity for an adult for some time into the future when it is anticipated that the adult will have capacity for some of that time.

15.97 The making of an appointment order for an adult who has fluctuating capacity may unduly impact on the adult's autonomy. A guardian or an administrator who is appointed for a matter under section 12 of the Act is entitled to rely on the Tribunal's finding that the presumption of capacity is rebutted and is not required to apply the presumption of capacity when making decisions for an adult for the matter.<sup>414</sup> It is arguable that this approach is not justified in the situation where the adult may regain capacity for the matter intermittently while he or she is subject to an appointment order. In addition, the conferral of decision-making power on the appointee effectively removes the adult's decision-making autonomy for the duration of the order (including during periods when the adult has regained capacity). This means that the appointee will always be recognised as having the legal authority to make the relevant decisions for the adult, even though, at the relevant time, the adult may have capacity to make the decision. Further, even though the appointee may have given effect to the adult's views and wishes when making a decision, the decision is nevertheless that of the appointee rather than the adult.

15.98 In light of these considerations, the Commission is of the view that the current scheme for appointing a guardian or an administrator under the *Guardianship and Administration Act 2000* (Qld) does not give sufficient recognition to the rights and interests of adults who have fluctuating capacity.

15.99 The Commission therefore considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to specifically provide that, when making an order to appoint a guardian or an administrator for an adult who has

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413 Information provided by Ms Clare Endicott, Senior member, Queensland Civil and Administrative Tribunal 24 February 2010.

414 See n 346 above.

fluctuating capacity, the Tribunal may limit the exercise of the appointee's powers to periods when the adult has impaired capacity. This approach is consistent with the scheme for appointing an attorney for personal matters under an enduring power of attorney.

15.100 The appointment of a guardian or an administrator on these limited terms is also consistent with article 12 of the United Nations *Convention of the Rights of Persons with Disabilities*, which requires that any restriction on the adult's exercise of legal capacity must be 'proportional and tailored to the person's circumstances'.<sup>415</sup>

15.101 A guardian or an administrator is generally entitled to rely on the Tribunal's finding (when making the order for his or her appointment) that the presumption that the adult has capacity for the matter has been rebutted and is not required to apply the presumption of capacity when making decisions for an adult for the matter. This approach, however, does not reflect the fact that the adult who has fluctuating capacity may well regain capacity during the period of the order. The Commission therefore considers that the Act should be amended to provide that, if the Tribunal has made an appointment order which stipulates that an appointee's power for a matter depends on the adult having impaired capacity for the matter, the guardian or administrator must apply the presumption of capacity when exercising power for the adult.

15.102 If the presumption of capacity is applied and not rebutted, the adult will have decision-making power for the matter. If the presumption of capacity is applied and is rebutted, the appointee will have decision-making power for the period during which the adult has impaired capacity. In the latter case, the appointee, when exercising decision-making power for the adult, is also required to apply the General Principles, which recognise the adult's right to participate in the decision-making process to the greatest extent practicable.<sup>416</sup>

15.103 The Commission also considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision, similar in effect to section 33(5) of the *Powers of Attorney Act 1998* (Qld), that, if an appointee's power for a matter depends on the adult having impaired capacity for the matter, a person dealing with the adult may ask for evidence, for example, a medical certificate, to establish that the adult has impaired capacity. Such a provision may help to address the issue of uncertainty when the appointee or the adult (as the case may be) is dealing with a third party.

15.104 Section 56 of the *Guardianship and Administration Act 2000* (Qld) is a general provision that applies where there has been a change in a power conferred

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<sup>415</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12.

<sup>416</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(1). For example, the adult must be given any necessary support and access to information to enable the adult to participate in decisions affecting the adult's life; to the greatest extent possible, the adult's views and wishes must be taken into account; and a person exercising power for the adult must do so in a way least restrictive of the adult's rights: *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3). See now the new General Principles 3(b)(iii), 7-9 recommended in Chapter 4 of this Report.

on a guardian or an administrator (for example, because the power has been suspended or the guardian or administrator has been removed) which renders the subsequent exercise of the power by the guardian or the administrator invalid. In certain circumstances, section 56 provides protection from liability for a guardian or an administrator and preserves the validity of third party transactions. The Commission considers that section 56 should be amended to ensure that it deals with a change in a power conferred on a guardian or an administrator that arises because the Tribunal has appointed the guardian or the administrator to exercise a power for an adult during periods when the adult has impaired capacity and the guardian or the administrator purports to exercise the power during a period when the adult has capacity.

15.105 One of the requirements that the Tribunal must adhere to when making an appointment order, is that it must do so in the way least restrictive of the adult's rights.<sup>417</sup> Amongst other things, this requires the Tribunal to make the order for the shortest possible time. In the context of an appointment order made for the period during which an adult has impaired capacity, it is also open for the Tribunal to include in the order a condition to the effect that the guardian or administrator must make an application to review the order, as soon as is practicable, if it appears to the guardian or administrator that the adult has regained capacity and it is reasonably contemplated that the adult will continue to have capacity in the foreseeable future (or that the adult has impaired capacity and is unlikely to regain it).

15.106 The Commission also notes that an appointment order for an adult with fluctuating capacity that limits the exercise of the appointee's power to a time when the adult has impaired capacity for the matter would be an exceptional and specific type of appointment order made only when the circumstances justify it. In keeping with the least restrictive approach, the Tribunal would be required to consider other alternatives before making such an appointment. For example, it may be that some decisions may be able to be delayed until a later time when the adult regains capacity. Alternatively, the adult may be able to make an enduring power of attorney when he or she has the capacity to do so.

## THE EFFECTIVENESS OF A HEALTH CARE DECISION MADE BY A GUARDIAN

15.107 Section 33(1) of the *Guardianship and Administration Act 2000* (Qld) provides:

### **33 Power of guardian or administrator**

- (1) Unless the tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.

417

*Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). See now the new General Principle 7(b) recommended in Chapter 4 of this Report.



15.108 The situation can arise where an adult's guardian demands health care for the adult that the adult's health provider considers is inconsistent with good medical practice. This raises the issue of the effectiveness of a decision made by a guardian.

15.109 As a matter of construction, it would seem that a decision by an adult's guardian could not be more effective than one made by the adult if he or she had capacity. As explained in Chapter 9 of this Report, a competent adult does not ordinarily have the power at common law to compel the provision of health care that has not been offered.<sup>418</sup> As a result, the fact that an adult may demand a particular treatment does not create a duty for the health provider to give the treatment. As the English Court of Appeal explained in *R (Burke) v General Medical Council*.<sup>419</sup>

In so far as a doctor has a legal obligation to provide treatment this cannot be founded simply upon the fact that the patient demands it. The source of the duty lies elsewhere.

15.110 However, section 66(3) of the *Guardianship and Administration Act 2000* (Qld) provides that, if subsection (2) does not apply and the Tribunal has appointed one or more guardians for the matter, 'the matter may only be dealt with by the guardian or guardians ... '.

15.111 In Chapter 9, the Commission referred to the similar situation that may arise where an adult's advance health directive gives a direction requiring particular health care and the adult's health provider considers that the required health care would be inconsistent with good medical practice. The Commission observed that, while section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) does not give a direction requiring health care any greater effect than such a direction would have at common law if given by a competent adult, some ambiguity arises from the terms of sections 65(2) and 66(2) of the *Guardianship and Administration Act 2000* (Qld). Those sections provide that, if the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with in accordance with the direction.<sup>420</sup>

15.112 The Commission made several recommendations to avoid the tension between section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) and sections 65 and 66 of the *Guardianship and Administration Act 2000* (Qld).

15.113 To emphasise the limitations that apply to a demand for treatment made by a competent adult, the Commission recommended that section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a direction in an advance health directive is as effective as, *but no more effective than*, if the matters in section 36(1)(b)(i) and (ii) apply.<sup>421</sup>

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418 See [9.28]–[9.31] above.

419 [2006] QB 273, 296.

420 See [9.324]–[9.327] above.

421 See Recommendation 9-3(a) of this Report.

15.114 The Commission also recommended that:<sup>422</sup>

- section 65 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 65(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld); and
- section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld).

15.115 The Commission considered that an advantage of this approach was that it could be adapted to address the similar situation that may arise where an adult's substitute decision-maker requests health care for the adult that the health provider considers is inconsistent with good medical practice.

### The Commission's view

15.116 In order to avoid any ambiguity about the scope of a guardian's authority under section 33(1) of the *Guardianship and Administration Act 2000* (Qld) in relation to the exercise a power for a health matter for an adult, the Commission considers that section 33 of the Act should be amended by inserting a new subsection to the effect that:<sup>423</sup>

A guardian's exercise of power for a health matter for the adult is as effective as, but no more effective than, if:

- (a) the adult exercised the power for the matter when a decision about the matter needed to be made; and
- (b) the adult then had capacity for the matter.

15.117 Further, section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(3) is subject to section 33 of the *Guardianship and Administration Act 2000* (Qld).

## THE SCOPE OF THE DUTIES OF GUARDIANS AND ADMINISTRATORS

15.118 The *Guardianship and Administration Act 2000* (Qld) seeks to balance the right of an adult with impaired capacity to the greatest possible degree of autonomy

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See Recommendations 9-19, 9-20 of this Report.

423

The proposed provision is similar in effect to s 110ZD(9) of the *Guardianship and Administration Act 1990* (WA), which provides:

**110ZD Circumstances in which person responsible may make treatment decision**

...

- (9) A treatment decision made by the person responsible for the patient has effect as if—
  - (a) the treatment decision had been made by the patient; and
  - (b) the patient were of full legal capacity.

in decision-making and the adult's right to adequate and appropriate support in decision-making. The Act confers potentially broad decision-making powers on guardians and administrators. In order to ensure that these powers are exercised in the adult's interests, the Act also imposes a number of concomitant and other duties, or requirements, on appointees.

15.119 One of the primary duties imposed under the Act on a guardian or an administrator is to act 'honestly and with reasonable diligence to protect the adult's interests'.<sup>424</sup> This duty reflects the standard of responsibility ordinarily expected from a person who acts as another's agent. This standard requires that a guardian or an administrator must not act for his or her own benefit but for the benefit of the adult.<sup>425</sup>

15.120 Guardians and administrators are also required to:<sup>426</sup>

- apply the General Principles contained in the legislation (and, the Health Care Principle, if relevant);
- act jointly if more than one (unless the Tribunal orders otherwise), and act unanimously if joint;
- consult regularly with other persons who are a guardian, an administrator or an attorney (including a statutory health attorney) for the adult; and
- exercise his or her power as required by the terms of the appointment order.

15.121 The Act also imposes a number of additional duties on administrators that would appear to reflect the general duty to act honestly and with reasonable diligence to protect the adult's interests. For example, an administrator is required to keep his or her property separate from the adult's property<sup>427</sup> and to avoid conflict transactions.<sup>428</sup> An administrator is also required to keep financial records and to produce those records if ordered to do so by the Tribunal.<sup>429</sup>

15.122 The duties imposed on guardians and administrators promote particular purposes sought to be achieved by the Act. For example, the requirement to apply the General Principles is a safeguard for the adult's rights and interests. Amongst other things, these principles provide a set of decision-making guidelines which require a substitute decision-maker to preserve the adult's autonomy to the

424 *Guardianship and Administration Act 2000* (Qld) s 35.

425 PD Finn, *Fiduciary Obligations* (1977) [28]. See eg *Re BAB* [2007] QGAAT 19, [50]; and *Re JK* [2005] QGAAT 58, [48]–[53] in which the Tribunal commented that attorneys and administrators, respectively, are in a fiduciary relationship with the principal.

426 See [15.17] above.

427 This requirement does not apply if the property is jointly owned by the adult and the administrator: *Guardianship and Administration Act 2000* (Qld) s 50(2).

428 *Guardianship and Administration Act 2000* (Qld) s 37. A similar provision, which applies to attorneys, is included in the *Powers of Attorney Act 1998* (Qld) s 73. Conflict transactions are discussed in Chapter 17 of this Report.

429 *Guardianship and Administration Act 2000* (Qld) s 49.

maximum extent possible. Additional examples are the general obligation to act in the adult's interests, and the specific obligation of an administrator to avoid conflict transactions. These duties constitute a safeguard against abuse, neglect or exploitation of the adult and the dissipation or exploitation of the adult's property.

## Discussion Paper

15.123 In the Discussion Paper, the Commission sought submissions about whether the duties imposed by the *Guardianship and Administration Act 2000* (Qld) on guardians and administrators are adequate and appropriate or whether they should be changed in some way.<sup>430</sup>

## Submissions

15.124 Several respondents, including the Adult Guardian, generally regarded the duties imposed on both guardians and administrators as adequate and appropriate.<sup>431</sup> The Perpetual Group of Companies considered that the duties imposed on administrators are appropriate.<sup>432</sup>

15.125 The Public Trustee, while generally agreeing with this view, raised a concern about the frequency with which administrators, and attorneys under enduring powers of attorney, enter into transactions which otherwise would constitute 'conflict transactions' pursuant to the Act.<sup>433</sup> The Perpetual Group of Companies also submitted that attorneys and administrators should be given similar protection for non-compliance with the requirements of the guardianship legislation.<sup>434</sup> These issues are discussed in Chapter 17 of this Report.

15.126 Carers Queensland suggested that an administrator's reporting requirements should be simplified if the adult concerned has limited funds.<sup>435</sup> It also considered that the minimum reporting requirement should be to ensure that the 'best interests' of the adult are being served by the expenditure.

## The Commission's view

15.127 In its submission, the Public Trustee raised concerns about the level of compliance of administrators and attorneys with their duty to avoid conflict transactions. In Chapter 17 of this Report, the Commission has made a series of recommendations for reform to address these and other concerns.

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430 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 99.

431 Submissions 164, 165, 177.

432 Submission 155.

433 Submission 156.

434 Submission 155.

435 Submission 146.

15.128 The Commission considers that the duties imposed on guardians and administrators by the *Guardianship and Administration Act 2000* (Qld) are otherwise generally appropriate.

15.129 Some submissions have raised concerns about the obligation of an administrator to keep records, and, if required by the Tribunal, to produce records of dealings and transactions involving the adult's property that are reasonable for inspection. The Commission considers that this requirement is appropriate. Although, in some cases, the duty to account may be burdensome, it is necessary to have an adequate level of regulatory oversight to ensure that the adult's interests are safeguarded.

15.130 Given that administrators have an obligation to keep records and to produce those records if required, it is important that administrators are given adequate information and assistance to enable them to perform their role and functions properly. In this regard, the Commission also notes that the Tribunal has recently commenced holding information sessions for private administrators on a regular basis. One of the purposes of these sessions is to give private administrators information about the General Principles administrators should apply in their role, how to manage gifts, keeping records and conflict transactions and the various financial forms which must be completed and lodged.<sup>436</sup>

15.131 QCAT has continued the practice of the Guardianship and Administration Tribunal of requiring a private administrator to submit accounts for audit annually.<sup>437</sup> Depending on the amount of the adult's assets under administration, these accounts are assessed by the Tribunal (for estates valued at under \$50 000) or professional auditors (for estates valued at over \$50 000). The Commission considers these arrangements to be generally sufficient to safeguard the adult's interests.

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436 Queensland Civil and Administrative Tribunal, Administration for adults matters, *Information sessions*, <<http://www.qcat.qld.gov.au/information-sessions.htm>> at 30 September 2010.

437 See Presidential Direction No 1 of 2003 (adopted as a practice direction under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) by QCAT Practice Direction No 8 of 2010) in relation to the provision of accounts of administration for private administrators, which provides that accounts of administration are to be provided in an approved form to the Tribunal (where the value of the adult's estate excluding the adult's principal place of residence or a nursing home bond is under \$50 000) or to one of the approved panel of examiners on (where the value of the adult's estate excluding the adult's principal place of residence or nursing home bond is over \$50 000) an annual basis: Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2003* <[http://www.qcat.qld.gov.au/Publications/2003-1\\_Acc\\_Admin\\_Priv.pdf](http://www.qcat.qld.gov.au/Publications/2003-1_Acc_Admin_Priv.pdf)> at 30 September 2010; Queensland Civil and Administrative Tribunal, *Practice Direction No 8 of 2010* <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 30 September 2010. See also Presidential Direction No 1 of 2007 (adopted as a practice direction under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) by QCAT Practice Direction No 10 of 2009) in relation to the provision of accounts of administration for the Public Trustee and trustee companies under the *Trustee Companies Act 1968* (Qld), which requires these administrators to provide a briefing report to the Tribunal (where the value of the adult's estate excluding the adult's principal place of residence is under \$300 000) or to the Tribunal's approved examiner (where the value of the adult's estate excluding the adult's principal place of residence is over \$300 000): Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2007* <[http://www.qcat.qld.gov.au/Publications/2007-1\\_Acc\\_PTO.pdf](http://www.qcat.qld.gov.au/Publications/2007-1_Acc_PTO.pdf)> at 30 September 2010; Queensland Civil and Administrative Tribunal, *Practice Direction No 8 of 2010* <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 30 September 2010.

## CONSULTATION WITH OTHER GUARDIANS, ADMINISTRATORS OR ATTORNEYS

15.132 Section 40 of the *Guardianship and Administration Act 2000* (Qld) requires a guardian, an administrator or an attorney for an adult to consult regularly with other persons who are a guardian, an administrator or an attorney for the adult. This requirement for consultation is intended to ensure that, where different decision-makers have been appointed for an adult, the appointees adopt a cooperative and constructive approach towards decision-making for the adult.

15.133 Section 40 provides:

### 40 Consult with adult's other appointees or attorneys

- (1) If there are 2 or more persons who are guardian, administrator or attorney for an adult, the persons must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them.
- (2) However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney.
- (3) In this section—

**attorney** means an attorney under an enduring document or a statutory health attorney.

15.134 The South Australian legislation requires guardians and administrators to keep each other informed of decisions or actions of a substantial nature. Section 75 of the *Guardianship and Management Act 1993* (SA) provides:

Where both a guardian and an administrator have been appointed under this Act in respect of the same person, each must endeavour to keep the other informed of decisions or actions of a substantial nature taken in pursuance of powers under this Act.

15.135 Section 40(1) of the *Guardianship and Administration Act 2000* (Qld) requires regular consultation between substitute decision-makers. The South Australian legislation is narrower in its scope because it simply requires guardians or administrators to keep each other informed about substantial decisions made or actions taken in the exercise of their powers.

15.136 Section 40(2) of the Act provides that a failure to comply with section 40(1) does not affect the validity of the exercise of decision-making power by a guardian, an administrator or an attorney.

## Discussion Paper

15.137 In the Discussion Paper, the Commission noted that, in a submission to the Attorney-General and Minister for Justice, the Guardianship and Administration Reform Drivers ('GARD') had suggested that, in practice, section 40(2) of the

*Guardianship and Administration Act 2000* (Qld) weakens the effect of the requirement to consult under section 40(1).<sup>438</sup>

15.138 Section 40 of the Act does not provide that failure to comply with that section is an offence. The Commission noted that, while the requirement to consult may seem less significant without specific provision for its enforcement, it may be unnecessary to make specific provision about a person's failure to comply because of existing review mechanisms.<sup>439</sup> For example, the appointment of a guardian or an administrator may be revoked by the Tribunal if the appointee is no longer competent because the appointee has neglected his or her duties or has otherwise contravened the *Guardianship and Administration Act 2000* (Qld). It noted that there may also be practical difficulties in attempting to enforce the application of a subjective requirement.<sup>440</sup>

15.139 In the Discussion Paper, the Commission sought submissions in relation to whether section 40 of the *Guardianship and Administration Act 2000* (Qld) is appropriate or should be changed in some way.<sup>441</sup>

## Submissions

15.140 A number of respondents, including those of the Adult Guardian and the Public Trustee, expressed the view that section 40 appropriately states the requirement for consultation.<sup>442</sup> The Adult Guardian also commented that:<sup>443</sup>

It is not a requirement that is capable of enforcement but it does reflect upon the appropriateness of the decision-maker.

15.141 The Public Trustee also commented that there have been relatively few concerns raised with him about any failure to communicate or consult effectively with other decision-makers in the roles of attorney or guardian.<sup>444</sup> To the extent that the Discussion Paper outlined concerns about compliance with the requirement to consult, the Public Trustee postulated that they spoke to the issue of consulting more generally with the adult's support network.

15.142 One respondent suggested that:<sup>445</sup>

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438 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [6.65] referring to Submission C24.

439 Ibid.

440 Ibid.

441 Ibid 101.

442 Submissions 155, 156A, 164, 165.

443 Submission 164.

444 Submission 156A.

445 Submission 177.

if there is conflict among the appointees the Tribunal may make it a requirement that the dates of consultations among the appointees, and the matters discussed and resolved at those discussions be reported to the Tribunal at the end of the first year of the appointment. The Tribunal may extend this requirement if circumstances indicate a need.

### **The Commission's view**

15.143 The Commission considers that the consultation requirement in section 40 of the *Guardianship and Administration Act 2000* (Qld) is appropriate as it currently stands.

15.144 The Act should not be amended to provide for the imposition of a penalty for non-compliance with section 40. It would be preferable to rely on the existing review mechanisms under the Act. As noted above, the appointment of a guardian or an administrator may be revoked on the basis that he or she is no longer competent or has neglected his or her duties under the Act (for example, by breaching the requirement to consult other guardians, administrators or attorneys under section 40 or breaching the requirement to apply the General Principles including the requirement to maintain the adult's existing supportive relationships).<sup>446</sup>

## **RECOMMENDATIONS**

### ***The exercise of power for an adult who has fluctuating capacity***

**15-1** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, when making an order to appoint a guardian or an administrator (an 'appointee') for an adult who has fluctuating capacity, the Tribunal may limit the exercise of the appointee's powers to periods when the adult has impaired capacity.

<sup>446</sup>

*Guardianship and Administration Act 2000* (Qld) sch 1 s 8. See now the new General Principle 4 recommended in Chapter 4 of this report. New General Principle 4(1), which restates existing General Principle 8, states that the importance of maintaining an adult's existing supportive relationships must be taken into account. New General Principle 4(2) specifies that maintaining an adult's existing supportive relationships may, for example, involve consultation with persons who have an existing supportive relationship with the adult or members of the adult's support network who are making decisions for the adult on an informal basis or both.



**15-2** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Tribunal has made an appointment order which stipulates that an appointee's power for a matter depends on the adult having impaired capacity for the matter, the guardian or administrator must apply the presumption of capacity when exercising power for the adult.

**15-3** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Tribunal has made an appointment order which stipulates that an appointee's power for a matter depends on the adult having impaired capacity for the matter, a person dealing with the adult may ask for evidence, for example, a medical certificate, to establish that the adult has impaired capacity.

**15-4** Section 56 of the *Guardianship and Administration Act 2000* (Qld) should be amended to ensure that it deals with a change in a power conferred on a guardian or an administrator that arises because the Tribunal has appointed the guardian or the administrator to exercise a power for an adult during periods when the adult has impaired capacity and the guardian or the administrator purports to exercise the power during a period when the adult has capacity.

***The effectiveness of a health care decision made by a guardian***

**15-5** Section 33 of the *Guardianship and Administration Act 2000* (Qld) should be amended by inserting a new subsection to the effect that:

A guardian's exercise of power for a health matter for the adult is as effective as, but no more effective than, if:

- (a) the adult exercised the power for the matter when a decision about the matter needed to be made; and
- (b) the adult then had capacity for the matter.

**15-6** Section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(3) is subject to section 33 of the *Guardianship and Administration Act 2000* (Qld).<sup>447</sup>

447

See also the related recommendations that deal with the effect of s 66(2), (4) and (5) of the *Guardianship and Administration Act 2000* (Qld): Recommendations 9-19, 9-20, 10-7, 16-10 of this Report.



# Chapter 16

## Enduring powers of attorney

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## INTRODUCTION

16.1 The Commission's terms of reference direct it to review the law relating to enduring powers of attorney as part of its review of the law on personal, financial and health care decision-making under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>448</sup>

16.2 This chapter gives an overview of the current scheme for enduring powers of attorney in Queensland, followed by an outline of similar measures in other jurisdictions. It also deals with specific issues about the legislative scheme for enduring powers of attorney. Some of these issues relate to attorneys, including attorneys appointed under advance health directives and, in some instances, to statutory health attorneys.<sup>449</sup>

## BACKGROUND

16.3 A general power of attorney is a formal arrangement by which an adult (called the donor or principal) gives authority to another person (called an attorney)

<sup>448</sup> The terms of reference are set out in Appendix 1.

<sup>449</sup> Advance health directives are considered in Chapter 9 of this Report and statutory health attorneys are considered in Chapter 10.

to act on his or her behalf. Traditionally, a power of attorney gave authority in relation to business matters.<sup>450</sup>

16.4 The usefulness of a general power of attorney is limited by two factors. The first is that a general power of attorney is automatically revoked upon the loss of the principal's capacity to manage his or her affairs.<sup>451</sup> This means that a person cannot use a general power of attorney to provide for the future management of his or her affairs in the event of his or her incapacity.

16.5 In many jurisdictions, this limitation was overcome by the statutory creation of enduring powers of attorney that continue to have effect beyond the loss of the principal's capacity.<sup>452</sup> In some cases, the attorney's authority is enlivened only if the principal's decision-making capacity becomes impaired.<sup>453</sup>

16.6 The second limitation of a general power of attorney is that its subject matter does not extend to personal matters.<sup>454</sup> This limitation has been overcome in some jurisdictions by enabling a principal to make an enduring power of attorney for certain personal or health care matters.<sup>455</sup>

16.7 Enduring powers of attorney have several advantages.<sup>456</sup> They are private arrangements that reserve the choice of substitute decision-maker to the adult and minimise the need for intervention by the Tribunal or the court. They are also relatively inexpensive and simple. The passing of decision-making power to a third party in a private arrangement, however, involves a potential for neglect or abuse and a resultant need for safeguards. Many aspects of the legislative scheme for enduring powers of attorney are directed to that end.

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450 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 93.

451 *Powers of Attorney Act 1998* (Qld) s 18(1). This reflects the rule at common law: B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 222.

452 In Queensland, enduring powers of attorney were first introduced by the *Property Law Act Amendment Act 1990* (Qld) s 6 which inserted a new division into the *Property Law Act 1974* (Qld). As to the other Australian jurisdictions, see [16.23]–[16.27] below. An enduring power of attorney which continues notwithstanding the principal's incapacity is also sometimes referred to as a 'continuing', 'lasting' or 'durable' power of attorney.

453 This is sometimes referred to as a 'springing power of attorney' because it springs into effect on the principal's loss of capacity.

454 *Powers of Attorney Act 1998* (Qld) s 8(1). At common law, there was also some doubt whether a principal could delegate authority to make decisions about the principal's personal life rather than his or her business affairs: B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 42.

455 In Queensland, the extension of the subject matter of enduring powers of attorney to personal and health matters was introduced by the *Powers of Attorney Act 1998* (Qld) s 32(1)(a). As to the other Australian jurisdictions, see [16.24]–[16.25] below. See also eg *Protection of Personal and Property Rights Act 1988* (NZ) s 98; *Powers of Attorney Act 1996* (Ireland) s 6(6).

456 Generally, see Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 83–4; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 93–4.

16.8 It is difficult to determine with accuracy the rate of uptake of enduring powers of attorney. However, research conducted in Queensland has recently been relied on for the following statistics:<sup>457</sup>

- Queensland has the highest uptake of enduring powers of attorney of all Australian States and Territories. The national figure is approximately 11 per cent of the population while in Queensland it is approximately 16 per cent.
- There is a slightly higher proportion of people who live in Brisbane who have an enduring power of attorney (17.6 per cent) than those living outside the capital city (16.8 per cent).
- Of those people in Queensland who have an enduring power of attorney, a significant proportion are over 65 years old (approximately 42 per cent) while approximately 44 per cent are aged between 35 and 64 years, and only 13 per cent are under 35 years old.

16.9 Barriers to the uptake of enduring powers of attorney include lack of knowledge about power of attorney provisions, fear of exploitation, family dynamics and difficulties in thinking about future incapacity or advance planning.<sup>458</sup> The Adult Guardian undertakes community education to raise awareness about enduring powers of attorney.<sup>459</sup>

## THE LAW IN QUEENSLAND

16.10 Chapter 3 of the *Powers of Attorney Act 1998* (Qld) provides for the making of enduring powers of attorney. By an enduring power of attorney, a principal may appoint an attorney to exercise power for one or more of the principal's financial, personal or health matters.<sup>460</sup> Authority may be given for anything that the principal could lawfully do by an attorney if the principal had capacity for the matter. The principal may also stipulate terms for the exercise of

457 Public Advocate Queensland, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law* (5 December 2006) 7 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub76.pdf>> at 2 September 2010 citing research on the management of assets of older people conducted by the University of Queensland School of Social Work and supported by the Australian Research Council in partnership with the Queensland Department of Families, Public Trustee, Guardianship and Administration Tribunal, Adult Guardian, and Public Advocate (ARC Linkage Grant LP0216561 Management of Assets of Older People, Principal Investigators Dr C Tilse, Dr J Wilson, Dr D Setterlund and Professor L Rosenman).

458 D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 3.

459 Office of the Adult Guardian, *Annual Report 08–09* (2009) 74–5. The provision of education and advice about the guardianship legislation is one of the Adult Guardian's statutory functions: *Guardianship and Administration Act 2000* (Qld) s 174(2)(h).

460 *Powers of Attorney Act 1998* (Qld) s 32. See also s 69(3) in relation to the execution of instruments by an attorney.

an attorney's powers. In the absence of such stipulations, the attorney will be taken to have the maximum power that could be given by the document.<sup>461</sup>

16.11 Section 32 of the Act provides:

**32 Enduring powers of attorney**

- (1) By an **enduring power of attorney**, an adult (principal) may—
- (a) authorise 1 or more other persons who are eligible attorneys (**attorneys**) to do anything in relation to 1 or more financial matters or personal matters<sup>32</sup> for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and
- (b) provide terms or information about exercising the power.
- (2) An enduring power of attorney<sup>33</sup> giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter.

32 *Personal matters* includes health matters but does not include special personal matters or special health matters—schedule 2, section 2.

33 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

16.12 A principal may also appoint an attorney in an advance health directive 'to exercise power for a health matter for the principal in the event the directions in the directive prove inadequate'.<sup>462</sup> This is in addition to the principal's ability to make a general appointment for an attorney for personal or financial matters. Advance health directives are specifically discussed in Chapter 9, but many of the issues raised later in this chapter relating to attorneys also apply to attorneys appointed under advance health directives.

16.13 An attorney's power for a personal or health matter is exercisable only during a period when the principal has impaired capacity for the matter.<sup>463</sup> On the other hand, power for a financial matter is exercisable:<sup>464</sup>

- at the time, or in the circumstance, specified in the enduring power of attorney; or
- if no time or circumstance is specified, once the enduring power is made; or

461 *Powers of Attorney Act 1998* (Qld) s 77.

462 *Powers of Attorney Act 1998* (Qld) s 35(1)(c). The approved form for making an advance health directive, however, allows a principal, by use of that form, to appoint an attorney to exercise powers for health or other personal matters generally: *Powers of Attorney Act 1998* (Qld) s 442, form 4 <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0007/15982/advance-health-directive.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0007/15982/advance-health-directive.pdf)> at 2 September 2010.

463 *Powers of Attorney Act 1998* (Qld) s 33(4).

464 *Powers of Attorney Act 1998* (Qld) s 33(1)–(3).

- if the adult has impaired capacity for the matter before the time or circumstance specified in the enduring power of attorney, during any or every period the adult has impaired capacity.

16.14 The principal may appoint one or more attorneys and may appoint different attorneys for different matters:<sup>465</sup>

**43 Appointment of 1 or more eligible attorneys**

- (1) Only a person who is an eligible attorney<sup>45</sup> may be appointed as an attorney by an enduring document.
- (2) A principal may appoint 1 or more of the following—
  - (a) a single attorney for a matter or all matters;
  - (b) different attorneys for different matters;
  - (c) a person to act as an attorney for a matter or all matters in a circumstance stated in the enduring document;
  - (d) alternative attorneys for a matter or all matters so power is given to a particular attorney only in a circumstance stated in the enduring document;
  - (e) successive attorneys for a matter or all matters so power is given to a particular attorney only when power given to a previous attorney ends;
  - (f) joint or several, or joint and several, attorneys for a matter or all matters;
  - (g) 2 or more joint attorneys for a matter or all matters, being a number less than the total number of attorneys for the matter or all matters.

45 See section 29 (Meaning of *eligible attorney*).

16.15 Jointly appointed attorneys must exercise their power unanimously unless the enduring power of attorney provides otherwise.<sup>466</sup> If two or more attorneys are appointed and the enduring power of attorney does not specify how power is to be shared between them, the appointment is taken to be a joint appointment.<sup>467</sup>

16.16 The legislation imposes eligibility requirements for the appointment of attorneys.<sup>468</sup> For example, an attorney must be at least 18 years old. It also imposes other formal requirements for the execution of an enduring power of

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465 *Powers of Attorney Act 1998* (Qld) s 43.

466 *Powers of Attorney Act 1998* (Qld) s 80(1).

467 *Powers of Attorney Act 1998* (Qld) s 78.

468 *Powers of Attorney Act 1998* (Qld) ss 29(1), 43(1).



attorney in relation to the principal's capacity, the use of a prescribed form, and witnessing.<sup>469</sup>

16.17 An enduring power of attorney may be revoked. For example, an enduring power of attorney may be revoked in writing by the principal or by operation of law, such as where the principal dies or makes another enduring power of attorney that is inconsistent with the first.<sup>470</sup> An enduring power of attorney may also be revoked to the extent that it relates to a particular attorney if the attorney resigns, dies, loses capacity or becomes bankrupt.<sup>471</sup> However, the principal cannot revoke an enduring power of attorney if he or she no longer has capacity.<sup>472</sup>

16.18 The legislation imposes certain duties on the exercise of an attorney's power. These are generally reflective of the principles of the law of agency.<sup>473</sup> For example, attorneys must act honestly and with reasonable diligence to protect the principal's interests, and must exercise power subject to the terms of the appointing document.<sup>474</sup>

16.19 Attorneys must also apply the General Principles and the Health Care Principle, consult with any other attorneys or any guardians or administrators for the principal, and maintain confidential information.<sup>475</sup>

16.20 Other duties apply specifically to attorneys appointed for financial matters. For example, attorneys must keep accurate records and accounts, must keep the attorney's property separate from the principal's property, and must not, unless authorised, enter into conflict transactions.<sup>476</sup> There are also limitations on the types of investments and gifts an attorney may make and the extent to which an attorney may provide for the needs of a dependant of the principal.<sup>477</sup>

469 *Powers of Attorney Act 1998* (Qld) ss 32(1), 41, 44. The capacity and witnessing requirements are examined in Chapter 8 of this Report.

470 *Powers of Attorney Act 1998* (Qld) ss 47, 49, 50–54. An attorney must not exercise a power if he or she knows it has been revoked: s 71. The maximum penalty for breach of this provision is 200 penalty units.

471 *Powers of Attorney Act 1998* (Qld) ss 55–59AA. As to when an attorney may resign, see ss 72, 82.

472 *Powers of Attorney Act 1998* (Qld) s 47.

473 An enduring power of attorney continues should the principal's capacity become impaired. This position reverses the common law, which is that the agency created under a power of attorney comes to an end if the principal's capacity becomes impaired: S Fisher, *Agency Law* (2000) [12.2.4] citing *The Matter of Campbell* (SC(Qld), Demack J No 59 of 1996, 7 February 1997, unreported).

474 *Powers of Attorney Act 1998* (Qld) ss 66(1), 67.

475 *Powers of Attorney Act 1998* (Qld) ss 76, 79, 74. The General Principles and the Health Care Principle are considered in Chapters 4 and 5 of this Report. The general duty of confidentiality was the subject of recommendations in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, ch 8.

476 *Powers of Attorney Act 1998* (Qld) ss 85, 86, 73(1). A conflict transaction is one which may involve conflict between the duty of the attorney toward the principal and either the interests of the attorney or a relation, business associate or close friend of the attorney, or another of the attorney's duties: s 73(2). Conflict transactions are discussed in Chapter 17 of this Report.

477 *Powers of Attorney Act 1998* (Qld) ss 84, 88, 89.

16.21 The *Powers of Attorney Act 1998* (Qld) contains provisions addressing the extent to which attorneys will be held liable for breaching their duties<sup>478</sup> and includes provisions to protect third parties who rely on the actions of an attorney in certain circumstances.<sup>479</sup>

16.22 Provisions for the proof and registration of enduring powers of attorney and the recognition of similar instruments made in other jurisdictions are also included in the *Powers of Attorney Act 1998* (Qld).<sup>480</sup>

## THE LAW IN OTHER JURISDICTIONS

16.23 Each of the other Australian jurisdictions makes provision for enduring powers of attorney in relation to a person's financial matters.<sup>481</sup>

16.24 In the ACT, a principal may also appoint an attorney for personal care or health care matters.<sup>482</sup> Provision is also made in South Australia and Victoria for special enduring powers of attorney for medical treatment decisions.<sup>483</sup>

16.25 In addition, the legislation in New South Wales, South Australia, Tasmania and Victoria allows a person to appoint an 'enduring guardian' to act as the person's guardian for personal and health matters if he or she loses decision-making capacity.<sup>484</sup> Similar provision has recently been made in Western Australia.<sup>485</sup> These measures correspond to the provisions in Queensland allowing the appointment of an attorney for health matters in an enduring document.

16.26 While there are rudimentary similarities between the jurisdictions on some matters, such as the minimum formal requirements for the making of enduring powers of attorney<sup>486</sup> and the primary duties of attorneys,<sup>487</sup> there is greater

478 *Powers of Attorney Act 1998* (Qld) ss 97, 98, 105. See also *Guardianship and Administration Act 2000* (Qld) s 24(1).

479 *Powers of Attorney Act 1998* (Qld) ss 99, 100, 101. See also *Guardianship and Administration Act 2000* (Qld) ss 24(2), 77.

480 *Powers of Attorney Act 1998* (Qld) ss 34, 45, 60.

481 *Powers of Attorney Act 2006* (ACT) ss 8, 13(2); *Powers of Attorney Act 2003* (NSW) s 19; *Powers of Attorney Act* (NT) s 13; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) ss 30(1), 31(1); *Instruments Act 1958* (Vic) s 115; *Guardianship and Administration Act 1990* (WA) s 104.

482 *Powers of Attorney Act 2006* (ACT) s 13(2).

483 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(1), (7); *Medical Treatment Act 1988* (Vic) s 5A(1)(a), (aa), (2).

484 *Guardianship Act 1987* (NSW) ss 6, 6E(1); *Guardianship and Administration Act 1993* (SA) s 25(1), (5); *Guardianship and Administration Act 1995* (Tas) s 32(1), (5); *Guardianship and Administration Act 1986* (Vic) ss 35A(1), 35B.

485 *Guardianship and Administration Act 1990* (WA) pt 9A.

486 For example, the requirement for an enduring power of attorney to be executed in the prescribed manner, signed by the principal, witnessed, and signed by the appointee: see eg, *Powers of Attorney Act 2006* (ACT) ss 13(1), 19, 23; *Powers of Attorney Act 2003* (NSW) ss 8, 19(1)(b), (c), 20, sch 2; *Powers of Attorney Act* (NT) ss 6(2), (4), 13(b), 14. The precise details of those requirements differ between the jurisdictions.

divergence on other issues such as the registration of enduring powers of attorney and recognition of interstate instruments.

16.27 Where relevant, the legislation in other jurisdictions is referred to throughout the chapter.

## ACHIEVING THE RIGHT BALANCE

16.28 Enduring powers of attorney are intended to provide people with a simple, inexpensive means to plan for their future. They are consistent with the principles of autonomy and least restrictive intervention in the lives of adults with impaired capacity by recognising private arrangements made in advance and minimising the need to resort to public guardianship and administration procedures. The importance of autonomy and least restrictive means is recognised in the *Convention on the Rights of Persons with Disabilities* (the 'Convention').<sup>488</sup>

16.29 Enduring powers of attorney can also be a useful preventative strategy against future abuse, neglect or exploitation by allowing people to appoint someone they trust to take care of their affairs should they become unable to do so themselves. Because adults can stipulate when power for a financial matter is exercisable, an enduring power of attorney can also assist adults who, although they retain capacity may otherwise be vulnerable and in need of assistance.

16.30 To minimise the risk of misuse of enduring powers of attorney, however, there is a need for legislative safeguards. For example, an adult may be pressured or lulled into making an enduring power of attorney without really understanding the significance of doing so.<sup>489</sup> Alternatively, an attorney might fail to use the power appropriately — either deliberately or out of ignorance of his or her duties.<sup>490</sup> It has been said, for example, that:<sup>491</sup>

the potential for abuse may arise due to the limited understanding of the provisions by those who had arranged an Enduring Power of Attorney, the complete trust placed in families or professionals to act in their best interests, and the processes involved in using an Enduring Power of Attorney.

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487 In particular, the obligation to protect the principal's interests or act in the principal's best interests: see eg, *Powers of Attorney and Agency Act 1984* (SA) s 7; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8); *Powers of Attorney Act 2000* (Tas) s 32(1) and elsewhere.

488 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, arts 3(a), 12(4). The Convention is considered in Chapter 3 of this Report.

489 Eg L Willmott and L Windle, 'Witnessing EPAs: Empirical Research' (2007) 27 *Queensland Lawyer* 238, 242 in which it was reported that enduring documents are sometimes executed by principals who do not have capacity. See also L Willmott and B White, 'Solicitors and enduring documents: Current practice and best practice' (2008) 16 *Journal of Law and Medicine* 466, 485.

490 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.47], [3.48].

491 D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 4.

16.31 The South African Law Commission has identified a fourfold purpose for safeguards to address these issues:<sup>492</sup>

First, to provide sufficient evidence that an enduring power has been granted.

Second, to protect the principal against fraud and undue influence when signing the enduring power. Because a person may execute an enduring power while in a vulnerable state, measures must be provided for to protect the principal from pressure to appoint a self-interested agent.

Third, to ensure that principals granting enduring powers properly understand the full implications of granting such powers. Lack of knowledge and understanding of the effect of an enduring power is apparently one of the greatest problems faced by other jurisdictions with regard to enduring powers.

Fourth, to deal with the risk of mismanagement (whether negligent or fraudulent) by the agent after the principal has become incapacitated. Unlike the position under an ordinary power of attorney, the principal under an enduring power can no longer supervise decision-making by the agent and scrutinise the actions of the agent in the way that a person with full capacity can. Protective devices are thus necessary to guard against exploitation.

16.32 Protection of adults with impaired capacity from abuse, neglect and exploitation is expressly recognised in the Convention<sup>493</sup> and in the General Principles of the guardianship legislation.<sup>494</sup>

16.33 It is also important to balance the need for safeguards with the availability of enduring powers of attorney as a convenient means of advance planning. The Alberta Law Reform Institute has stated, for example, that:<sup>495</sup>

It is necessary to recognize that, short of a comprehensive and completely state-administered and state-guaranteed system of administration of the property of incapacitated persons, there is no way to give a 100% guarantee that no person who administers the affairs of an incapacitated person, including an attorney appointed by an [enduring power of attorney], will abuse the powers given to that person. Reasonable safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of cases in which it is utilized.

16.34 An issue for consideration is whether the current legislative scheme achieves the right balance between appropriate safeguards and providing an

492 South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.49].

493 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 16. The Convention is considered in Chapter 3 of this Report.

494 The General Principles are considered in Chapter 4 of this Report.

495 Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Report No 88 (2003) [23]. See also Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [12].

accessible form of advance planning. The key features of the legislative scheme are described at [16.10]–[16.22] above and safeguards include:

- execution safeguards such as a requirement for writing, a witness's certificate as to the principal's capacity,<sup>496</sup> a formal acceptance of the appointment by the attorney, and the use of a prescribed form;
- eligibility and termination safeguards such as the prohibition on a person who is bankrupt from acting as an attorney for financial matters, and the ability for the principal to revoke the enduring power of attorney while he or she retains capacity;
- the imposition of a number of duties on attorneys including the obligation to exercise power honestly and with reasonable diligence to protect the principal's interests, to take account of the adult's views and wishes, and to consult with other appointees for the adult; and
- supervisory and accounting safeguards such as the obligation on attorneys for financial matters to keep accurate records of all transactions and dealings, and the Adult Guardian's power to instigate an audit of accounts and to suspend an attorney's power in certain circumstances.

16.35 Despite the existing measures taken in the legislation to guard against misuse, there is some evidence to suggest that enduring powers of attorney may contribute to, or fail to protect against, abuse in some cases. The Public Trustee, for example, has identified enduring powers of attorney 'as the main source of financial abuse' of older people<sup>497</sup> and the Adult Guardian reports that 'most complaints made to the Adult Guardian are about financial abuse by attorneys under an enduring power of attorney'.<sup>498</sup>

16.36 An analysis of Tribunal case files has also suggested that older people with enduring powers of attorney are not always protected from financial abuse.<sup>499</sup> That research involved an analysis of 234 cases heard between November 2002 and June 2003 involving adults with impaired capacity aged 65 years and older and in respect of whom an administration order was made. The cases were classified as either non-financial abuse cases or suspected financial abuse cases. Cases were classified as suspected financial abuse cases if there were concerns about the current asset management arrangements for the older person but only if there was substantial data in the files to classify them in this way.<sup>500</sup> The researcher

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496 The witnessing requirements are considered in Chapter 8 of this Report.

497 See Public Advocate Queensland, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (5 December 2006) 6.

498 Adult Guardian Queensland, 'Concerns about abuse' <<http://www.justice.qld.gov.au/1331.htm>> at 31 October 2009.

499 A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' 8(1) (2006) *The Journal of Adult Protection* 20.

500 *Ibid* 25.

used the following definition of abuse in nominating cases as either non-financial abuse or suspected financial abuse cases:<sup>501</sup>

any act, or failure to act, which results in a significant breach of a vulnerable person's rights, civil liberties, bodily integrity, dignity or well-being, whether intended or inadvertent, including ... financial transactions to which the person has not or cannot validly consent or which are deliberately exploitative.

16.37 Suspected financial abuse cases comprised approximately 26 per cent of the total sample with a mixture of both intentional and inadvertent suspected financial abuse.<sup>502</sup>

In the majority of SFA [suspected financial abuse] cases, the older person with impaired capacity was subject to 'asset stripping' (77%: n=46). In other cases (23%: n=14), the abuser was more likely to financially abuse through ignorance of expected asset management procedures or the fact that they too, like the older person for whom they were asset managing, had some personal decision-making disability. An example of this would be where the older person with impaired capacity is being asset managed by their partner who is also suspected of having failing capacity.

16.38 In the majority (79 per cent) of the case files analysed, the older person did not have, or was not known to have, an enduring power of attorney.<sup>503</sup> This was consistent with the fact that the applications were often made to the Tribunal because of concerns that financial management arrangements had not been put in place or because there were no family members available to assist the adult.<sup>504</sup> However, in 65 per cent of the cases identified as suspected financial abuse cases, the adult had executed an enduring power of attorney.<sup>505</sup>

Enduring powers of attorney were almost twice as likely to occur within SFA [suspected financial abuse] cases (65%) as within NFA [non-financial abuse] cases (35%). The greater presence of EPAs in SFA cases suggests that having an attorney did not protect the older person with impaired capacity from financial abuse. In some cases, EPAs were not directly used to access the older person's assets for financial abuse. However, if the EPA was donated and the attorney was aware of financial abuse or irregularities, then a lack of intervention by the attorney in such cases was considered abusive for the purposes of the research because it clearly contravened the obligations of the attorney to safeguard the older person's assets.

16.39 The researcher concluded that proactive measures with respect to education, monitoring and intervention are required to address financial abuse.<sup>506</sup>

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501 Ibid.

502 Ibid 26.

503 Ibid 27.

504 Ibid.

505 Ibid 28.

506 Ibid 30.

It is not argued here that all people who are attorneys are dishonest. Neither is it suggested that all older people and their assets need monitoring. Particular focus is needed upon those with impaired capacity. Families are managing the assets of older people with impaired capacity and most are doing so in a capable fashion. However, there are some who are using their formal and semi-formal mechanisms in abusive ways either through ignorance of legal requirements or an intentional decision to take over the older person's assets. Best practice would ensure that the family members are supported and monitored in their asset management. The tension in such situations is ensuring that the older person with impaired capacity is safeguarded against financial abuse whilst not making the task of supporting the older person so onerous that a family is not willing to undertake the task.

16.40 The researcher also acknowledged that the results of that study cannot be generalised to the whole population of older people with impaired capacity.<sup>507</sup> The research was limited to a sample of Tribunal case files of older adults who had an administration order made by the Tribunal. In addition, in considering an application for administration, the Tribunal is not required to make a specific finding about financial abuse, but must instead apply a set of more general criteria focusing on whether an appointment is necessary to meet the adult's needs or protect the adult's interests with respect to a particular decision or decisions.<sup>508</sup> As a consequence, the classification of particular cases as involving suspected financial abuse was made on the researcher's interpretation of the case files. Further, applications are usually made to the Tribunal only if there is a concern about the inadequacy or inappropriateness of existing decision-making arrangements; it is to be expected that those cases in which enduring powers of attorney are working well would not ordinarily find their way to the Tribunal.

16.41 Caxton Legal Centre Inc has explained, for example, that 'while we sometimes encounter abuse of EPAs, we tend to see even more problematic cases where people have never made an EPA'.<sup>509</sup> In addition, in a study by the Australian Institute of Criminology of older people's knowledge and experiences of substitute decision-making processes and abuse, most participants whose relatives used an enduring power of attorney on their behalf reported positive experiences.<sup>510</sup> Research conducted in Queensland has also suggested, however, that older people have a limited understanding of the law relating to enduring powers of attorney, making them more vulnerable to financial abuse.<sup>511</sup>

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507 Ibid 25.

508 *Guardianship and Administration Act 2000* (Qld) s 12(1).

509 Caxton Legal Centre Inc, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (February 2007) 22 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub112.pdf>> at 3 September 2010.

510 D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 4.

511 D Setterlund, C Tilse and J Wilson, 'Older people and substitute decision making legislation: limits to informed choice' (2002) 21(3) *Australasian Journal on Ageing* 128. That research involved interviews and focus groups with a sample of 377 people comprised of older people and their families living in Brisbane and South West rural Queensland and residents living in aged care facilities and retirement villages and their family carers in Brisbane.

## Discussion Paper

16.42 In the Discussion Paper, the Commission raised as an issue for general consideration whether the current legislative scheme for enduring powers of attorney achieves the right balance between the utility of an advance planning mechanism and the need for safeguards against abuse. It also asked if it is considered that the current scheme does not achieve the right balance, how the balance might be improved.<sup>512</sup> In raising this issue, it also noted the importance of considering the role of non-legislative measures, such as continued community education, in preventing misuse of enduring powers of attorney.<sup>513</sup>

## Submissions

16.43 The submissions were divided in their views about whether the current legislative scheme for enduring powers of attorney achieves the right balance between the utility of an advance planning mechanism and the need for safeguards against abuse.

16.44 The majority of submissions expressed concern or dissatisfaction about some aspect of the operation of the current legislative scheme for enduring powers of attorney.<sup>514</sup> These included, generally, the problem of financial abuse of older persons by their attorneys<sup>515</sup> and, specifically, the making of enduring powers of attorney,<sup>516</sup> the occurrence of conflict transactions,<sup>517</sup> the regulation and supervision of attorneys,<sup>518</sup> and the general level of community education and awareness in relation to the nature and effect of an enduring power of attorney.<sup>519</sup>

16.45 The Adult Guardian considered that the prevalence of elder abuse is an emerging problem within the community:<sup>520</sup>

The view of the Adult Guardian is that ... there is a significant amount of abuse perpetrated by attorneys which is never reported and never investigated. [The problem] will be exacerbated over the next few years by the exponential increase in those aged over 65 in comparison with other age groups in the community and the commensurate pressure on funding. Simply put, more and more adults as they age will need to consider private arrangements for substitute decision-making and the community will need to take steps to

512 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 165.

513 Ibid [9.42].

514 Submissions C5, C22, C42, C59, C72, C124, C140, 2A, 4, 25, 48, 60, 72, 75, 78, 90, 105, 138, 156A, 162.

515 Submissions C5, C22, C42, C72, C124, C141, 25, 48, 50, 75, 90, 138, 164.

516 Submissions 50, 60, 138, 115A.

517 Submissions C42, 72, 156A. The issue of conflict transactions is discussed in Chapter 17 of this Report.

518 Submissions C5, C22, C59, C72, C124, C140, 4, 25, 48, 72, 75, 78, 90, 156A.

519 Submission 60. The issues of training and support for substitute decision-makers and community education and awareness are discussed in Chapter 30 of this Report.

520 Submission 164.



safeguard those adults and create public confidence in the system. Within our office, the Adult Guardian has accepted appointments as attorney for about a 1000 Queenslanders who have no one else in their life suitable or willing to take the appointment: about 17 of those appointments are currently operative.

During 2008/09 the Adult Guardian conducted 203 investigations. Allegations of abuse were substantiated in 77 matters resulting in, inter alia, suspension of 21 Enduring Powers of Attorney. Referrals to our service were made by family members in 41% of matters and service providers in 25% of matters. Often the non-payment of nursing home fees is a trigger for an investigation.

The validity of enduring powers of attorney continues to be a major focus for investigations.

16.46 The Public Trustee proposed a range of legislative measures for improving the current scheme, including providing for attorneys to be subject to a similar level of Tribunal oversight to that which applies to administrators, and a penalty for a breach of the conflict transaction provisions where the transaction results in a loss to the adult.<sup>521</sup>

16.47 The Public Trustee also suggested that non-legislative measures, such as community education and continuing professional development for lawyers may also help to prevent the misuse of enduring powers of attorney.

16.48 On the other hand, the Department of Communities, the Perpetual Group of Companies and the Trustee Corporations Association of Australia each considered that the current scheme achieves the right balance.<sup>522</sup> However, the Perpetual Group of Companies suggested that the balance might be improved by 'better education of attorneys and principals, and perhaps more ready access to free information and advice for families concerned about the conduct of an attorney, is more likely to safeguard principals against abuse than more prescriptive legislation'.<sup>523</sup>

### The Commission's view

16.49 The current scheme for enduring powers of attorney involves a balance between the utility of an advance planning mechanism and the need for safeguards against abuse, neglect or exploitation. One of the features that make enduring powers of attorney attractive as an advance planning tool — their relative informality and lack of Tribunal or court involvement — also increases the potential for their abuse. It is therefore important that the scheme for enduring powers of attorney contains sufficient safeguards to help discourage, prevent and detect such abuse.

16.50 During the course of this review, a number of concerns have been raised with the Commission about various aspects of the scheme for enduring powers of

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521 Submission 156A.

522 Submissions 155, 158, 169.

523 Submission 155.

attorney. One common concern related to the problem of financial abuse of older persons by their relatives or attorneys. Other concerns related to the legislative provisions dealing with the creation of an enduring power of attorney and the adequacy of existing legislative safeguards against the misuse of an enduring powers of attorney.

16.51 In light of these concerns, the Commission has made a range of recommendations in this Report to assist in the prevention of abuse in the creation of enduring powers of attorney and the improper use of enduring powers of attorney. While some of these recommendations propose modifying some of the existing legislative safeguards, others propose new measures to help prevent abuse. In formulating these recommendations, the Commission has been mindful that the abuse of enduring powers of attorney is a serious problem, but ideally, it should not be remedied in ways that make the scheme for enduring powers of attorney more complicated or costly.

16.52 In Chapter 8 of this Report, the Commission has recommended legislative reforms to help prevent abuse in the creation of enduring powers of attorney, including:

- clarifying the statutory test for the capacity to make an enduring power of attorney;<sup>524</sup> and
- strengthening the witnessing requirements for enduring documents.<sup>525</sup>

16.53 The Commission has made recommendations designed to prevent the improper use of enduring powers of attorney. These include legislative measures to:

- exclude a person from being eligible to be an attorney if the person has been
  - a paid carer for the principal within the previous three years;<sup>526</sup> or
  - convicted on indictment for an offence involving personal violence or dishonesty in the previous 10 years;<sup>527</sup>
- clarify the scope of conflict transactions and an attorney's duty to avoid conflict transactions;<sup>528</sup> and

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524 See Recommendations 8-1, 8-5, 8-7 of this Report.

525 See Recommendations 8-8 to 8-13 of this Report.

526 See Recommendation 16-4 of this Report.

527 See Recommendation 16-5 to 16-6 of this Report.

528 See Recommendations 17-1 to 17-11 of this Report.

- expand the legislative remedies available for non-compliance with an attorney's duties under the *Powers of Attorney Act 1998* (Qld).<sup>529</sup>

16.54 The Commission has also recommended that the Criminal Code (Qld) should be amended to provide for an increased penalty for an attorney who commits fraud against his or her principal.<sup>530</sup> It has also recommended that consideration be given, as a matter of priority, to the development of a new criminal offence dealing with the financial abuse and exploitation of vulnerable persons.<sup>531</sup>

16.55 In recognition of the fact that some of the difficulties with enduring documents arise from a lack of knowledge or understanding of the legal requirements and operation of enduring powers of attorney rather than the actual law, the Commission has also emphasised the importance of ensuring that principals and attorneys are given comprehensive information about the key features of an enduring power of attorney and the role, powers and duties of an attorney. Accordingly, the Commission has recommended that the approved forms should be redrafted to more clearly explain these matters.<sup>532</sup> The Commission has also emphasised the importance of giving attorneys adequate support and training to assist them in fulfilling their role,<sup>533</sup> and in educating the wider community about the use and operation of enduring powers of attorney.<sup>534</sup>

## ELIGIBLE ATTORNEYS

### The law in Queensland

16.56 Section 29 of the *Powers of Attorney Act 1998* (Qld) sets out the eligibility requirements for an attorney appointed under an enduring power of attorney or under an advance health directive:

#### **29 Meaning of eligible attorney**

- (1) An eligible attorney, for a matter under an enduring power of attorney, means—
- (a) a person who is—
- (i) at least 18 years; and
- (ii) not a paid carer, or health provider, for the principal;<sup>28</sup>  
and

<sup>529</sup> See Recommendations 17-16 to 17-17 of this Report.

<sup>530</sup> See Recommendation 17-18 of this Report.

<sup>531</sup> See Recommendation 17-19 of this Report.

<sup>532</sup> See Recommendations 16-11 to 16-13 of this Report. These matters also include that the principle may elect to nominate particular persons who must be notified of the activation of the power of attorney.

<sup>533</sup> See [30.169]–[30.170] below.

<sup>534</sup> See Recommendation 30-21 of this Report.

- (iii) not a service provider for a residential service where the principal is a resident; and
    - (iv) if the person would be given power for a financial matter—not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
  - (b) the public trustee; or
  - (c) a trustee company under the *Trustee Companies Act 1968*; or
  - (d) for a personal matter only—the adult guardian.
- (2) An eligible attorney, for a matter under an advance health directive, means—
- (a) a person who has capacity for the matter who is—
    - (i) at least 18 years; and
    - (ii) not a paid carer, or health provider, for the principal;<sup>29</sup> or
  - (b) the public trustee; or
  - (c) the adult guardian.

28 *Paid carer and health provider* are defined in schedule 3 (Dictionary).

29 *Paid carer and health provider* are defined in schedule 3 (Dictionary).

### **Capacity for appointment as an attorney**

16.57 Section 29(2)(a) of the *Powers of Attorney Act 1998* (Qld) provides that an eligible attorney for a matter under an advance health directive is a person who, in addition to other specified requirements, ‘has capacity for the matter’. However, section 29(1)(a), which sets out the requirements for an eligible attorney for a matter under an enduring power of attorney, does not include a similar requirement. This would appear to be a drafting oversight.<sup>535</sup>

### **General requirements for eligibility**

16.58 The eligibility requirements are designed to ensure at least a minimum degree of competency in undertaking the responsibilities conferred on an attorney, for example, in relation to financial transactions.

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There is no suggestion in the *Powers of Attorney Act 1998* (Qld) that a person may be appointed as an attorney for a matter under an enduring power of attorney if the person has impaired capacity for the matter. On the contrary, s 56 of the Act, which applies both to enduring powers of attorney and advance health directives, provides that, if an attorney for a matter becomes a person who has impaired capacity for the matter, the enduring document is revoked to the extent that it gives power to the attorney for the matter.

16.59 The restrictions on eligibility are also intended to minimise conflicts between the interests of the attorney and the interests of the principal:<sup>536</sup>

The general rule is that attorneys' decisions must be in the best interests of the principal. This is called a fiduciary obligation or obligation of good faith and is the prime obligation imposed by law on attorneys. It follows that attorneys must not be people with interests which conflict with those of the principal. Thus someone like a Director of Nursing, or the superintendent of a hostel, or person in charge of supported accommodation should never be appointed as attorney. Such a person has financial interests which conflict with those of the principal.

## Discussion Paper

16.60 In the Discussion Paper, the Commission noted that, while the tenor of the eligibility requirements in section 29 would appear to be generally appropriate, an issue for consideration is whether any additional eligibility requirements should be imposed.<sup>537</sup> It also noted that the eligibility requirements for an attorney under section 29 are largely consistent with those for the appointment of a guardian or an administrator.<sup>538</sup> Sections 14 and 15 of the *Guardianship and Administration Act 2000* (Qld) additionally provide, however, that when deciding whether a person is appropriate for appointment as a guardian or an administrator, the Tribunal must have regard, among other things, to:<sup>539</sup>

- (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
- (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else.

16.61 The Discussion Paper<sup>540</sup> also noted that, in the application form, the proposed guardian or administrator must sign a statutory declaration with respect to a number of issues, including that he or she does not have 'any criminal history, in Queensland or elsewhere' and has not been 'refused or removed from an

<sup>536</sup> R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 103.

<sup>537</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.47], 169.

<sup>538</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1) provides that a person is not eligible for appointment as a guardian or an administrator unless the person is at least 18 years, not a health provider or a paid carer for the adult and, for appointment as an administrator, is not bankrupt or taking advantage of the laws of bankruptcy. This issue is discussed in Chapter 14 of this Report.

<sup>539</sup> *Guardianship and Administration Act 2000* (Qld) s 15(4)(a), (b). Also see ss 14(1)(c), 15(1)(g).

<sup>540</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.48].

appointment as a guardian, administrator, attorney or other person making a decision for someone else' in Queensland or elsewhere.<sup>541</sup>

16.62 The Commission also sought submissions about whether a person with a relevant criminal or other history should be ineligible for appointment as a person's attorney.<sup>542</sup> The Commission noted that this may help protect adults against abuse or exploitation by unscrupulous attorneys. For example, a person with a history of family violence or abuse may be unsuitable for appointment as attorney for a family member. Similarly, a person convicted of fraud may be unsuitable for appointment as a financial attorney.

16.63 The Manitoba Law Reform Commission has recently recommended the inclusion of provisions disqualifying certain persons from acting as financial attorneys under an enduring power of attorney. That Commission recommended, like the Queensland eligibility requirements, the disqualification of a person who provides personal care or health care services to the principal for compensation or who is an employee at a facility in which the principal resides and through which he or she receives personal care or health care services. It also recommended disqualification of:<sup>543</sup>

an individual who has been convicted within the previous 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust, unless the individual has been pardoned or the donor, in writing, acknowledges the conviction and consents to the individual acting.

16.64 That Commission considered such provisions an important safeguard in the context of financial decision-making where 'the potential for a conflict of interest is high'.<sup>544</sup>

16.65 The Discussion Paper noted that a similar provision may be useful in Queensland, and sought submissions on how to define the type of past conduct or findings on which ineligibility should depend.<sup>545</sup> It noted, for example, not all criminal convictions will indicate unsuitability for appointment. If the net is cast too wide, it may unnecessarily exclude from eligibility persons who are otherwise appropriate and competent. Conviction for traffic offences, for example, may have little bearing on the person's competence as an attorney. In addition, there may be circumstances where there has been no criminal conviction but there is a history of behaviour that undermines the person's appropriateness as an attorney. For

541 Queensland Civil and Administrative Tribunal, *Application for administration/guardianship appointment or review: Guardianship and Administration Act 2000 (Qld)* (Form 10) 10, 15 <[http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10\\_Ap\\_admin.g\\_app\\_rw.pdf](http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10_Ap_admin.g_app_rw.pdf)> at 3 September 2010.

542 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.49], 169.

543 Manitoba Law Reform Commission, *Enduring Powers of Attorney: Areas for Reform, Supplementary Report*, Report No 117 (2008) 20.

544 *Ibid.*

545 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.52], 169.

example, a person may have had a domestic violence order made against him or her on the application of the principal or someone in the principal's family, or may have been removed as someone's attorney or administrator because of a failure to act appropriately.

16.66 The Commission raised the issue of how to implement the ineligibility criteria.<sup>546</sup> Such an issue raises the question of how the principal and the witness are to be satisfied of such matters — for example, what inquiries would need to be made and what additional burden and expense this would add. Information about an attorney's past conduct will be peculiarly within the knowledge of the proposed attorney. The Discussion Paper noted that it may be more appropriate, therefore, to require the attorney to sign a statutory declaration to the effect that he or she does not have a relevant criminal history, for example, and is eligible for appointment. This would be consistent with the approach taken with respect to applications for the appointment of a guardian or an administrator.

16.67 Unlike a proposed guardian or administrator, however, an attorney is given authority without the oversight of the Tribunal. While a proposed guardian or administrator must declare that he or she does not have a criminal history, the Tribunal has a discretion to decide whether the person is appropriate and should be appointed, having regard to all the circumstances and available evidence. The Discussion Paper noted that this is a key difference in the appointments of attorneys on the one hand, and guardians and administrators on the other.

## Submissions

16.68 A number of submissions proposed the amendment of the existing eligibility criteria for the appointment of an attorney under section 29 of the *Powers of Attorney Act 1998* (Qld).<sup>547</sup>

### ***Capacity for appointment as an attorney***

16.69 The former Acting Public Advocate and the Department of Communities considered that, for the sake of consistency between section 29(1) and (2) of the *Powers of Attorney Act 1998* (Qld), section 29(1) should be amended to provide that an eligible attorney should have capacity for the matter.<sup>548</sup>

### ***General requirements for eligibility***

16.70 Several respondents, including a respondent who is a long-term Tribunal member, suggested that, as an additional safeguard against financial abuse, the existing definition of 'paid carer' for an adult in the *Powers of Attorney Act 1998* (Qld) should be broadened to include a former paid carer for the adult.<sup>549</sup> This

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546 Ibid [9.53].

547 Submissions 50, 55, 156, 160, 165, 168, 169, 173, 179.

548 Submissions 160, 169.

549 Submissions 50, 55, 179.

would have the effect of disqualifying a former paid carer from eligibility for appointment as an attorney.

16.71 The Perpetual Group of Companies, however, submitted that the fact that a close relative, such as an adult child caring full time for an incapacitated person, will be ineligible to continue as an enduring attorney if they receive remuneration causes unnecessary problems.<sup>550</sup> It considered that there is no reason in principle why such persons should be ineligible.

### ***Disqualification of persons with a relevant criminal or other history***

16.72 A number of respondents commented on whether section 29 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a person is not eligible for appointment as an attorney under an enduring power of attorney (or under an advance health directive) if he or she has a relevant criminal history or history of other conduct that may undermine his or her competence to act as attorney.

#### *Disqualification on the basis of a relevant criminal history*

16.73 The Department of Communities considered that section 29 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a person is not eligible for appointment as an attorney under an enduring power of attorney (or under an advance health directive) if he or she has a relevant criminal history.<sup>551</sup>

16.74 The Adult Guardian, the Public Trustee, the Queensland Law Society, the Perpetual Group of Companies and the Queensland Police Service each supported the amendment of section 29 of the Act to provide that a person is ineligible for appointment as an attorney under an enduring power of attorney if he or she has a relevant criminal history, unless the adult acknowledges the history and nevertheless consents to the appointment.<sup>552</sup> This view reflects the approach taken by the Manitoba Law Reform Commission.<sup>553</sup>

16.75 The Queensland Law Society, Queensland Aged and Disability Advocacy Inc and the former Acting Public Advocate also considered that an attorney should be required to declare whether he or she has a relevant criminal history.<sup>554</sup>

16.76 The Queensland Law Society referred to the fiduciary nature of the relationship between the attorney and the principal and submitted that the legislation should require a prospective attorney to declare any relevant criminal history both to the principal and the drafter of the enduring power.<sup>555</sup>

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550 Submission 155.

551 Submission 169.

552 Submissions 155, 156A, 164, 168, 173.

553 See [16.63] above.

554 Submissions 148, 160, 168.

555 Submission 168.



Due to the fiduciary nature of the relationship and the serious obligations owed by the attorney to their principal, the law requires complete honesty and loyalty in the attorney's dealings with the principal.

...

[T]he prospective attorney should be made to declare any relevant criminal history ... or conduct to both the principal and the drafter of the enduring power. The principal may then make the informed decision whether or not to appoint the attorney and the drafter is provided with the opportunity to refuse instructions. In essence, I believe that attorneys, like legal practitioners, should disclose any suitability matters that may affect their ability to discharge their duties to the principal.

16.77 Several respondents considered that, consistent with the principal's autonomy, it should be possible for a principal to consent to the appointment of an attorney who has a relevant criminal history, in the circumstances where that history is known to the principal.<sup>556</sup>

16.78 The former Acting Public Advocate, whilst acknowledging the utility in preventing the appointment of a person with a relevant criminal history as an attorney, commented that this needed to be balanced against the adult's right to autonomy.<sup>557</sup>

However, the adult's fundamental right to exercise discretion and autonomy in decision-making and appointing an attorney must not be overlooked. Generally a person appointed as an attorney will be someone the principal knows very well and trusts. It is recognised in some cases that a proposed attorney may have a criminal history relating to an offence committed many years previously, and has not reoffended in that time. The attorney's life and circumstances may have changed to such an extent that they are not at risk of reoffending. Accordingly, aside from their criminal conviction, they may otherwise be suitable and appropriate for appointment as an attorney. If exclusion from eligibility as an attorney on the basis of criminal history is introduced, it must be balanced with a competent adult's right to autonomy and self-determination in decision-making, namely to exercise personal choice in electing an attorney.

16.79 The former Acting Public Advocate suggested the introduction of a requirement for a proposed attorney to disclose his or her criminal history fully to the principal and to declare it in the enduring power of attorney form, and for the principal to sign a statutory declaration declaring his or her consent for the person to act as an attorney despite the existence of the criminal history.

16.80 Caxton Legal Centre Inc also commented that:<sup>558</sup>

While we know that great care must be taken to protect vulnerable adults in this area of law, we are also aware that a person may still be the most appropriate person to be an adult's attorney, despite perhaps having some difficulties in the past, which resulted in a criminal history being recorded.

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556 Submissions 148, 155, 174.

557 Submission 160.

558 Submission 174.

16.81 A number of respondents commented on the type of criminal history that would be relevant for the purposes of the eligibility requirements.

16.82 The Queensland Police Service suggested that the type of criminal history that would be relevant and appropriate as a basis for disqualification of an attorney would be a finding of guilt, made within the last 10 years, for one or more of the following criminal offences.<sup>559</sup>

- Dishonesty, in particular stealing, fraud, forgery, uttering forged documents, or possession of instruments of fraud;
- possession of ‘schedule 1 drugs’ (that is, drugs of dependence such as heroin, amphetamines or LSD); or
- violence, such as assault.

16.83 The Department of Communities suggested that the serious and excluding offences under the *Disability Services Act 2006* (Qld) could be used as a guide to determining eligibility for appointment as an attorney.<sup>560</sup> These offences include violent offences, sexual offences, offences against persons with impairment of the mind or children and serious drug offences.

16.84 Queensland Advocacy Incorporated considered that a conviction for a criminal offence involving violence or dishonesty should be relevant in considering a person’s eligibility for appointment as an attorney.<sup>561</sup>

16.85 The Queensland Law Society suggested that a ‘relevant criminal history’ could be defined to include spent, pardoned or quashed criminal convictions or other conduct.<sup>562</sup>

*Disqualification on the basis of other conduct*

16.86 Queensland Advocacy Incorporated considered that, in addition to certain criminal conduct, other conduct relevant in considering a person’s eligibility for appointment should include the person being named as a respondent to a domestic violence protection order and the person’s removal by a court or tribunal as an adult’s attorney, administrator or guardian.<sup>563</sup>

16.87 The Queensland Police Service did not consider that a person should be disqualified automatically if named as a respondent in an order under the *Domestic and Family Violence Protection Act 1989* (Qld), as an order can be made as a

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559 Submission 173.

560 Submission 169. See pt 10 and s 81 of the *Disability Services Act 2006* (Qld).

561 Submission 162. Speaking Up For You Inc, an individual advocacy organisation for people with a disability who live in Brisbane and the Moreton Region, also adopted the recommendations made by Queensland Advocacy Incorporated in its submission.

562 Submission 168.

563 Submission 162.

consequence of a broad range of behaviour and may be made without the respondent admitting to any of the grounds for an order.<sup>564</sup>

16.88 Caxton Legal Centre Inc expressed similar views, noting the potential for the misuse of domestic violence procedures in family law disputes.<sup>565</sup>

16.89 The Adult Guardian also commented that merely being named as a respondent to a domestic violence order may be too broad an approach in terms of eligibility for appointment, given the frequency that domestic violence applications are made and consented to within the family law context.<sup>566</sup> Instead, the Adult Guardian proposed that the relationship between the complainant and the respondent should be the relevant factor:

So for example if the EPA is donating power from a spouse to a spouse, a DVO between the attorney and spouse should be relevant. If however the EPA is between parent and child, perhaps a DVO between the child attorney and his former spouse may not be relevant.

16.90 The Department of Communities considered that a person should not be eligible for appointment as an attorney if he or she has a history of conduct that may undermine his or her competence to act as attorney.<sup>567</sup>

#### ***Duty to notify or advise of change of eligibility status***

16.91 The former Acting Public Advocate also raised an issue that was not specifically dealt with in the Discussion Paper namely, the manner in which criminal convictions subsequent to an attorney's appointment, and while an attorney is acting, should be dealt with.<sup>568</sup> He suggested that, similar to the position for a guardian and an administrator, an attorney must notify the Tribunal (or the principal) if he or she has been convicted or charged with any criminal offence subsequent to his or her appointment:

At present guardians/administrators have a continuing duty following appointment to advise the Tribunal of issues relating to appropriateness and competence. Presumably this would include notifications about newly acquired criminal convictions/charges. Consideration could be given to whether similar requirements for notification should be introduced to apply to attorneys. This situation can be differentiated from circumstances where a proposed attorney has a criminal conviction as in the latter case the adult still has capacity to consent to the appointment of the attorney despite the criminal history. Where an adult no longer has capacity, their rights and interest arguably require greater protection.

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564 Submission 173.

565 Submission 174.

566 Submission 164.

567 Submission 169.

568 Submission 160.

### The Commission's view

16.92 The Commission considers that the current eligibility requirements under section 29 of the *Powers of Attorney Act 1998* (Qld) for appointment as an attorney under an enduring power of attorney (or an advance health directive) are generally appropriate and should continue to apply. These requirements are similar to those for the appointment of a guardian or an administrator under the *Guardianship and Administration Act 2000* (Qld).<sup>569</sup>

16.93 However, the Commission also considers that the introduction of additional eligibility requirements for appointing an attorney for an enduring document under the Act may help to minimise the risk of abuse of enduring documents. Accordingly, section 29 of the *Powers of Attorney Act 1998* (Qld) should be amended in the following ways.

16.94 In order to rectify what would appear to be a drafting oversight, section 29(1) should be amended to provide that an eligible attorney should have capacity for the matter.<sup>570</sup> This amendment would ensure consistency between section 29(1) (which sets out the eligibility requirements for the appointment of an attorney under an enduring power of attorney) and section 29(2) (which sets out the eligibility requirements for the appointment of an attorney under an advance health directive).

16.95 As mentioned above, several respondents proposed that the existing definition of 'paid carer' for an adult in the *Powers of Attorney Act 1998* (Qld) should be broadened to include a former paid carer for the adult. A person who is a paid carer for an adult may become eligible for appointment as attorney if he or she relinquishes his or her position. While, in many cases, the person may be an appropriate appointee, in some cases, the appointment of an adult's former paid carer as the adult's attorney may raise concerns about the potential for financial or other abuse of the adult. The risk of abuse by a person who previously was the adult's paid carer may be reduced if the person is eligible for appointment only once a specified period of time has elapsed since the person has ceased to act as the adult's paid carer. The Commission therefore considers that the definition of 'eligible attorney' in section 29(1) of the Act should be amended to exclude a person who has been a paid carer for an adult within a period of three years before the principal makes an enduring power of attorney.

16.96 The Commission is of the view that a person who has a history of certain criminal conduct should not be eligible for appointment as a person's attorney. The power that may be conferred on an attorney under an enduring power of attorney is potentially very broad.<sup>571</sup> The Act imposes a specific duty on an attorney to exercise his or her power for an adult 'honestly and with reasonable diligence to

<sup>569</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1).

<sup>570</sup> See [16.57] above.

<sup>571</sup> See *Powers of Attorney Act 1998* (Qld) s 32(1)(a), which provides that, by an enduring power of attorney, a principal may authorise an attorney to do anything in relation to a financial matter or a personal matter that the principal could lawfully do by an attorney if the principal had capacity for the matter when the power is exercised. The principal may provide terms or information about exercising the power: s 32(1)(b).

protect the adult's interests'.<sup>572</sup> Consistent with this overriding obligation, the Act also imposes a number of specific duties on an attorney (particularly in relation to the exercise of power for financial matters) which reflect the attorney's duty to avoid a conflict with the principal's interests and to ensure that the attorney acts in the principal's interests and not in the interests of any other person.<sup>573</sup> These duties demand a very high standard of conduct by an attorney in exercising power for a principal. Given these considerations, a conviction on indictment for certain offences, namely an offence of personal violence or dishonesty, may cast doubt on a person's appropriateness and competence to act as an attorney. Another factor which favours the automatic disqualification of a person with a relevant criminal history (as opposed to the provision of a mechanism for the adult to consent to the appointment of such a person subject to the disclosure of his or her criminal history) is that once an adult loses capacity, he or she cannot revoke the enduring power of attorney or remove the attorney. This may leave the adult vulnerable in the event that the attorney misuses his or her powers, as well as reliant on others to raise any concerns about the attorney's behaviour with the Adult Guardian or the Tribunal.

16.97 However, the Commission considers that not all criminal or other history will necessarily render a person unsuitable for appointment. For example, the fact that a person has been named as a respondent to a domestic violence order would not necessarily indicate unsuitability for appointment. As the Queensland Police Service has noted, a domestic violence order may be made as a consequence of a broad range of behaviour and may be made without admitting to grounds for the order. It may also be that a proposed attorney who has committed offences many years previously that would otherwise disqualify him or her from appointment has not re-offended since that time. If the Act were amended to provide that a person who falls into either of these categories is ineligible for appointment, it may constitute an unnecessary intrusion on the principal's exercise of autonomy and prevent the appointment of an otherwise suitable attorney.

16.98 The definition of 'eligible attorney' in section 29(1) of the *Powers of Attorney Act 1998* (Qld) should therefore be amended to exclude a person who has been convicted on indictment of an offence of violence involving personal violence or dishonesty in the previous 10 years. The imposition of a 10 year timeframe is

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*Powers of Attorney Act 1998* (Qld) s 66(1). The maximum penalty for breach of this duty is 200 penalty units — that is, \$20 000: *Powers of Attorney Act 1998* (Qld) s 66(1); *Penalties and Sentences Act 1992* (Qld) s 5 (meaning of 'penalty unit'). This duty appears to reflect the fiduciary nature of the relationship between the attorney and the principal: see eg *Re BAB* [2007] QGAAT 19, [50]; and *Re JK* [2005] QGAAT 58, [48]–[53] in which the Tribunal commented that attorneys and administrators, respectively, are in a fiduciary relationship with the principal. A fiduciary is in a special position of trust and loyalty characterised by an obligation to act in the interests of the other party: PD Finn, *Fiduciary Obligations* (1977) [15], [27]; P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (1996) [1001].

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See eg *Powers of Attorney Act 1998* (Qld) ss 73 (Avoid conflict transaction), 85 (Keep records), 86 (Keep property separate).

generally consistent with the disclosure requirements under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).<sup>574</sup>

16.99 If that recommendation is implemented, the Commission also considers that the Act should be amended to provide that, if an attorney is convicted on indictment for an offence of violence involving personal violence or dishonesty, the enduring document is revoked to the extent it gives power to the attorney. This amendment would be consistent with sections 59 and 59AA of the Act, which provide that, if an attorney becomes the principal's paid carer or health provider or a service provider for a residential service where the principal is a resident, the enduring document is revoked to the extent it gives power to the attorney.<sup>575</sup>

### **Appointment of the Public Trustee or a trustee company as an attorney under an enduring power of attorney**

16.100 Although section 29(1)(d) of the *Powers of Attorney Act 1998* (Qld) provides that the Adult Guardian is eligible for appointment as an attorney under an enduring power for personal matters only, section 29(1)(b)–(c) of the Act does not limit the matters in respect of which the Public Trustee or a trustee company is an eligible attorney under an enduring power of attorney.

16.101 This means that the Public Trustee and trustee companies are eligible attorneys not only for financial matters but also for personal matters. As a result, they may be given power to make decisions under an enduring power of attorney about matters, other than special personal matters or special health matters, relating to the principal's care (including the principal's health care) or welfare, including for example:<sup>576</sup>

- where the principal lives;
- with whom the principal lives;
- whether the principal works and, if so, the kind and place of work and the employer;
- what education or training the principal undertakes;
- whether the principal applies for a licence or permit;
- day-to-day issues, including, for example, diet and dress;

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The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) provides for the notional removal of certain types of conviction from a person's criminal history after a prescribed rehabilitation period has elapsed. The general rehabilitation period for an adult is a period of 10 years from the date the conviction is recorded. This applies only to convictions in which there has been no period of custody or those for which the period of custody has been no more than 30 months. There must have been no further conviction since: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 3 (definition of **rehabilitation period**), 5, 6.

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*Powers of Attorney Act 1998* (Qld) s 99 provides protection for third parties who deal with an attorney who purports to use a power that is invalid.

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*Powers of Attorney Act 1998* (Qld) sch 2 s 2.

- whether to consent to a forensic examination of the principal;<sup>577</sup>
- health care of the principal; and
- a legal matter not relating to the principal's financial or property matters.

16.102 The scope of the matters for which the Public Trustee or a trustee company may be appointed as an attorney under an enduring power of attorney is inconsistent with the scope of their powers under the *Guardianship and Administration Act 2000* (Qld). Under that Act, the Public Trustee or a trustee company may be appointed as an administrator to make financial decisions for an adult,<sup>578</sup> but may not be appointed as a guardian to make personal decisions (including decisions about health matters) for an adult.<sup>579</sup>

16.103 The current provision is also inconsistent with the recommendation of this Commission in its original 1996 report. In that report, the Commission recommended that:<sup>580</sup>

the authority of the Public Trustee or a trustee company to act under an enduring power of attorney should be limited to exclude decisions about the personal care and welfare of the person who made the enduring power of attorney.

16.104 The Commission envisaged that decisions about personal matters would be made by either a person who was close to the adult and familiar with the adult's lifestyle and values or the Adult Guardian.<sup>581</sup>

16.105 Although section 29(1)(b) of the *Powers of Attorney Act 1998* (Qld) provides, without any limitation, that the Public Trustee is an eligible attorney 'for a matter under an enduring power of attorney', the Commission has been informed that it is not the practice of the Public Trustee to accept an appointment as an attorney for personal matters under an enduring power of attorney.<sup>582</sup>

16.106 The Commission notes that, in the ACT, a principal may not, in an enduring power of attorney, appoint a corporation as an attorney for a personal care or health matter.<sup>583</sup>

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577 A forensic examination of a principal means 'a medical or dental procedure for the principal that is carried out for forensic purposes, other than because the principal is suspected of having committed a criminal offence': *Powers of Attorney Act 1998* (Qld) sch 3.

578 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

579 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a).

580 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 115. That recommendation was reflected in the draft legislation contained in vol 2 of that report: see Draft Assisted and Substituted Decision Making Bill 1996 cl 37.

581 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 115.

582 Information provided by the Public Trust Office 18 September 2009.

583 *Powers of Attorney Act 2006* (ACT) s 14(2).

### **Discussion Paper**

16.107 In the Discussion Paper, the Commission sought submissions about whether section 29(1)(b)–(c) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, for a matter under an enduring power of attorney:<sup>584</sup>

- the Public Trustee is an eligible attorney for a financial matter only; and
- a trustee company is an eligible attorney for a financial matter only.

### **Submissions**

16.108 Several respondents, including the Adult Guardian, the Public Trustee and the former Acting Public Advocate, considered that section 29(1)(b)–(c) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, for a matter under an enduring power of attorney:<sup>585</sup>

- the Public Trustee is an eligible attorney for a financial matter only; and
- a trustee company is an eligible attorney for a financial matter only.

16.109 In supporting such an amendment, the Public Trustee noted that, under its current policy, the Public Trustee does not accept appointment under a power of attorney for personal or health matters.<sup>586</sup> However, he also suggested that ‘in very peculiar circumstances’ that there might be some utility in retaining a residual power such as that reflected currently in the *Public Trustee Act 1978* (Qld), that is, to act in any fiduciary capacity. This would allow the Public Trustee to consider an appointment in circumstances where nobody else is available or perhaps is otherwise conflicted or inappropriate or for whatever reason a donor feels particularly strongly about an appointment.

16.110 One respondent suggested that lifestyle decisions should be made by informal decision-makers or the Adult Guardian where ‘appropriate and necessary’ rather than by the Public Trustee.<sup>587</sup> This respondent suggested that the role of the Public Trustee should be limited to financial issues and circumstances where no other competent person is available.

16.111 The Department of Communities supported the amendment of section 29(1) to provide that the Public Trustee is an eligible attorney for a financial matter only.<sup>588</sup>

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584 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 171–2.

585 Submissions 20B, 54A, 156A, 160, 162, 164, 165.

586 Submission 156A.

587 Submission 165.

588 Submission 169.



16.112 The Perpetual Group of Companies and the Trustee Corporations Association of Australia both supported the amendment of section 29(1) to provide that a trustee company is an eligible attorney for a financial matter only.<sup>589</sup>

### ***The Commission's view***

16.113 The Commission considers that the scope of the powers of the Public Trustee or a trustee company when appointed as an attorney under an enduring power of attorney should be consistent with the scope of their powers when appointed as an administrator under the *Guardianship and Administration Act 2000* (Qld).

16.114 Accordingly, section 29(1)(b) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, for a matter under an enduring power of attorney, the Public Trustee is an eligible attorney for a financial matter only. Similarly, section 29(1)(c) of the Act should be amended to provide that, for a matter under an enduring power of attorney, a trustee company is an eligible attorney for a financial matter only.

## **THE NUMBER OF ATTORNEYS**

### **The law in Queensland**

16.115 Section 43 of the *Powers of Attorney Act 1998* (Qld) provides for the appointment of one or more attorneys in an enduring power of attorney (or an advance health directive). Different attorneys may be appointed for different matters, or attorneys may be appointed to act jointly or as alternative or successive attorneys. The legislation does not impose a limit on the number of attorneys who may be appointed. This flexibility is important in maximising the extent to which an adult's advance planning can be put into effect.

16.116 Joint appointment of several attorneys may, however, pose practical difficulties.<sup>590</sup> Jointly appointed attorneys can benefit from consultation with each other and each can act as a check on the other, but:<sup>591</sup>

The arrangement also has a disadvantage. It may become cumbersome to obtain joint consent or signatures when the two people do not live in the same town or city or even the same State or Territory. Further, if the attorneys disagree an application may need to be made to a guardianship board or tribunal, or a court, for a ruling.

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589 Submissions 155, 158.

590 Jointly appointed attorneys must exercise their power unanimously unless the enduring document provides otherwise: *Powers of Attorney Act 1998* (Qld) s 80(1). The appointment of two or more attorneys is taken to be a joint appointment if the enduring document does not specify how power is to be shared between them: s 78.

591 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 105.

16.117 The latter situation may occur, for example, if an ageing parent appoints each of his or her several children as joint attorneys who, in the event the parent loses capacity, are unable to agree on decisions. The possibility of disagreement and family dispute might be reduced if there were a limit on the maximum number of attorneys who could be jointly appointed. On the other hand, the appointment of a number of joint attorneys may act as a safeguard by requiring agreement between several parties.

16.118 A limitation on the number of attorneys who may be jointly appointed under an enduring power of attorney would, however, be consistent with the position under the *Trusts Act 1973* (Qld). Under that Act, the maximum number of trustees of any property is four.<sup>592</sup>

## Discussion Paper

16.119 In the Discussion Paper, the Commission sought submissions about whether there should be a limit on the number of joint attorneys a principal may appoint in an enduring power of attorney and, if so, what the maximum number of joint attorneys should be.<sup>593</sup>

## Submissions

16.120 Several respondents considered that there should be a limit on the number of joint attorneys a principal may appoint in an enduring power of attorney.<sup>594</sup> One respondent suggested a maximum number of three attorneys.<sup>595</sup> The Adult Guardian and the Department of Communities suggested a maximum number of four attorneys.<sup>596</sup> The Queensland Police Service suggested a maximum number of five attorneys.<sup>597</sup>

16.121 The Public Trustee had no objection to limiting the number of attorneys who may be appointed. He noted that, in practice, conflict between attorneys may arise as a function of the combination of the dynamics between attorneys and the

<sup>592</sup> *Trusts Act 1973* (Qld) s 11(1)–(2). There are some limited exceptions to this: s 11(3). The maximum limitation of four trustees was recommended by the Queensland Law Reform Commission in its Report on the law relating to trusts and was based on the position in England which had also been adopted in Victoria: see Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) [11]. The Commission commented:

As the law now stands in Queensland there is no upper limit on the permissible number of trustees who may be appointed, and in practice a multiplicity of trustees is productive of considerable expense, delay and inconvenience, particularly where conveyancing is involved and where re-vesting of trust property is necessitated by successive deaths of trustees.

<sup>593</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 173.

<sup>594</sup> Submissions 941, 164, 165, 166, 169.

<sup>595</sup> Submission 165.

<sup>596</sup> Submissions 164, 169.

<sup>597</sup> Submission 173.

types of decision that need to be made, rather than the number of attorneys that have been appointed:<sup>598</sup>

The Public Trustee has not seen an enduring power of attorney appointing significant numbers of attorneys but has seen instances of conflict between attorneys; this has not been a function so much of the number of attorneys appointed but the decisions to be made and the dynamics within the family of the attorney. It is unlikely that a legislative cure is available for these types of matters.

16.122 The Perpetual Group of Companies noted that it usually would not accept appointment as co-attorney with more than one other person.<sup>599</sup>

### The Commission's view

16.123 The *Powers of Attorney Act 1998* (Qld) does not impose a limit on the number of attorneys who may be appointed under an enduring power of attorney (or an advance health directive). This approach provides flexibility in the adult's advance planning. However, it may raise some problems in relation to the appointment of joint attorneys, especially where the number of attorneys appointed for a matter becomes an impediment to effective decision-making.

16.124 The Commission therefore considers that section 43 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a principal may appoint a maximum of four joint attorneys for a matter under an enduring power of attorney. A similar numerical limitation generally applies under the *Trusts Act 1973* (Qld) in relation to the appointment of trustees.

### GIFTS

16.125 The guardianship legislation includes provisions in relation to the gifting of the adult's property — section 88 of the *Powers of Attorney Act 1998* (Qld) and section 54 of the *Guardianship and Administration Act 2000* (Qld).

16.126 These provisions recognise the importance of providing a reasonable level of gifts to be given to cover established social practices of the adult and social expectations that may arise for the attorney or administrator to respond to on the adult's behalf. They also recognise that, in order to protect the interests of the adult, there need to be appropriate limits on the value and the circumstances in which a gift may be made.

16.127 The gifting provisions set out the circumstances in which an attorney or an administrator for an adult (as the case may be) may exercise power to gift the adult's property. The 'gift' may be in the form of a gift or a donation. If an attorney

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Submission 156A. Although it noted a hypothetical scenario in which an ageing parent who has more than four children might be distressed at having to choose only four of those children to act as attorney.

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Submission 155.

or an administrator contravenes the gifting provisions, a court may order him or her to compensate the adult for any loss arising from the contravention.<sup>600</sup>

16.128 An issue that was not specifically raised in the Commission's Discussion Paper relates to an inconsistency between section 88 of the *Powers of Attorney Act 1998* (Qld) and section 54 of the *Guardianship and Administration Act 2000* (Qld). Section 88 of the *Powers of Attorney Act 1998* (Qld), which applies to attorneys, provides:

**88 Gifts**

- (1) Unless there is a contrary intention expressed in the enduring power of attorney, an attorney for financial matters for an individual may give away the principal's property only if—
  - (a) the gift is—
    - (i) to a relation or close friend of the principal; and
    - (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or
  - (b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make;
 

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.
- (2) The attorney or a charity with which the attorney has a connection is not precluded from receiving a gift under subsection (1).

16.129 Section 54 of the *Guardianship and Administration Act 2000* (Qld), which applies to administrators, is in similar, but slightly broader terms. That section provides:

**54 Gifts**

- (1) Unless the tribunal orders otherwise, an administrator for an adult may give away the adult's property only if—
  - (a) the gift is—
    - (i) a gift or donation of the nature the adult made when the adult had capacity; or
    - (ii) a gift or donation of the nature the adult might reasonably be expected to make; and

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*Guardianship and Administration Act 2000* (Qld) s 106(1).

- (b) the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances.
- (2) The administrator or a charity with which the administrator has a connection is not precluded from receiving a gift under subsection (1).

16.130 Section 54 of the *Guardianship and Administration Act 2000* (Qld) and section 88 of the *Powers of Attorney Act 1998* (Qld) are generally similar. Firstly, they limit the value of any gift that can be made. Secondly, they each enable an attorney or an administrator (as the case may be) to make a gift that is a donation only if it is of the nature the adult made when the adult had capacity or that the adult might reasonably be expected to make.

16.131 However, section 54 has a broader scope than section 88 in relation to the treatment of a gift that is not a donation. Whereas section 54 enables an administrator to make a gift that is not a donation only if it is of the nature the adult made when the adult had capacity or that the adult might reasonably be expected to make, section 88 enables an attorney to make such a gift only if it is to a relation or a close friend of the principal and is of a seasonal nature or because of a special event (including, for example, a birth or marriage). Given that attorneys and administrators are subject to similar duties, this raises the issue of whether the gifting provisions should be the same for both of these types of decision-makers.

## Submissions

16.132 A long-term Tribunal member and the Perpetual Group of Companies submitted that there is no justification for differentiating between the powers of an attorney or an administrator to make a gift.<sup>601</sup> They each submitted that section 54 of the *Guardianship and Administration Act 2000* (Qld) provides a more flexible and reasonable approach to defining what is a permissible gift than section 88 of the *Powers of Attorney Act 1998* (Qld).

## The Commission's view

16.133 The Commission is of the view that attorneys and administrators should be subject to the same gifting requirements. The Commission considers that the approach taken in section 54 of the *Guardianship and Administration Act 2000* (Qld) is to be preferred because it provides a more flexible and less prescriptive approach to the issue of gifting than section 88 of the *Powers of Attorney Act 1998* (Qld), while also providing reasonable safeguards to protect the adult's interests.

16.134 Accordingly, section 88 of the *Powers of Attorney Act 1998* (Qld) should be amended. The amended provision should be modelled on section 54 of the *Guardianship and Administration Act 2000* (Qld).

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Submissions 155, 179.

## THE EFFECTIVENESS OF A HEALTH CARE DECISION MADE BY AN ATTORNEY

16.135 Section 32(1)(a) of the *Powers of Attorney Act 1998* (Qld) provides:

### 32 Enduring powers of attorney

(1) By an enduring power of attorney, an adult (principal) may—

- (a) authorise 1 or more other persons who are eligible attorneys (attorneys) to do anything in relation to 1 or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and

... (note omitted)

16.136 The situation can arise where an adult's attorney demands health care for the adult that the adult's health provider considers is inconsistent with good medical practice. This raises the issue of the effectiveness of a decision made by an attorney.

16.137 As a matter of construction, it would seem that a decision by an adult's attorney could not be more effective than one made by the adult if he or she had capacity. As explained in Chapter 9 of this Report, a competent adult does not ordinarily have the power at common law to compel the provision of health care that has not been offered.<sup>602</sup> As a result, the fact that an adult may demand a particular treatment does not create a duty for the health provider to give the treatment. As the English Court of Appeal explained in *R (Burke) v General Medical Council*.<sup>603</sup>

In so far as a doctor has a legal obligation to provide treatment this cannot be founded simply upon the fact that the patient demands it. The source of the duty lies elsewhere.

16.138 However, section 66(4) of the *Guardianship and Administration Act 2000* (Qld) provides that, if subsections (2) and (3) do not apply and the adult has made one or more enduring documents appointing one or more attorneys for the matter, 'the matter may only be dealt with by the attorney or attorneys for the matter appointed by the most recent enduring document'.

16.139 In Chapter 9, the Commission referred to the similar situation that may arise where an adult's advance health directive gives a direction requiring particular health care and the adult's health provider considers that the required health care would be inconsistent with good medical practice. The Commission observed that, while section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) does not give a direction requiring health care any greater effect than such a direction would have at common law if given by a competent adult, some ambiguity arises from the terms

602 See [9.28]–[9.31] above.

603 [2006] QB 273, 296.

of sections 65(2) and 66(2) of the *Guardianship and Administration Act 2000* (Qld). Those sections provide that, if the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with in accordance with the direction.<sup>604</sup>

16.140 The Commission made several recommendations to avoid the tension between section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) and sections 65 and 66 of the *Guardianship and Administration Act 2000* (Qld).

16.141 To emphasise the limitations that apply to a demand for treatment made by a competent adult, the Commission recommended that section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a direction in an advance health directive is as effective as, *but no more effective than*, if the matters in section 36(1)(b)(i) and (ii) apply.<sup>605</sup>

16.142 The Commission also recommended that:<sup>606</sup>

- section 65 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 65(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld); and
- section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld).

16.143 The Commission considered that an advantage of this approach was that it could be adapted to address the similar situation that may arise where an adult's substitute decision-maker requests health care for the adult that the health provider considers is inconsistent with good medical practice.

### The Commission's view

16.144 In order to avoid any ambiguity about the scope of an attorney's authority under section 32(1)(a) of the *Powers of Attorney Act 1998* (Qld) in relation to the exercise a power for a health matter for an adult, the Commission considers that section 32 of the Act should be amended by inserting a new subsection to the effect that:<sup>607</sup>

An attorney's exercise of power for a health matter for the principal is as effective as, but no more effective than, if:

- (a) the principal exercised the power for the matter when a decision about the matter needed to be made; and

<sup>604</sup> See [9.324]–[9.327] above.

<sup>605</sup> See Recommendation 9-3(a) of this Report.

<sup>606</sup> See Recommendations 9-19, 9-20 of this Report.

<sup>607</sup> The proposed provision is similar in effect to s 110ZD(9) of the *Guardianship and Administration Act 1990* (WA), which is set out at n 423 above.

(b) the principal then had capacity for the matter.

16.145 Further, section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(4) is subject to section 32 of the *Powers of Attorney Act 1998* (Qld).

## THE APPROVED FORM

### The law in Queensland

16.146 Section 44(1) of the *Powers of Attorney Act 1998* (Qld) provides that an enduring power of attorney must be executed in the approved form. Two approved forms are provided: Form 2 (Enduring power of attorney short form) and Form 3 (Enduring power of attorney long form).<sup>608</sup> The existing forms raise a number of issues for consideration.

16.147 First, as noted above, there are two approved forms. The long form is to be used if the principal wishes to appoint different attorneys for financial matters and for personal or health matters. The short form is used if the principal wishes to appoint the same attorney for financial and personal matters, or to appoint an attorney for certain matters only. The forms need to be flexible enough to allow for the different types of appointment a person wishes to make. However, it may be more confusing to do this through the provision of separate forms, rather than by having one form that can accommodate multiple options.

16.148 Secondly, the substantial length of the forms may be intimidating. The short form totals 18 pages, the long form 24. This is compared with the much simpler and shorter form that was used for an enduring power of attorney under the *Property Law Act 1974* (Qld).<sup>609</sup> Part of the reason for the length of the forms is the inclusion of several pages of explanatory information. Such explanation is of critical importance in assisting both principals and attorneys in understanding the import of the document.<sup>610</sup> However, the execution form itself may be more user-friendly if the explanatory information were instead included in an accompanying booklet.<sup>611</sup> On the other hand, it is likely to provide greater assurance that principals will see the explanatory information if it continues to be incorporated into the form rather than being contained in a separate document. This is consistent

608 Department of Justice and Attorney-General <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list>> at 6 September 2010.

609 *Property Law Act 1974* (Qld) sch 2 Form 16A, reprint No 1.

610 R Creyke, 'Privatising Guardianship — The EPA Alternative' (1993) 15 *Adelaide Law Review* 79, 90.

611 Eg South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.81].



with consumer protection legislation that prescribes, for particular contracts, particular information that is to be included in the contract itself.<sup>612</sup>

16.149 Thirdly, despite including substantial explanatory information, the existing forms may not necessarily include sufficient explanation or warning of particularly important matters.<sup>613</sup> For example, it is not necessarily obvious from the form that the attorney is not to sign the document, by way of accepting his or her appointment, before the principal has signed. Doing so may, however, render the document invalid. Similarly, the forms do not explain to the principal that an attorney cannot enter a conflict transaction without authority<sup>614</sup> and that a principal should consider whether to authorise particular transactions.<sup>615</sup> In the absence of a requirement to receive legal advice when making an enduring power of attorney, the form (or accompanying explanatory notes) should, arguably, include examples or explanations of such matters.<sup>616</sup>

16.150 Fourthly, the forms may give rise to significant interpretative difficulties in relation to the trigger for a financial power.<sup>617</sup> As noted above, power for a financial matter is exercisable either immediately on making the document, on a particular date specified in the document, or on a particular occasion specified in the document. If the principal intends the power to commence upon the happening of a particular event, such as the principal's loss of capacity, the form of words to be used is left entirely to the individual. The forms do not provide any guidance in this respect, so that it is left to the principal, with whatever assistance is given by the witness or others, to set out with sufficient clarity and specificity the occasion on which the power is to commence.

612 Eg *National Credit Code* (Cth) s 17(16) and *National Consumer Credit Protection Regulations 2010* (Cth) reg 74(4); *Domestic Building Contracts Act 2000* (Qld) ss 65(3)(b), 66(6)(b) and *Domestic Building Contracts Regulation 2010* (Qld) ss 4, 5; *Property Agents and Motor Dealers Act 2000* (Qld) ss 114(3)(b), 133(3)(b), 173(3)(b), 255, 332 and *Property Agents and Motor Dealers Regulation 2001* (Qld) ss 17, 25, 37; *Retirement Villages Act 1999* (Qld) s 45 and *Retirement Villages Regulation 2000* (Qld) s 4; *Residential Services (Accommodation) Act 2002* (Qld) ss 12, 16 and *Residential Services (Accommodation) Regulation 2002* (Qld) s 3; *Residential Tenancies Act 1994* (Qld) s 38 and *Residential Tenancies Regulation 2005* (Qld) s 6, sch 1 pt 2.

613 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.67], [3.71].

614 *Powers of Attorney Act 1998* (Qld) s 73. A warning about conflict transactions is included in the approved form as part of the explanation specifically addressed to attorneys. This is discussed in Chapter 17 of this Report.

615 It has also been suggested, for example, that specific authorisation may need to be given to an attorney to deal with the principal's binding death benefit nominations under superannuation funds: Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 3] (Brian Herd).

616 Eg University of Queensland School of Social Work and Applied Human Sciences, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (27 November 2006) 5 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub26.pdf>> at 6 September 2010 in which it is noted that the ease with which forms can be obtained and executed, and the absence of a requirement for, and availability of, appropriate legal advice significantly contributes to the potential for financial abuse.

617 Eg University of Queensland School of Social Work and Applied Human Sciences, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (27 November 2006) 4 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub26.pdf>> at 6 September 2010 in which it is noted that older people tend mistakenly to believe that the financial power will automatically become exercisable only when the person loses capacity.

## The United Kingdom

16.151 In the United Kingdom, a recent evaluation of the approved forms for making a lasting power of attorney identified a number of difficulties and challenges with their design.<sup>618</sup> As a result, the forms have been redesigned so that they are more streamlined, with fewer repeated questions, are written in plain English and include basic guidance on how to complete them in the margins rather than on separate sheets.<sup>619</sup>

## Discussion Paper

16.152 In the Discussion Paper, the Commission sought submissions about whether:<sup>620</sup>

- there are any difficulties with the use of the approved forms for making an enduring power of attorney and, if so, how they could be addressed;
- there should be one approved form that could be used for all types of appointment, rather than two separate forms for different types of appointments;
- explanatory information should be provided in a separate booklet rather than as part of the form itself;
- there are any matters that should be explained that are not currently explained in the forms, or there are any matters that should be better, or more fully, explained in the forms (for example, a more detailed explanation and warning about conflict transactions); and
- the forms include a set of standard words for the commencement of power for a financial matter on the principal's loss of capacity.

## Submissions

16.153 A number of submissions identified specific problems with the approved forms for making an enduring power of attorney and, in some cases, made suggestions for improving them.<sup>621</sup> The problems identified included that:

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618 Ministry of Justice, *Reviewing the Mental Capacity Act 2005: forms, supervision and fees*, Consultation Paper, CP 26/08 (2008) 15–16.

619 Ibid.

620 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 175.

621 Submissions 148, 155, 156A, 164, 165, 166, 174.

- the approved forms are cumbersome<sup>622</sup> and, compared with other jurisdictions, relatively lengthy,<sup>623</sup> and
- some of the instructions or explanations provided in the approved forms are inadequate, confusing or inconsistent with the legislation or with other instructions or explanations provided in the forms.<sup>624</sup>

16.154 The Adult Guardian considered that the approved forms should be completely redrafted because they are ‘poorly organised, internally inconsistent and unnecessarily complex’.<sup>625</sup>

16.155 The Public Trustee agreed that the approved forms should be comprehensively reviewed.<sup>626</sup> The Public Trustee noted that there is a significant variation between jurisdictions in relation to the legislative requirements for making an enduring power of attorney, and in the nature and content of the approved forms used for making enduring powers of attorney.<sup>627</sup> In light of these variations, the Public Trustee considered it desirable for there to be a uniform approach taken in relation to the approved forms used for making enduring powers of attorney.

16.156 The Registrar of Land Titles suggested that the approved forms for making an enduring power of attorney could be clarified or improved in a number of ways.<sup>628</sup> These suggestions included:<sup>629</sup>

- providing greater clarity to indicate when terms of appointment are intended to specify limited powers as opposed to when the terms are intended to specify additional powers;
- including a clear explanation of the difference between an alternative attorney and successive attorneys in relation to when the powers given to a previous attorney ends;
- retaining explanatory information in the form but separating this information into parts appearing immediately before the relevant item to be completed ensuring consistent use of terminology between the forms; and

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622 Submission 155.

623 Submission 156A.

624 Submissions 156A, 166.

625 Submission 164.

626 Submission 156A.

627 In this regard, the Public Trustee referred to a 2007 comparison of enduring powers of attorney in Australian jurisdictions made by Glenn Dickson, Special Counsel, Public Trustee of Queensland: G Dickson, ‘The Enduring power of Attorney Form — Should it be changed?’ (Paper delivered at Queensland Law Society Symposium 2007).

628 Submission 166. In his submission, the Registrar of Land Titles referred to ‘Queensland Titles Registry Issues regarding Power of Attorney Forms’, an Issues Paper prepared by the Department of Environment and Resource Management Queensland Titles Registry.

629 Submission 166.

- including more information about what is a conflict transaction.

16.157 Caxton Legal Centre Inc considered it would be useful if the approved form indicated how many attorneys may be appointed.<sup>630</sup>

We are often asked this question by our clients and the Form is confusing on this point. Although the Act states that ‘one or more’ attorneys can be appointed, the form only provides space for 3 names. Where an adult has, say, 4 willing, able and suitable adult children to help — the adult may wish to nominate all 4 as attorneys for a variety of compelling reasons. It is unclear from the current form whether or not this is possible. This issue should be clarified both in the Act and on the forms. In complex family situations, it may be appropriate for a larger number of attorneys to be named.

16.158 The Trustee Corporations Association of Australia stated that the ‘forms should contain the key information on the rights of principals and the responsibilities of attorneys, but should not be overly long and complex as this could deter many potential principals from completing them’.<sup>631</sup>

### ***The number of approved forms***

16.159 Several respondents agreed that there should be one approved form that could be used for all types of appointment, rather than two separate forms for different types of appointments.<sup>632</sup> Caxton Legal Centre Inc and the Perpetual Group of Companies disagreed with that view.<sup>633</sup> Caxton Legal Centre Inc noted that it had not encountered any major problems with the fact that there is a short form and a long form for making an enduring power of attorney.<sup>634</sup>

If anything, the availability of the two forms arguably draws the client’s attention to the fact that they are able, if they so desire, to separate the various tasks across different attorneys. In many situations, this offers a very practical outcome.

16.160 The Perpetual Group of Companies commented that the use of the equivalent of the long form when only one type of attorney is required is unnecessarily confusing.<sup>635</sup> It also commented that, where the enduring attorneys for personal or health matters are different from the ending attorneys for financial matters, it is more convenient to have separate forms:

Because the explanations in the present forms must be broad enough to cover both types of appointment, they are in fact more cumbersome and confusing than would be the case if there were separate explanations tailored for each type of appointment. In Perpetual’s view, having two separate ‘short forms’

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630 Submission 174.

631 Submission 158.

632 Submissions 164, 165, 169.

633 Submissions 155, 174.

634 Submission 174.

635 Submission 155.

specific to personal/health and financial EPOAs respectively would simplify the position by reducing the number of choices the principal has to make in completing each form. It is unrealistic to expect that a principal will read two 18 page documents in full. This might be addressed by focusing first in each form very expressly on the information peculiar to that form, and then clearly delineating the information that also appears in the other form.

***The provision of explanatory information in a separate booklet***

16.161 Several submissions considered that explanatory information should be provided in a separate booklet rather than as part of the approved form itself.<sup>636</sup>

16.162 Queensland Aged and Disability Advocacy Inc considered that it would be advantageous to have a separate booklet for the reasons that:<sup>637</sup>

- it could be kept by the principal for ease of reference in situations where his or her enduring power of attorney has been lodged in a location other than his or her home; and
- it would have the effect of shortening the main part of the enduring power of attorney.

16.163 The Trustee Corporations Association of Australia considered that additional detail such as guidance on keeping records, avoiding conflicts of interest (possibly including examples) and keeping property separate could be provided in a stand-alone 'kit' to accompany the form.<sup>638</sup> It also suggested that attorneys, when accepting appointments, should be required to acknowledge that they have read and understood the information about their responsibilities set out in the form and in the kit.

16.164 The Public Trustee also supported the inclusion of explanatory information in a separate booklet.<sup>639</sup> The Public Trustee considered that the booklet should address key matters including conflict transactions.

16.165 However, a number of submissions opposed the provision of explanatory information in a separate booklet.<sup>640</sup>

16.166 The Registrar of Land Titles suggested that the approved form should retain the explanatory information and also separate the information into parts appearing immediately before the relevant item to be completed.<sup>641</sup>

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636 Submissions 148, 156A, 158.

637 Submission 148.

638 Submission 158.

639 Submission 156A.

640 Submissions 155, 166, 169, 174.

641 Submission 166.

16.167 Caxton Legal Centre Inc considered that, although the approved form is ‘already quite lengthy’, it is useful to have the explanatory information attached to the approved form.<sup>642</sup>

In many ways, this helps to ensure that adults who are signing the form have a better opportunity to be properly informed about the pros and cons of signing such an important document. It also means that adults are less vulnerable to being tricked into signing a form they do not understand, or which they think is to be used for some other purpose. The presence of the ‘fine print’ throughout the form itself is a useful warning device.

16.168 Both the Department of Communities and the Perpetual Group of Companies considered it important for the explanatory information to be retained in the approved form to ensure that the information is available to a principal who is contemplating or executing an enduring power of attorney.<sup>643</sup> The Perpetual Group of Companies suggested that:<sup>644</sup>

If explanatory information is in a separate book, it is more difficult to be sure that the principal in fact had the information available to read. Having the principal or the attorney sign that they have read the information is a notoriously unreliable way to ensure it in fact happened. At least if the information is physically attached one knows it was there to be read.

***Standard wording for the commencement of power for a financial matter***

16.169 The submissions that addressed this issue each considered that the forms should include a set of standard words for the commencement of power for a financial matter on the principal’s loss of capacity.<sup>645</sup>

16.170 Caxton Legal Centre Inc commented that, since the enduring powers of attorney were introduced, it has observed different trends over the years in terms of the sorts of ‘triggers’ inserted into the approved forms.<sup>646</sup>

We have ourselves adopted a number of different approaches in this regard. For example, we have, at times, encouraged clients to insert words to the effect that the EPA would only be triggered during the relevant period if the adult has lost capacity (either temporarily or permanently) as diagnosed by a treating psychiatrist or psycho-geriatrician. However, as the cost of these reports appears to have increased significantly over the years, many clients now simply opt instead for a trigger clause based on a diagnosis of lost capacity by a medical practitioner, which enables a family GP to make the relevant assessment. This is a cheap and, in intact family situations, effective option. However, it does leave some elderly people more exposed to risk where an abuser manoeuvres an adult with failing capacity into consulting a new GP who may have no real understanding of the adult’s true history and home circumstances.

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642 Submission 174.

643 Submissions 155, 169.

644 Submission 155.

645 Submissions 54A, 148, 155, 156A, 165, 169, 174.

646 Submission 174.

Many people with small estates (especially where their main asset is simply the family home) are loathe to insert a trigger that is likely to cost in the vicinity of \$3,000 for the relevant report. Instead, they will opt for a simple and cheap alternative.

16.171 Caxton Legal Centre Inc considered that it would be helpful if the enduring power of attorney included a number of standard triggering clauses, which would provide people with more options when making this incredibly important decision as to when the enduring power of attorney should commence operation:<sup>647</sup>

This could include matters such as ... the use of medical certificates ... In situations where an adult is acutely aware that they may have family members who may try to exploit them, or where the family is quite fractured, the adult may opt for a much more technical triggering clause, which requires expert evidence to clarify when the EPA is to commence operation.

16.172 Queensland Aged and Disability Advocacy Inc suggested that it may be useful if the approved form provided examples of wording which could be adopted to specify the event by which the enduring power of attorney is activated, for example, that the principal's incapacity has been confirmed by two independent health care professionals.<sup>648</sup>

16.173 The Perpetual Group of Companies suggested that a set of standard words may be useful for untrained principals, 'as long as provision is made that if the principal uses different words instead, the standard words in the form are not to be used to interpret what the principal meant by the words he or she did use'.<sup>649</sup>

### The Commission's view

16.174 The *Powers of Attorney Act 1998* (Qld) requires enduring powers of attorney to be made in the approved form. The use of an approved form helps to minimise the risk of executing an enduring power of attorney that does not comply with the requirements for formal validity under the Act. The approved form also provides information to principals, attorneys and witnesses about the key features of the document as well as their respective roles, functions and duties and instructions for completing the document.

16.175 At present, there are two approved forms provided for making an enduring power of attorney: Form 2 (Enduring power of attorney short form) and Form 3 (Enduring power of attorney long form). The long form is to be used if the principal wishes to appoint different attorneys for financial matters and for personal or health matters. The short form is used if the principal wishes to appoint the same attorney for financial and personal matters, or to appoint an attorney for certain matters only. For the sake of convenience and to assist in avoiding confusion for users of the forms (particularly in relation to less complex appointments), the Commission

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647 Ibid.

648 Submission 148.

649 Submission 155.

considers that there should continue to be two separate forms for different types of appointments.

16.176 In view of the concerns that have been raised in the submissions about the length and content of the approved forms, the Commission is of the view that the approved forms should be redrafted by a multidisciplinary team with expertise and experience in relation to the users of the forms as well as the law. In this regard, the Commission notes that a group of academics from the School of Social Work and Human Services at the University of Queensland and from the School of Law at the Queensland University of Technology hold a grant from the Legal Practitioner Interest on Trust Accounts Funds Grants Fund for 2009–10 to undertake research into the improvement of the forms and outcomes in relation to enduring documents.<sup>650</sup>

16.177 Although the Commission is not undertaking the redrafting of the approved form, there are nonetheless several matters in relation to the form that should be addressed when they are redrafted.

16.178 Explanatory information and notes about the key features of the enduring power of attorney document and the roles, functions and duties of the principal, attorney and the witness should continue to be included in the approved form. This information should be drafted so that it is not overly long or too complex. The content of the explanatory information should be reviewed to ensure that it gives a sufficient explanation or warning of particularly important matters. In this regard, the Commission notes that there are some matters which the forms do not explain adequately or at all. For example, the warning about the duty to avoid conflict transactions in the approved forms,<sup>651</sup> is confusing and may lead an attorney into error.<sup>652</sup> The approved forms should address this deficit by the provision of additional information about what constitutes a conflict transaction.

16.179 The Commission is of the view that some of the clauses in the approved form should be redrafted to more accurately reflect the corresponding provisions of the Act. For example, one of the clauses in the approved forms asks ‘Do you want to set out any terms for the power given [to an attorney for a financial matter or personal matter or both] in clause 1 (ie give specific information about your

650 See Department of Justice and Attorney-General, Legal Practitioner Interest on Trust Accounts Funds Grants Fund recipients 2009–10 <<http://www.justice.qld.gov.au/corporate/sponsorships-and-grants/?a=650>> at 7 September 2010.

651 The approved forms contain the following warning about the duty to avoid transactions that involve conflict of interest:

You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value.

However, you may enter into such a transaction if it has been authorised in this document or by the Court, or if the transaction provides for the needs of someone that the principal could reasonably be expected to provide for, such as his/her child.

652 See eg *Ede v Ede* [2006] QSC 378, [29], [52], in which the Supreme Court found that the respondent, who transferred property belonging to the applicant to the respondent's daughter, was misled by the notation about the duty to avoid transactions that involve conflict of interest on the Power of Attorney instrument.



wishes).<sup>653</sup> Because the word ‘term’ is defined in the Act to include a condition, limitation or an instruction,<sup>654</sup> it would be preferable to clarify in this clause that the terms set out by the principal may also include a limitation on the exercise of the attorney’s power. In addition, one of the clauses of the approved form asks the principal to nominate the manner in which attorneys are to make their decisions (jointly, severally, as a majority or otherwise) if more than one attorney is appointed.<sup>655</sup> The note to this clause, which addresses the manner in which an attorney may exercise a power for a matter other than jointly, severally or as a majority, refers only to the principal’s ability to appoint successive attorneys — it does not reflect the principal’s ability to appoint alternative attorneys as is provided for under section 42(2)(d) of the Act. This omission should be remedied.

16.180 The power for a financial matter is exercisable either immediately on making the enduring power of attorney document, on a particular date specified in the document, or on a particular occasion specified in the document. If the principal intends the power to commence upon the happening of a particular event, such as the principal’s loss of capacity, the form of words to be used is inserted by the individual. To assist in providing greater clarity and specificity as to when the attorney may commence exercising power for the matter under the enduring power of attorney, the clause in the approved forms that deals with the commencement of the attorney’s power should include various examples of standard words for the commencement of power for a financial matter on the principal’s loss of capacity. These examples should particularly draw the principal’s attention to the type of evidence that will be required to establish his or her incapacity (for example, a report by the adult’s general practitioner, by the adult’s treating psychiatrist or geriatrician or by two independent health professionals).

16.181 Although the Commission has recommended that the explanatory information should be included in the approved forms, it is also of the view that it would be useful to provide the explanatory information in a separate booklet as well. This would be a convenient way of supplementing the information provided in the approved forms about the key features of the enduring power of attorney document as well as the roles and duties the principal, attorney and the witness. Such a booklet might also serve as a handy reference guide for subsequent use by the principal and the attorney.

16.182 In addition to the recommendations made above, the Commission has made recommendations in this Chapter and in Chapter 8 (which deals with the capacity to make an enduring document) in relation to particular content that should also be included in the approved forms for enduring documents.<sup>656</sup>

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653 Enduring power of attorney Short form (Form 2) cl 2, Enduring power of attorney Long form (Form 3) cl 2. Note, however, that clause 3 in both forms contains an example of a limitation on an attorney’s power.

654 *Powers of Attorney Act 1998* (Qld) sch 3.

655 Enduring power of attorney Short form (Form 2) cl 2, Enduring power of attorney Long form (Form 3) cl 2.

656 See Recommendations 8-10, 8-13, 16-14, 16-16, 16-17 of this Report.

## COPIES AND PROOF

### The law in Queensland

16.183 Section 45 of the *Powers of Attorney Act 1998* (Qld) deals with proof of enduring documents, including enduring powers of attorney. It provides that, without limiting the ways in which an enduring power of attorney may be proved, it may be proved by a copy certified in the prescribed manner as a true and complete copy of the original.<sup>657</sup> An enduring power of attorney may also be proved by a certified copy of a certified copy.

16.184 New South Wales, the Northern Territory and Victoria also provide for proof of enduring powers of attorney by certified copy.<sup>658</sup>

### Discussion Paper

16.185 In the Discussion Paper, the Commission discussed the issue of whether section 45 of the *Powers of Attorney Act 1998* (Qld) provides sufficient certainty for third parties.<sup>659</sup>

16.186 It noted that, while the current provision sets out a procedure for certification of a copy, it does not limit the ways in which an enduring power of attorney may be proved. This raises an issue as to the circumstances in which a third party can safely rely on a copy of an enduring power of attorney that is not certified in accordance with the provision.<sup>660</sup> The Commission noted that, while flexibility is important, additional clarification under the legislation may be warranted. It may be useful, for example, for the legislation to include examples of other ways in which an enduring power of attorney may be proved.

16.187 The Commission also noted that it might be appropriate for the approved forms for making an enduring power of attorney to alert principals to the provision in section 45.<sup>661</sup> At present, the explanatory notes at the start of the approved forms advise principals to give a copy of their completed enduring power of attorney to people such as their attorney, doctor, accountant, solicitor or stockbroker. It does not mention, however, the provision for certified copies.

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The certification, which must appear on every page, must be given by the principal, a justice of the peace, a commissioner for declarations, a notary public, a lawyer, a trustee company or a stockbroker: *Powers of Attorney Act 1998* (Qld) s 45(4).

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*Powers of Attorney Act 2003* (NSW) s 44; *Powers of Attorney Act* (NT) s 12; *Instruments Act 1958* (Vic) ss 125ZG–125ZK.

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Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.73]–[9.75].

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This issue was raised in the context of advance health directives in B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 49.

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See B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 51 in the context of advance health directives.

16.188 It was also noted that issues in relation to the authenticity of an enduring power of attorney might also be addressed by provisions for registration (which are discussed later in this Chapter).

16.189 Accordingly, the Discussion Paper sought submissions about whether:<sup>662</sup>

- section 45 of the *Powers of Attorney Act 1998* (Qld) should clarify the ways in which a copy of an enduring power of attorney may be proved and, if so, in what ways; and
- the explanatory information provided in the approved forms for making an enduring power of attorney should advise the principal to provide certified copies of the document to relevant third parties.

## Submissions

16.190 The Adult Guardian considered that section 45 of the *Powers of Attorney Act 1998* (Qld) should clarify how a copy of an enduring document may be proved because it does not provide sufficient certainty for third parties and, as a result, attorneys are 'often frustrated by financial and other institutions who refuse to recognise the documents or who have introduced bureaucratic procedures to satisfy their organisations' particular requirements'.<sup>663</sup>

16.191 Disability Services Queensland (now Disability and Community Care Services)<sup>664</sup> agreed that section 45 of the *Powers of Attorney Act 1998* (Qld) should clarify the requirements for proof of a document, particularly in relation to the requirement to certify each page of the document.<sup>665</sup> It also considered it desirable to achieve consistency between certification requirements for a general and an enduring document and as between Queensland and the other Australian jurisdictions.

16.192 In contrast, the Registrar of Titles considered the current certification requirements are satisfactory for the purpose of registering an enduring power of attorney.<sup>666</sup>

16.193 Three submissions considered that the explanatory information provided in the approved forms for making an enduring power of attorney should advise the principal to provide certified copies of the document to relevant third parties.<sup>667</sup>

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662 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 176.

663 Submission 164.

664 Disability and Community Care Services forms part of the Department of Communities.

665 Submission 93.

666 Submission 166.

667 Submissions 54A, 165, 169.

### The Commission's view

16.194 In Chapter 9, the Commission considered the manner of proving an advance health directive under section 45 of the *Powers of Attorney Act 1998* (Qld). In that context, the Commission recommended that section 45(2) and (3) of the *Powers of Attorney Act 1998* (Qld) should be omitted and replaced by a new subsection to the effect that the copy of the enduring document must be certified to the effect that it is a true and complete copy of the original.<sup>668</sup> The Commission considers that the amendment proposed by that recommendation for dealing with the manner of proving an advance health directive is also an appropriate way of dealing with the manner of proving an enduring power of attorney.

16.195 In the Commission's view, the explanatory notes for the approved form for an enduring power of attorney should continue to recommend that a copy of the form be given to relevant third parties (for example, the adult's attorney, doctor, solicitor, accountant or stockbroker). In order to minimise disputes about whether a copy of an enduring power of attorney is sufficient evidence of the document, it would be desirable for the explanatory notes to refer to the importance of providing a *certified* copy of the enduring power of attorney to those people. The approved forms should also explain how a copy of the enduring power of attorney should be certified in order to comply with section 45 of the *Powers of Attorney Act 1998* (Qld).

### REGISTRATION

16.196 Section 60 of the *Powers of Attorney Act 1998* (Qld) provides that an enduring power of attorney and an instrument revoking an enduring power of attorney may be registered. While registration is not generally required under the Act, if an attorney undertakes land transactions under the authority of the enduring power of attorney, it will need to be registered for the transactions to be valid. The need to register an enduring power of attorney in this situation arises from the philosophy underlying the Torrens system of 'title by registration' that a person entering into a transaction involving a registered interest should be able to rely on the register.<sup>669</sup>

16.197 This is similar to the position in the ACT and New South Wales.<sup>670</sup>

16.198 In contrast, the legislation in the Northern Territory and Tasmania requires all enduring powers of attorney to be registered<sup>671</sup> and also provides for the

<sup>668</sup> See Recommendation 9-9 of this Report. That recommendation is expressed in terms wide enough to apply to advance health directives and enduring powers of attorney/

<sup>669</sup> *Gibbs v Messer* [1891] AC 248.

<sup>670</sup> *Powers of Attorney Act 2006* (ACT) s 29(1); *Registration of Deeds Act 1957* (ACT) s 4; *Land Titles Act 1925* (ACT) s 130; *Powers of Attorney Act 2003* (NSW) ss 51, 52. South Australia also provides for voluntary registration of medical powers of attorney: *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14.

<sup>671</sup> *Powers of Attorney Act* (NT) ss 7, 8, 13(c); *Powers of Attorney Act 2000* (Tas) ss 9(1)(i), 16. In Tasmania, an instrument appointing an enduring guardian must also be registered with the Tribunal: *Guardianship and Administration Act 1995* (Tas) s 32(2)(d).

registration of interstate enduring powers of attorney.<sup>672</sup> Similarly, the legislation in the United Kingdom requires lasting powers of attorney to be registered.<sup>673</sup>

16.199 In the Northern Territory, registration is a precondition for the attorney to exercise his or her power under an enduring power of attorney.<sup>674</sup> The requirements for registration are that the instrument must be created in the approved form, be signed and witnessed and generally contain a specimen signature of the attorney appointed under the instrument.<sup>675</sup> A fee is incurred for the lodgement or notification of the revocation of an enduring power of attorney, and for conducting a search of the register or requesting a copy of an enduring power of attorney.<sup>676</sup> Interstate instruments may also be registered in certain circumstances.<sup>677</sup>

16.200 In Tasmania, registration is required for all power of attorney instruments, including enduring powers of attorney.<sup>678</sup> To register an enduring power of attorney, the document must comply with legislative requirements for the creation and execution of the document and be accompanied by a registration application and fee.<sup>679</sup> The register, which is a public record, is also searchable for a fee.<sup>680</sup>

16.201 In the United Kingdom, the *Mental Capacity Act 2005* (UK) provides that a lasting power of attorney is unenforceable unless the following requirements are satisfied: the instrument is properly created; an application for registration is

672 *Powers of Attorney Act* (NT) s 7(1)(a); *Powers of Attorney Act 2000* (Tas) s 43.

673 *Mental Capacity Act 2005* (UK) s 9(2)(b), sch 1 pt 2.

674 *Powers of Attorney Act* (NT) s 13. *Powers of Attorney Regulations* (NT) reg 3(2) provides for the following information to be recorded on the register: the name of the donor, the lodgement number and date of the instrument creating the power; and, where applicable, the date of the revocation of a power by the operation of s 16 or 17 of the Act, a protection order under the *Aged and Infirm Persons' Property Act* (NT) and an order of the Supreme Court revoking or varying the terms of an instrument creating a power under s 19(3) of the *Powers of Attorney Act* (NT).

675 *Powers of Attorney Act* (NT) s 7; *Powers of Attorney Regulations* (NT) reg 5(1)(a). See Northern Territory Government, Department of Justice, Land Titles Office, Power of Attorney <[http://www.nt.gov.au/justice/bdm/land\\_title\\_office/power.shtml](http://www.nt.gov.au/justice/bdm/land_title_office/power.shtml)> at 7 September 2010.

676 *Registration Regulations* (NT) sch 1 pt 4: Registering a power of attorney in the approved form under s 23 of the *Powers of Attorney Act* (NT) 95 revenue units (\$95), otherwise 145 revenue units (\$145); Registering a revocation of a power of attorney 95 revenue units (\$95); Endorsing a copy of an original instrument creating or revoking a power of attorney — for each instrument or other document 40 revenue units (\$40); Search of a power of attorney 5 penalty units (\$5); Photocopy or facsimile of a power of attorney (per page) \$2. See *Revenue Units Act 2009* (NT) ss 3, 4.

677 *Powers of Attorney Regulations* (NT) reg 5AA.

678 *Powers of Attorney Act 2000* (Tas) s 4.

679 *Powers of Attorney Act 2000* (Tas) ss 9, 30, sch 1 s 11 form 5. *Powers of Attorney Act 2000* (Tas) pt 4 provides for the creation of enduring powers of attorney. An appointment must be made according to the provided form and must be signed by the donor in front of two witnesses and accompanied by a statement of acceptance by the attorney/s or the Public Trustee where relevant. Enduring power of attorney instruments can be revoked (in the case of revocation or of the death, bankruptcy or insolvency of the donor) or varied by providing the Recorder with an order or notification of the revocation or variation. The prescribed fee for lodging an application is \$90.50: *Powers of Attorney Act 2000* (Tas) sch 2 item 1.

680 *Powers of Attorney Act 2000* (Tas) s 5. The prescribed fee for searching the register is \$20.00: *Powers of Attorney Act 2000* (Tas) sch 2 item 2. Other prescribed fees include a copying fee of \$20.00 and a certified copy fee of \$50.50: *Powers of Attorney Act 2000* (Tas) sch 2 items 3–4.

filed,<sup>681</sup> the application fee is paid;<sup>682</sup> particular persons nominated by the principal have been notified,<sup>683</sup> and registration is completed.

16.202 In some Canadian jurisdictions, a donor may file the instrument with the Public Trustee upon the creation of an enduring power of attorney.<sup>684</sup>

16.203 Financial and other institutions and service providers are often reluctant to recognise power of attorney arrangements.<sup>685</sup> The Australian Parliament's Standing Committee on Legal and Constitutional Affairs considered that this lack of recognition could be addressed by:<sup>686</sup>

the harmonisation of legislation on the instruments and the establishment of a national system of registration that could easily verify substitute decision making arrangements and detect cases where instruments have been revoked, and principals no longer have capacity.

16.204 This reflected the views expressed in a number of submissions made to that Committee's inquiry.<sup>687</sup> Carers Queensland submitted, for example, that:<sup>688</sup>

Even when people do go to the trouble to arrange formal appointments, they are not always acknowledged by entities such as banks. This is particularly true of EPAs. Instead, older people and their families are sometimes asked to complete additional 'semi-formal' processes for the organisation's own use. This places additional demands on the older person and the carer and negates the purpose of establishing a legal appointment.

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681 An application for the registration of a lasting power of attorney must include the following documentation: the Lasting Power of Attorney (Property and Affairs and/or Personal Welfare) Donor's Statement; a certificate providing a statement by an independent person that in making the instrument the donor had capacity and was not subject to fraud or undue pressure; an application for registration (complete with donor or attorney's declaration); a notice of intention to apply for registration:

682 The prescribed application fee for a Lasting Power of Attorney is £120. The application fee must be paid unless an exemption or remission is applicable: *Mental Capacity Act 2005* (UK) sch 1 pt 2. See also Office of the Public Guardian, Forms and Booklets, *Registering a Lasting or Enduring Power of Attorney (EPA) and Fees, exemptions and remissions* (2009) OPG506 <<http://www.publicguardian.gov.uk/forms/forms.htm>> at 7 September 2010.

683 *Mental Capacity Act 2005* (UK) sch 1 pt 2 para 6–14. If the principal or a named person in the lasting power of attorney objects to the registration of the lasting power of attorney, the Public Guardian must not register the instrument unless the court, on application of the person applying for the registration, is satisfied that the ground is not established and directs the Public Guardian to register the instrument: *Mental Capacity Act 2005* (UK) sch 1 pt 2 para 13.

684 *Powers of Attorney Act* (Manitoba) s 12; *Powers of Attorney Act* (Northwest Territories) s 15.

685 See Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.117]–[3.143], and submissions made to the Committee.

686 Ibid [3.142]. See also at [3.134].

687 Eg submissions from University of Queensland School of Social Work and Applied Human Sciences (27 November 2006); Caxton Legal Centre Inc (February 2007); and Alzheimer's Australia (30 November 2006) available from <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs.htm>> at 7 September 2010.

688 Carers Queensland, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (December 2006) 5 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub81.pdf>> at 7 September 2010.

It would appear that those organisations who do not acknowledge EPAs do so out of concerns concerning their authenticity. In particular, concerns over whether the person had capacity when they signed the EPA, if it is the most recent EPA, if the EPA has been revoked, etc. Registration of EPAs may improve acceptance of the attorney's authority on relevant matters.

16.205 An alternative approach to a national system of registration was proposed recently in a South Australian review of the system of enduring documents in that jurisdiction.<sup>689</sup> It proposed the establishment of a national voluntary repository for enduring documents to enable people or their agents to retrieve their enduring document or to know where it is stored when it is needed.<sup>690</sup>

16.206 An issue remaining for consideration in relation to the Queensland legislation is whether any improvements could be made to the existing provision for registration of enduring powers of attorney. One issue to consider is whether registration should be mandatory or optional. This involves a consideration of both the perceived benefits and likely costs and limitations of a registration system.

### Verifying the existence and validity of an enduring power of attorney

16.207 There is a need to balance expedient recognition of an attorney's authority, and the care that must be taken by third parties to ensure the validity of that authority to minimise the potential for fraud or abuse. Registration could provide some comfort regarding the existence and validity of an enduring power of attorney and could help prevent abuse.<sup>691</sup> The Law Commission of England and Wales commented, for example, that:<sup>692</sup>

A straightforward administrative registration procedure can have the merit of bringing a document into the public domain and establishing its formal validity. A mark of validity can be of benefit to both donor and donee. A process of registration involving a public body will undoubtedly discourage some people who might abuse powers which remain in the private domain and will provide a point of reference for those who have queries or concerns about the status of a particular document. Registration can also serve to distinguish [continuing powers of attorney] from ordinary powers of attorney.

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Advance Directives Review Committee (SA), *Advance Directives Review — Planning ahead: your health, your money, your life: Second Report of the Review of South Australia's Advance Directives, Stage 2 Proposals for implementation and communication strategies*, 40 <[http://www.agd.sa.gov.au/news/pdfs/2009/Stage\\_2\\_report\\_final.pdf](http://www.agd.sa.gov.au/news/pdfs/2009/Stage_2_report_final.pdf)> at 7 September 2010. It was considered that a national repository may be of benefit for the many Australians who travel interstate or relocate and would introduce economies of scale, accommodate the variations in enduring documents around the nation, and make 24 hour access more economically feasible. The report noted that submissions suggested that to be most effective a national repository would need to be free to registrants and enquirers, and preferably be web-based to enable enduring documents to be scanned in without alteration or transcription and to ensure broad geographical accessibility.

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Ibid.

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Eg A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *Journal of Adult Protection* 20 in which it is suggested that the registration of enduring powers of attorney and/or monitoring of enduring powers of attorney through enhanced accountability procedures could improve the proactive responses to financial abuse of older people.

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Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.30].

16.208 There are likely to be limitations, however, on the extent to which a registration system can ensure the validity of a registered instrument. It is doubtful, for example, whether the administrative task of verifying the formal requirements for a valid instrument would permit of any serious consideration of whether or not the principal had the requisite capacity to execute the document, or whether it was executed under duress or undue influence.<sup>693</sup> Reliance would probably be placed on the witness's certificate in this regard, pointing to the concomitant need for sufficiently rigorous witnessing requirements.<sup>694</sup> At present, a power of attorney is registered by the land titles office if it is signed, witnessed and otherwise in the correct format.<sup>695</sup>

16.209 There are also likely to be limitations on the extent to which a registration system can adequately record the status of an enduring instrument. It is unclear by what means, for example, the registration authority could verify that the power has in fact come into operation, particularly if the power is one that begins only on the principal's loss of capacity. It could require, for example, the registration of a medical certificate? Similarly, there may be serious consequences for a principal who has revoked an enduring power of attorney but not yet had time to register the revocation,<sup>696</sup> particularly in relation to financial transactions.

16.210 An advantage of mandatory registration is that third parties could verify the existence of an enduring power of attorney. An issue to consider in this respect is the extent to which any such register should be searchable.

16.211 At present, the land titles register, on which enduring powers of attorney may be registered, is searchable. A general inquiry, by name of the principal or attorney, can be made as to whether or not a power of attorney is registered. In addition, a copy of the instrument can be obtained on payment of a fee. The availability of such information is important with respect to land transactions.

16.212 However, the ability to search a register of enduring powers of attorney raises serious privacy implications for enduring powers of attorney involving other matters, especially given that such instruments may contain quite sensitive personal information. It also has significant resource implications given that access to such information would require case-by-case assessment and monitoring.<sup>697</sup>

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693 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 151.

694 The witnessing requirements for enduring documents are considered in Chapter 8 of this Report.

695 Information provided by Land Officer, Department of Natural Resources (19 February 2009).

696 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 157.

697 Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [40]; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 152.



## Encouraging reliance on an attorney's authority

16.213 As noted above, service providers and other institutions are often reluctant to recognise power of attorney arrangements. In particular, difficulties have been noted with respect to Centrelink, the Australian Government agency responsible for delivering Commonwealth services and benefits.<sup>698</sup>

16.214 The Australian Parliament's Standing Committee on Legal and Constitutional Affairs considered that a national system of registration of powers of attorney 'should have the benefit of facilitating the recognition of substitute decision-making instruments by Commonwealth instrumentalities'.<sup>699</sup> It is unclear, however, whether a system of registration would encourage greater reliance by Centrelink on an attorney's authority. While registration may allow Centrelink to verify the existence of a power of attorney and to obtain a copy of the instrument itself, there is nothing in the relevant Commonwealth legislation requiring Centrelink to recognise the authority of an attorney.

16.215 At present, Commonwealth legislation makes provision for people's dealings with Centrelink to be managed by a 'nominee' on their behalf.<sup>700</sup> Under the *Social Security (Administration) Act 1999* (Cth), a 'payment nominee' can be appointed to receive payments on behalf of the recipient, or a 'correspondence nominee' can be appointed to deal with Centrelink on the recipient's behalf, for example, by making an application or claim for the recipient.<sup>701</sup> The same person may be appointed as both the payment and correspondence nominee for the recipient.<sup>702</sup>

16.216 A person must not be appointed as nominee except with the appointee's written consent and after taking into account the recipient's wishes (if any) with respect to such an appointment.<sup>703</sup>

16.217 A recipient can authorise the appointment of a nominee by lodging a form.<sup>704</sup> The form requires the recipient to stipulate the reason for making the nominee arrangement. If it is because of a power of attorney or a court, Tribunal or guardianship or administration order, supporting documents must be attached. If the recipient is 'unable to sign due to physical, psychiatric or intellectual disability',

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698 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 7.

699 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.134].

700 *Social Security (Administration) Act 1999* (Cth) pt 3A.

701 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C, 123F, 123H. Australian Government, Centrelink also makes provision for a recipient to authorise a 'person permitted to inquire' who may make enquiries of Centrelink on the recipient's behalf: Australian Government, Centrelink, *Someone to deal with Centrelink for you* <<http://www.centrelink.gov.au/internet/internet.nsf/services/nominee.htm>> at 7 September 2010.

702 *Social Security (Administration) Act 1999* (Cth) s 123D(1).

703 *Social Security (Administration) Act 1999* (Cth) s 123D(2).

704 Australian Government, Centrelink, *Authorising a person or organisation to enquire or act on your behalf* <<http://www.centrelink.gov.au/internet/internet.nsf/forms/ss313.htm>> at 7 September 2010.

the form may be signed by someone else on the recipient's behalf. However, that person must not be the person being authorised as nominee. Evidence of the recipient's inability to sign the form must also be attached.

16.218 The Centrelink nominee provisions were intended to facilitate family arrangements:<sup>705</sup>

It is reasonably common for children of an elderly person who can no longer manage their own affairs to manage the financial affairs of their parent and to handle their correspondence relating to their age pension. It is also common for parents of children with a disability to manage the financial affairs of their children and to handle their correspondence relating to disability support pension. The new provision facilitates such arrangements.

16.219 The Australian Parliament's Standing Committee on Legal and Constitutional Affairs noted that, in determining nominee arrangements, powers of attorney will be taken into account:<sup>706</sup>

Representatives from Centrelink advised the Committee that, in making nominee arrangements, they 'take into account any current arrangements that may exist, such as a power of attorney', and 'in the normal course of events such an arrangement would be sufficient'.<sup>707</sup> In a further appearance before the Committee, Centrelink added that whether a power of attorney is accepted for a nominee arrangement 'depends on what is contained in the... agreement'.<sup>708</sup> (notes in original)

16.220 In evidence to the Standing Committee, a Centrelink representative gave the following explanation of the policy on recognition of powers of attorney:<sup>709</sup>

We do not seek to override any powers of attorney or any state based arrangements. We do have, though, an arrangement in place under the Social Security Act to establish nominee arrangements for either correspondence or payment. Of course, we take into account current arrangements that are in place—powers of attorney or otherwise—in making that determination. With the variation of arrangements state by state—there is quite a degree of difference—we run a national universal comprehensive welfare system that needs a national consistent method of dealing with issues, and this is one of the issues. The nominee arrangements are specific to and quite explicit in the Social Security Act and, when we are making judgements on establishing those nominee arrangements, we take into account any current arrangement that may exist, such as a power of attorney.

<sup>705</sup> Explanatory Memorandum, Family and Community Services Legislation Amendment (Budget Initiatives and Other Measures) Bill 2002 (Cth) 3.

<sup>706</sup> Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.125].

<sup>707</sup> Mr Paul Cowan, Centrelink, *Transcript of Evidence*, 23 March 2007, 5, 6.

<sup>708</sup> Mr Roy Chell, Centrelink, *Transcript of Evidence*, 17 August 2007, 32.

<sup>709</sup> Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 23 March 2007 [LCA 5] (Paul Cowan).

16.221 While power of attorney arrangements are taken into account in determining Centrelink nominee arrangements, the Commonwealth legislation does not expressly require a person who is relevantly authorised under a power of attorney made under State legislation to be recognised as a nominee. Concerns have been raised that ‘powers of attorney are not automatically recognised as authorisation for a nominee where the principal has lost capacity’.<sup>710</sup> In the absence of legislative recognition, the role of registration in encouraging greater reliance on power of attorney arrangements remains questionable.

## Resource and privacy implications

16.222 It is also important to bear in mind that any system of compulsory registration is likely to have significant resource implications and to add an additional, burdensome layer of complexity and expense to the process of advance planning for adults and their families.<sup>711</sup>

16.223 In the United Kingdom, the Office of the Public Guardian has recently undertaken an evaluation of several aspects of the registration system in that jurisdiction as part of its review of the implementation of the *Mental Capacity Act 2005* (UK).<sup>712</sup> During that process, the Board identified a number of practical difficulties with the operation of the registration system,<sup>713</sup> including the amount of the registration fee, significant delays in the registration process and low levels of customer satisfaction.<sup>714</sup> In response to those complaints, the Board has reduced the registration fee<sup>715</sup> and introduced measures designed to streamline the

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710 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 3] (Brian Herd).

711 Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [40]; Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report, Enduring Powers of Attorney*, Report No 47 (1988) [30].

712 Ministry of Justice, *Reviewing the Mental Capacity Act 2005: forms, supervision and fees*, Consultation Paper, CP 26/08 (2008).

713 Many applicants complained that the forms were too lengthy and complicated to fill in resulting in some applicants seeking the assistance of legal practitioners in order to complete the forms, costing applicants as much as £1000 in legal fees: The Public Guardian Board, Annual Report 2009, *Making Legislative Reform a Reality* (2009) 14, <<http://www.publicguardian.gov.uk/docs/pgb-annual-report-2009.pdf>> at 7 September 2010; see also H Meyer ‘Give someone power of attorney ... before it’s too late’ *Guardian.co.uk*, 3 June 2009 <<http://www.guardian.co.uk/money/2009/jun/03/power-of-attorney>> at 7 September 2010. Consumers also complained that the fee for registration was high, that the processing time was significantly delayed and that the complaints contact centre was inefficient and under-resourced: Ministry of Justice, *Reviewing the Mental Capacity Act 2005: forms, supervision and fees*, Consultation Paper, CP 26/08 (2008) 9.

714 In practice, donors have faced significant expense and delay since the registration system’s implementation in 2007. From 1 January 2008 to 31 August 2008, 46 000 applications to register a lasting power of attorney or enduring power of attorney were received by the Office of the Public Guardian. In the first year of the system’s operation, registration was taking 13 weeks and the office’s contact centre received a ‘disproportionately high’ number of complaints totalling 1384 complaints between April 2008 to March 2009 relating to applications and processing alone: Office of the Public Guardian, *Annual Report and Accounts 2008–2009* (2009) 29–32 <<http://www.publicguardian.gov.uk/docs/opg-annual-report-accounts-2008-091.pdf>> at 7 September 2010.

715 In response to consumer complaints, the application forms have been redesigned, are now accompanied with a completion guide and the fee has been reduced from £150 to £120: Office of the Public Guardian, *Annual Report and Accounts 2008–2009* (2009) 39 <<http://www.publicguardian.gov.uk/docs/opg-annual-report-accounts-2008-091.pdf>> at 7 September 2010.

registration process and to improve customer satisfaction.<sup>716</sup>

16.224 The implementation of a registration system also raises the question of who should be responsible for its administration.

16.225 In Queensland, general and enduring powers of attorney are registrable on the powers of attorney register kept by the Registrar of Titles within the Department of Environment and Resource Management.<sup>717</sup> Registration involves a minimum lodgement fee of \$127.90.<sup>718</sup> Other fees including requisition fees (which are payable if formal requirements are not complied with) and fees for the removal of a power of attorney from the register may also apply. If registration were to become mandatory, the number of lodgements would likely increase and would need to be met by increased funding.

16.226 The responsibility for operating a compulsory registration system would be a considerable administrative burden. If the register were to track information about the validity of the instruments, there may be an advantage in transferring responsibility to an agency that is familiar with the guardianship legislation, such as the Adult Guardian or the Public Trustee. However, this would represent a considerable expansion of the functions of that agency, may detract from core functions and would need to be met by an increase in staffing and resources.<sup>719</sup> It might also involve an undesirable perception of conflict of interest.

16.227 It is also important to remember that enduring powers of attorney may bear on land transactions such that their continued registration in the land titles register seems entirely appropriate.

16.228 A final consideration is that the imposition of a system of mandatory registration would add to the already large list of agencies with whom adults and their families and carers are required to interact to facilitate day-to-day transactions.

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As at 10 September 2009, the Office of the Public Guardian reported that 'the delays in registration have been reduced to 8 weeks if there are no errors in the application or objections and where errors are found applicants are notified within 2 weeks of the applications receipt'. The Office stated that its target for March 2010 was to register 80% of applications within eight weeks of their receipt: Office of the Public Guardian, 'How long will my application take? *Application to register a Lasting Power of Attorney* <<http://www.publicguardian.gov.uk/application-register-lpa.htm>> at 2 December 2009. As at 21 April 2010, the Office of the Public Guardian reported that, due to currently experiencing 'an exceptionally high level' of applications for lasting powers of attorney, the registration and return of lasting powers of attorney may take up to 14 weeks. The Office stated that its aim is to return registered lasting powers of attorney within nine weeks of receiving them: Office of the Public Guardian, 'How long will my application take? *Application to register a Lasting Power of Attorney* <<http://www.publicguardian.gov.uk/application-register-lpa.htm>> at 30 September 2010.

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The current attorney register is maintained by the Registrar of Titles under s 133(1) of the *Land Title Act 1994* (Qld). This register is maintained, together with the freehold land register and other land registers, in the Department of Environment and Resource Management's Automated Titles System.

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*Land Title Regulation 2005* (Qld) sch 2 item 2(m).

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In the late 1980s, for example, the Australian Law Reform Commission considered whether the Public Trustee should act as a registration authority in the ACT. It recommended against this, however, partly on the basis that the Public Trustee would have insufficient resources to properly scrutinise enduring powers of attorney and that this could in fact hinder the Public Trustee's ability to perform its more general supervisory and advice role: Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report, Enduring Powers of Attorney*, Report No 47 (1988) [29]–[30].

## Discussion Paper

16.229 In the Discussion Paper, the Commission sought submissions about whether the *Powers of Attorney Act 1998* (Qld) should provide for the registration of enduring powers of attorney, and the reasons why or why not.<sup>720</sup>

16.230 It also sought submissions on whether, if the Act made provision for the registration of enduring powers of attorney:<sup>721</sup>

- registration should be mandatory or optional; and
- what other features the registration system should have.

## Submissions

### A system of registration

16.231 The submissions were divided on the issue of whether the *Powers of Attorney Act 1998* (Qld) should provide for the registration of enduring powers of attorney.

16.232 The Adult Guardian, the Queensland Law Society, the former Acting Public Advocate, Queensland Health, Disability Services Queensland and several other respondents each considered that the *Powers of Attorney Act 1998* (Qld) should provide for registration of enduring powers of attorney.<sup>722</sup>

16.233 Nearly all of these respondents identified two main advantages of registration. First, the improvement of the identification and recognition of attorneys by providing a central system through which professionals (including health providers), government agencies, law enforcement officers, financial and other institutions and other service providers and third parties may determine whether an enduring power of attorney for an adult exists, and if so, the identity of the attorney.<sup>723</sup> It was suggested, for example, that a registration scheme may be useful where an adult in an emergency room has lost capacity and requires life sustaining treatment and the enduring power of attorney must be located urgently. Secondly, the general deterrence of financial abuse of adults with impaired capacity and, if a registration scheme were mandatory, prevention of multiple and/or fraudulent enduring powers of attorney and their attempted use.

16.234 The respondents considered that other benefits of registration included:

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720 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 182.

721 Ibid.

722 Submissions C87B, 48, 54A, 93, 105, 133, 160, 164, 168.

723 Submissions C87B, 160.

- the provision of information in relation to the existence of multiple enduring powers of attorney (if relevant);<sup>724</sup>
- the facilitation of access to information for substitute decision-makers through enhanced recognition of their right to information;<sup>725</sup>
- the provision of a time-saving mechanism for third parties attempting to determine whether an enduring power of attorney exists and has been activated;<sup>726</sup> and
- ease for attorneys and adults in locating their enduring powers of attorney (which are often lost or misplaced).<sup>727</sup>

16.235 The Queensland Law Society argued that the privacy arguments against registration of enduring powers of attorney are outweighed by the benefits and the potential to reduce financial abuse:<sup>728</sup>

Provision of the name of the principal, their attorney, etcetera, on a publicly available register has implications for the privacy of the principal. However ... enduring power of attorney registration has a three fold benefit:

- a. The principal receives the benefit of the register bringing the existence [of] their enduring power of attorney into the public domain and assisting in the recognition of the principal's wishes;
- b. People who intend to rely on the enduring power of attorney receive the assurance that the attorney has the ostensible authority to deal with the principal's personal, medical, health, property and/or business/financial affairs and
- c. The attorney receives the benefit that the evidence they provide to validate their power under the enduring power of attorney is more easily accepted.

16.236 The Adult Guardian explained that registration of an enduring power of attorney may also assist in resolving arguments in relation to an adult's capacity at the time the document was executed:<sup>729</sup>

Registration could also be used to address another emerging issue about the use of EPAs and that is that at the time the enduring power of attorney was granted, the adult did not have capacity to grant the donor the power given under the instrument. If registration were contingent upon production of a certificate by a GP or other defined group of persons certifying that the adult had capacity to grant the enduring power of attorney, retrospective

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724 Submission C87B.

725 Submission 160.

726 Submissions C87B, 160, 168.

727 Submissions C87B, 160.

728 Submission 168.

729 Submission 164.

investigations to determine capacity would be largely unnecessary and the ease with which vulnerable adults are currently approached and induced to enter enduring powers of attorney would be significantly reduced.

Currently the gatekeeper to capacity at the time an enduring power of attorney is entered is the officer who, amongst other things, is responsible for certifying the document. In the experience of this office, that is usually JPs or lawyers. Our work in investigating allegations of abuse would indicate that neither undertakes this role with sufficient vigour.

16.237 The Adult Guardian also questioned why compulsory registration of an enduring power of attorney was required for land transactions by an attorney, but not required for dealings with any other assets:

One of the current inconsistencies with the current system which requires registration for land dealings but no other dealings is that it implicitly stipulates the need to protect land dealings as being somehow more special. From the point of view of the individual there is nothing to suggest that financial abuse which results in the loss of savings in the form of bank accounts, shares or other forms of security is of any less importance to the individual.

16.238 On the other hand, Queensland Aged and Disability Advocacy Inc, the Perpetual Group of Companies, and several other respondents each considered that the *Powers of Attorney Act 1998* (Qld) should not provide for registration of enduring powers of attorney.

16.239 Queensland Aged and Disability Advocacy Inc did not consider that a register would solve the problem of abuse of enduring powers of attorney.<sup>730</sup>

Registration does not provide a safeguard against abuses. Registration may in fact have the opposite and unintended effect, for example giving greater credence to an improperly obtained EPA. QADA submits that registration per se offers little, if any, protection from intentional abuses by persons who set out to defraud through the means of an EPA. (The legitimate status of the EPA requires a detailed forensic examination of the circumstances surrounding the making of the EPA. Provisions in the *Powers of Attorney Act 1998* for the making of an EPA generally provide as much protection as is realistically workable.)

16.240 The Perpetual Group of Companies did not support the imposition of any additional registration requirements under the Act.<sup>731</sup>

If every [enduring power of attorney] executed had to be registered, it may discourage principals from putting in place a very desirable part of their planning structure, and complicate the revocation and replacement of those arrangements. Perpetual does not support such a requirement.

On the other hand registration of at least an [enduring power of attorney] for financial matters before the attorney begins to act on it may provide some of the mooted benefits without some of the disadvantages. However it may delay the attorney's ability to act, which might in some circumstances cause problems.

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730 Submission 148.

731 Submission 155.

At present the attorney can sign the acceptance at any time, even after the principal has lost capacity. This needs to be taken into account if one were considering what should be the proposed effect of failing to register.

It is unclear what the effect of registration, as opposed to failing to register, might be. Is it to give some protection to a third party?

Presumably the [enduring power of attorney] might be ineffective unless and until registered. If it revokes an earlier [enduring power of attorney] by inconsistency, is that revocation similarly ineffective? Is an express revocation to be effective only on registration, even if notice has been given to the former enduring attorney?

In practice, on balance, Perpetual has not observed sufficient problems to justify imposing additional registration requirements at any stage.

16.241 The Trustee Corporations Association of Australia noted the competing arguments for and against registration.<sup>732</sup>

This remains a contentious issue. A non-compulsory register would be of limited value. Extending to all enduring powers of attorney the current compulsory registration requirements that apply to enduring powers of attorney where dealing in real estate is involved might not be a huge step, as most people contemplating enduring powers of attorney probably own some real estate these days. Registration would offer potential benefits in terms of enhanced accountability for attorneys and easier monitoring of dealings under enduring powers of attorney by the authorities. Compulsory registration would, of course, involve extra costs. The costs (and benefits) would be less if compulsory registration applied only to enduring powers of attorney that have been activated. Compulsory registration also raises serious privacy concerns. Many elderly people possibly would elect to forego an enduring power of attorney, rather than have their privacy compromised by registration. If this were the case, a registration requirement might prove counterproductive. Further, if compulsory registration were to be adopted, it probably would need to be done on a national basis. If enduring powers of attorney were registered in some jurisdictions only, concerns would arise with regard to cross-recognition and jurisdiction-hopping.

16.242 The Public Trustee, while not expressing a strong view on whether there should be a registration system for enduring powers of attorney, expressed some provisional views about a registration system.<sup>733</sup> The Public Trustee suggested that an important factor to take into account in deciding whether to implement a register is that a register would have significant resource implications. In this regard, the Public Trustee considered it important to look to the practical experience of registration systems in Australia and the United Kingdom.

16.243 The Public Trustee considered that the question of whether a registration system should be implemented would depend on the purpose of the register, noting that registration should not be determinative of the validity of a document.

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732 Submission 158.

733 Submission 156A.



16.244 The Public Trustee also considered that a registration system may have merit if it is coupled with a form of statutory insurance:

that is part of the registration fee funds a form of statutory insurance for those who suffer a loss caused by the 'misuse' particularly of enduring powers of attorney. For this to be viable it would be likely that registration should be compulsory. Such a scheme might bear a similar framework to that which exists in the Torrens Titling System in Queensland (see sections 188–190 *Land Title Act 1994*). The scheme would not be predicated upon a loss of title but rather a loss caused by the fraud or misuse of particularly an enduring power of attorney by the attorney. The State could be subrogated to the rights of the principal should compensation be paid as is the case for those who lose an interest in a lot under the Torrens System (section 188 (2) and section 190 of the *Land Title Act 1994*).

So that there is no distinction between loss occasioned by the similar roles of financial administrators and attorneys the scheme might also be conveniently extended to losses at the hands of financial administrators. A statutory insurance scheme particularly for elder financial abuse, largely self-funded through registration fees, might represent a very real and practical step in addressing the concerns that the Public Trustee has in respect of financial abuse by fiduciaries in this area.

16.245 While not commenting on the desirability of mandatory registration as a means of overcoming practical difficulties faced by some attorneys, the Registrar of Titles noted that such a registration system would involve a number of complex legal and practical issues.<sup>734</sup>

16.246 The Registrar of Titles strongly opposed any proposal for a separate national register or a register maintained by another State agency:

[The establishment of a national system of registration for powers of attorney] would clearly involve complex constitutional and legislative issues, and consideration would also need to be given to the practicality and cost of building and maintaining a new register.

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The issues of practicality, convenience and cost are also relevant if consideration is given to placing responsibility for registering powers of attorney with a different State agency other than the registrar of titles.

16.247 Another issue raised by the Registrar of Titles related to the proper role of the registering authority in the registration process:

A power of attorney will be registered if it appears on its face to be capable of registration. It would not be appropriate for the registrar of titles to have any role in determining whether the principal had capacity to execute the power of attorney or in scrutinising matters other than the formal requirements for the document. Tracking information about the validity of the instruments ... would not be an appropriate function for the registrar of titles to undertake and could not be done within the current system of registration, which follows a similar

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Submission 166.

process to that for all other documents lodged for registration in the Automated Titles System.

16.248 The Registrar of Titles also raised a number of issues about the legal effect of registering an enduring power of attorney. First, while registration enables a third party to verify the existence of an enduring power of attorney, a search of the powers of attorney register cannot always confirm that a named attorney is currently entitled to exercise the power. The Registrar of Titles suggested that such confirmation would require a system under which an enduring power of attorney is only registered when the attorney commences to exercise his or her powers. Secondly, he noted the possibility of reliance being placed on the apparent legitimacy of an enduring power of attorney, based on its status as a registered document, in circumstances where the enduring power of attorney has been revoked or the principal has died. The Registrar of Titles commented that while this issue is generally well understood by lawyers and others who are regularly engaged in land transactions, others who do not have that experience may not have the same understanding.

16.249 Another issue raised by the Registrar of Titles related to the possible privacy implications of mandatory registration:

As the freehold land register and other registers relating to land are public registers, it is essential that details of a power of attorney which is used to deal with land should also be ascertainable by search. However this may not be desirable for all enduring powers of attorney, which contain personal information about the principal and the attorneys. ... It would not be possible under the current system of registration for requests for information to be assessed on a case-by-case basis, nor would this be an appropriate function for the registrar of titles. Searches of any power of attorney registered in the Automated Titles System can only be conducted on the same basis as searches of all other registered documents.

16.250 The Registrar of Titles also commented on the logistics of mandatory registration:

It is not clear whether all existing enduring powers of attorney would need to be registered in a proposed system of compulsory registration, for example within a specified time after the commencement of legislation. I believe this would be impossible to achieve as there would be a very large number of enduring powers of attorney in existence and no practical way of informing relevant persons of their obligation to register these. It is not clear ... how many enduring powers of attorney are likely to be in existence or how many are likely to be created each year. If these were to be registered under the current system of registration, it is likely that the additional number of lodgements could be handled by the titles registry without any additional resources. Powers of attorney would probably continue to make up only a small proportion of the total number of documents lodged for registration.

16.251 Finally, the Registrar of Titles raised the issue of whether the costs and formalities involved in the registration process may be burdensome for people who are not used to dealing with the current system. He noted, for example, that:

It is likely a large number [of enduring powers of attorney] are not used to deal with land. When the power is to be used to deal with land, there will often be

other professionals, for example lawyers, involved in the transaction who can advise on the need and formal requirements for registration. Information about these formal requirements is readily available; nevertheless we find that many people who are inexperienced with titles registry transactions have difficulty complying with these requirements unless they engage a lawyer to act on their behalf.

### ***Mandatory or optional registration***

16.252 A number of submissions, including those received from the Adult Guardian, the former Acting Public Advocate and the Queensland Police Service, supported the mandatory registration of enduring powers of attorney.<sup>735</sup> The Queensland Police Service explained:

The QPS Fraud and Corporate Crime Group has identified cases of persons who are suspected of dishonesty who hold appointments by several different vulnerable persons. Two options for registration should be available, i.e. public or private registration. Public registration needs to be encouraged through administratively simple procedures and at reasonable cost. [The] registration process should include keeping a copy of the instrument of appointment and instrument of revocation. Private registration should be available through appropriately qualified persons such as lawyers and accountants who hold membership with the relevant professional bodies. Basic details of public or private registration should be searchable on a register kept by the State. Basic details should be publicly available such as the name of the appointer / appointee, the date of the appointment, when the appointment takes effect and who holds the appointment instrument. Funding for the register could be raised through search fees instead of lodgement fees. Search fees would also discourage persons conducting searches for inappropriate reasons.

16.253 The Caxton Legal Centre Inc supported an optional registration system for enduring powers of attorney.<sup>736</sup>

### ***Features of a registration system***

16.254 The Adult Guardian suggested that, if a registration system were implemented, the *Powers of Attorney Act 1998* (Qld) should require that the registration documents include a medical certificate certifying that the adult had capacity to execute the enduring power of attorney.<sup>737</sup>

### **The Commission's view**

16.255 The Commission has closely examined the issue of whether the *Powers of Attorney Act 1998* (Qld) should be amended to require that all enduring powers of attorney be registered.

16.256 Registration has a number of benefits. It ensures that enduring powers of attorney are known about so the principal's wishes can be respected after decision-

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<sup>735</sup> Submissions C59B, 54A, 81, 105, 160, 162, 164.

<sup>736</sup> Submission 174.

<sup>737</sup> Submission 164.

making capacity is lost or diminished. A requirement for registration would enable third parties (including financial institutions, medical facilities and aged care providers) to make inquiries about the existence and current status of an enduring power of attorney. It may also help to expose the situation where an adult has made a succession of enduring powers of attorney which create a series of incompatible powers.

16.257 However, while a registration system may assist in verifying the existence and formal validity of an enduring power of attorney, there are likely to be limitations on the extent to which a registration system can ensure the essential validity of a registered instrument. In particular, registration would not necessarily detect fraud or abuse. For example, the registration process would not necessarily reveal that an enduring power of attorney has been fraudulently obtained or executed in circumstances where the principal had no capacity to make it. In addition, because registration may give apparent legitimacy to dealings, a general requirement for registration may increase the possibility of improper actions by an attorney under an enduring power of attorney — in particular, if the principal dies, in the period following the death of the principal or, if the principal has revoked the enduring power of attorney, before the instrument revoking the enduring power of attorney has been registered. There are also likely to be limitations on the extent to which a registration system can adequately record the status of an enduring power of attorney.

16.258 In addition, a registration system is likely to have significant privacy and resource implications and to add an additional layer of formality, complexity and expense to the process of making an enduring power of attorney. In particular, it may be difficult for people to comply with the formal requirements for registration without legal or other assistance.

16.259 The Commission considers that, on balance, the burdens of mandatory registration would likely outweigh its benefits. The Commission has serious concerns that the formality, costs and complexity of registration would inevitably discourage some adults from making an enduring power of attorney. The Commission therefore considers that the *Powers of Attorney Act 1998* (Qld) should not be amended to require that all enduring powers of attorney be registered.

16.260 Finally, the Commission notes the difficulties that have been identified in [16.221] in relation to the recognition of substitute decision-making instruments, including enduring powers of attorney, under the current Centrelink nominee arrangements, and observes that these arrangements may benefit from being reviewed by the Standing Committee of Attorneys-General.

## NOTICE PROVISIONS

16.261 Some overseas jurisdictions include, or have considered, mandatory notice requirements in relation to the execution, registration or commencement of an enduring power of attorney. These provisions are designed to inform interested parties about an enduring power of attorney that has come into existence so that any objections to it can be ventilated at an early stage. At present, similar

provisions are not included in the *Powers of Attorney Act 1998* (Qld) nor in the legislation in other Australian jurisdictions.

16.262 The legislation in Ireland, for example, provides a two-tier system of notice.

16.263 First, notice must be given of the execution of the enduring power of attorney to at least two persons who are named by the principal in the enduring power as persons to whom notice must be given, one of whom must be the principal's spouse, child or relative.<sup>738</sup>

16.264 Secondly, notice must be given prior to registration. An attorney under an enduring power of attorney who 'has reason to believe that the donor is or is becoming mentally incapable' must apply to the court to register the instrument.<sup>739</sup> Before making the application, the attorney must give notice of his or her intention to apply for registration to the principal, the persons notified of the execution of the instrument, and any joint attorneys.<sup>740</sup> A notified person then has a period of five weeks from the date of the notice to lodge a written objection to the registration with the court on one or more of the following grounds:<sup>741</sup>

- (a) that the power purported to have been created by the instrument was not valid;
- (b) that the power created by the instrument is no longer a valid and subsisting power;
- (c) that the donor is not or is not becoming mentally incapable;
- (d) that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney;
- (e) that fraud or undue pressure was used to induce the donor to create the power.

16.265 The *Mental Capacity Act 2005* (UK) also requires pre-registration notice to be given to the persons named in the instrument and, once the application for registration is made, to the principal or the attorney (depending on who has made the application).<sup>742</sup> Notified persons have five weeks from the date of the notice

<sup>738</sup> *Powers of Attorney Act 1996* (Ireland) s 5(2); *Enduring Powers of Attorney Regulations 1996* (Ireland) s 7.

<sup>739</sup> *Powers of Attorney Act 1996* (Ireland) s 9(1).

<sup>740</sup> *Powers of Attorney Act 1996* (Ireland) s 9(2), sch 1 cl 1, 2, 8. The Act also makes provision to identify the persons entitled to receive notice if notice cannot be given to the persons who received notice of the execution of the document.

<sup>741</sup> *Powers of Attorney Act 1996* (Ireland) ss 9(2), 10(3), sch 1 cl 6. This does not apply to the principal.

<sup>742</sup> *Mental Capacity Act 2005* (UK) s 9, sch 1 cl 6–8. The principal may name up to five persons who are to receive notice in the lasting power of attorney: *Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) s 6.

within which to object to the registration.<sup>743</sup>

16.266 The Law Commission of England and Wales considered that notice to the principal of the intention to register is especially important:<sup>744</sup>

It may be some time since the document was executed and, in any event, the act of registration will significantly alter matters by triggering the attorney's power to act. The donor must be warned that this is in prospect and be given an opportunity to prevent registration.

16.267 An alternative mechanism, which is not dependent on a system of registration, is to require the attorney to give notice of his or her intention to begin exercising power under the enduring power of attorney. The Western Canada Law Reform Agencies have recently recommended such a system.<sup>745</sup> Under their proposal, an attorney would be under a statutory duty to give a 'Notice of Attorney Acting' to:

- the principal; and
- the persons named in the enduring power of attorney as persons who are to receive the notice; or
- where no such designation is made in the instrument, the principal's immediate family members.

16.268 If there is no person to whom the attorney can give the notice, the attorney must give the notice to the appropriate public official, such as the Public Guardian. The notice would need to be given 'within a reasonable period after the donor becomes incapacitated and the attorney assumes exclusive responsibility for managing the donor's financial affairs'.<sup>746</sup>

16.269 In recommending the duty to notify, the Western Canada Law Reform Agencies noted that:<sup>747</sup>

The point in time when the donor is declared to lack capacity to manage financial affairs and the attorney begins acting without the donor's supervision is a good point at which to let family members, and possibly other persons, know that the attorney is now acting independently. Doing so will place the attorney's actions under the scrutiny of a select group of persons.

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<sup>743</sup> *Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) ss 14, 15.

<sup>744</sup> Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.34].

<sup>745</sup> Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008) 63, rec 12. The Western Canada Law Reform Agencies comprises the Alberta Law Reform Institute, the British Columbia Law Institute, the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan. See also Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Report No 88 (2003) [29]–[41].

<sup>746</sup> Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008) [158].

<sup>747</sup> *Ibid* [145].

## Discussion Paper

16.270 In the Discussion Paper, the Commission raised the issue of whether the *Powers of Attorney Act 1998* (Qld) should make provision for any notice requirements.<sup>748</sup> It noted that such provisions may serve to ensure some measure of scrutiny in relation to the actions of an attorney.<sup>749</sup> This will be particularly important when the principal has impaired capacity and cannot supervise the attorney's actions. It has been noted, for example, that:<sup>750</sup>

In many cases, these are secretive processes kept away from the other members of the family who only discover what has been going on once the worst has happened. A form of notification and registration is a way of reducing potential misuse of these documents as well.

16.271 The Discussion Paper also noted that it is also important, however, not to infringe the adult's privacy unjustifiably. Mandatory notice to family members, irrespective of the principal's wishes, 'conflicts with the autonomy principle'.<sup>751</sup> Similarly, it is necessary to consider how notice requirements, such as a 'Notice of Attorney Acting', would operate with respect to a principal who experiences fluctuating or intermittent periods of impaired capacity. For example, a notice requirement may necessitate a large number of notices regarding the periods when the principal does and does not have capacity. Such a requirement is also likely to impose significant costs on the parties.

16.272 The Commission sought submissions on whether the *Powers of Attorney Act 1998* (Qld) should include any notice requirements in relation to the execution or commencement of an enduring power of attorney.<sup>752</sup>

16.273 In the event that the Act were amended to include notice requirements, the Commission also sought submissions on:<sup>753</sup>

- what sort of notice should be required, namely:
  - notice of the execution of an enduring power of attorney;
  - notice of the attorney's intention to begin exercising power under the enduring power of attorney; or

<sup>748</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 185.

<sup>749</sup> Ibid [9.111].

<sup>750</sup> Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 9] (Brian Herd).

<sup>751</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.112] citing Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.37].

<sup>752</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 185.

<sup>753</sup> Ibid 185–6.

- some other notice; and
- to whom notice should be given, namely:
  - the principal;
  - the persons named in the enduring power of attorney by the principal as persons who are to receive notice;
  - members of the principal's family;
  - members of the principal's 'support network' (defined to include members of the adult's family, close friends of the adult, and any other people the Tribunal decides provide support to the adult);
  - 'interested persons' (defined as persons with a sufficient and continuing interest in the adult); or
  - some other person.

## Submissions

16.274 A number of respondents, including the Adult Guardian, Queensland Aged and Disability Advocacy Inc, the former Acting Public Advocate and the Trustee Corporations Association of Australia, considered that the *Powers of Attorney Act 1998* (Qld) should include notice requirements in relation to the execution or commencement of an enduring power of attorney.<sup>754</sup>

16.275 The Adult Guardian preferred the Irish model, in which notice of the execution of the enduring power of attorney must be given prior to registration to at least two persons who are named in the document by the principal.<sup>755</sup>

16.276 Queensland Aged and Disability Advocacy Inc suggested that any notification process should be simple and not costly.<sup>756</sup> It considered, for example, that a short notification period with a simple requirement for notification of say, at least two of the 'interested persons' nominated by the principal may help to guard against abuse.

16.277 The Public Trustee considered that informing particular family members that an enduring power of attorney is operational may 'introduce a level of scrutiny which otherwise would not apply'.<sup>757</sup> The Public Trustee also observed that the 'requirement for notices carries with it an administrative burden which likely will be frequently overlooked'.

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<sup>754</sup> Submissions 2A, 54A, 136, 148, 158, 164.

<sup>755</sup> Submission 164.

<sup>756</sup> Submission 148.

<sup>757</sup> Submission 156A.



16.278 Several other respondents, including the Queensland Law Society, the Queensland Police Service and the Perpetual Group of Companies, disagreed with a requirement for mandatory notification of the execution or commencement of an enduring power of attorney,<sup>758</sup> although many supported a discretionary notification regime.<sup>759</sup>

16.279 The Perpetual Group of Companies considered that a legislative requirement to notify particular individuals at the time of the execution of an enduring power of attorney is ‘excessively intrusive, and inappropriate’:<sup>760</sup>

Requiring every attorney to give notice to individuals when ‘activating’ the enduring power of attorney raises serious potential problems around finding, or perhaps even identifying, those people, particularly if the enduring power of attorney was executed a long time previously.

Perpetual is neutral about whether a principal should have the opportunity to include a requirement for the attorney to give notice to particular people before exercising power under an enduring power of attorney if the principal has lost capacity.

16.280 The Queensland Law Society, who considered that the principal should be permitted to nominate whether or not they wish to notify interested persons, proposed that the notification and registration of an enduring power of attorney should occur simultaneously at the time when the attorney wishes to rely on the enduring power of attorney document.<sup>761</sup> They also considered it may be beneficial for the principal to specify in the document who is to be notified, the reasons for notification and the reasons against notification.

### The Commission’s view

16.281 The Commission does not consider that it is desirable to amend the *Powers of Attorney Act 1998* (Qld) to impose a mandatory notification requirement about the execution or commencement of an enduring power of attorney, or about an attorney’s decisions. While such a requirement would be a safeguard against the improper use of power by an attorney, it would also increase the level of complexity of the scheme for enduring powers of attorney, which may make enduring powers less attractive as an advance planning tool. A mandatory notification requirement would also infringe on the autonomy and privacy of those principals who do not wish to have others notified of an attorney’s decisions. The Commission therefore considers that the option of requiring notification should be left to the principal’s discretion. This could be easily done by including a specific instruction in the enduring power of attorney.

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758 Submissions 155, 160, 168, 173.

759 Submissions 155, 160, 168.

760 Submission 155.

761 Submission 168.

16.282 For example, if the principal wishes the attorney to notify particular persons, who have a genuine interest in the principal's welfare and in being kept informed about the principal's affairs or the attorney's decisions, the principal might include an additional instruction in his or her enduring power of attorney which expresses the principal's wishes that the attorney advise one or more persons, nominated by the principal, of all decisions made or transactions undertaken as the principal's attorney in relation to the matters for which they have been appointed.<sup>762</sup>

16.283 Consistent with this approach, the explanatory information in the approved forms for an enduring power of attorney should explain that the principal may give a specific instruction in his or her enduring power of attorney which expresses the principal's wishes about notification. For example, the principal may express the wish that the attorney notify one or more persons, nominated by the principal, of all decisions made or transactions undertaken as the principal's attorney in relation to the matters for which they have been appointed.

## DECLARATION OF IMPAIRED CAPACITY

16.284 Section 33(5) of the *Powers of Attorney Act 1998* (Qld) provides that:

- (5) If an attorney's power for a matter depends on the principal having impaired capacity for a matter, a person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has the impaired capacity.

16.285 Under section 110 of the *Powers of Attorney Act 1998* (Qld), a person may also apply to the Supreme Court<sup>763</sup> or the Tribunal<sup>764</sup> for a declaration in relation to an enduring power of attorney. Section 115 provides:

### **115 Declaration about commencement of power**

The court may make a declaration that—

- (a) a power, under a power of attorney, enduring power of attorney or advance health directive, has begun; or
- (b) the principal has impaired capacity for a matter or all matters.

16.286 The persons who may apply for a declaration include the principal, an attorney, a member of the principal's family, the Adult Guardian, the Public Trustee and an 'interested person'.<sup>765</sup>

<sup>762</sup> See *Powers of Attorney Act 1998* (Qld) s 67, which requires an attorney to exercise his or her power subject to the terms of the enduring document.

<sup>763</sup> *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'court').

<sup>764</sup> *Powers of Attorney Act 1998* (Qld) s 109A.

<sup>765</sup> *Powers of Attorney Act 1998* (Qld) s 110(3). An interested person is defined in sch 3 of the Act as a person with a sufficient and continuing interest in the other person. The definition of 'interested person' is discussed in Chapter 21 of this Report.

16.287 Sections 33(5) and 115 provide for a measure of certainty about the commencement of an enduring power.<sup>766</sup> They also provide a flexible procedure in that a medical certificate or declaration is not required in all cases, but may be sought in those circumstances where there is some doubt or dispute.

16.288 An alternative procedure has been adopted, or considered, in some other jurisdictions.

16.289 In the Canadian provinces of Alberta, Manitoba and Saskatchewan, for example, a written declaration as to the principal's loss of capacity is required for powers that are exercisable only if the principal has impaired capacity.<sup>767</sup> Section 6(1)–(5) of Manitoba's *Powers of Attorney Act* is typical:

**Power in force at future time**

6(1) A donor may provide in the power of attorney that it comes into force at a specified future date or on the occurrence of a specified contingency.

**Donor may appoint declarant**

6(2) The donor may in the power of attorney name one or more persons from whom the attorney may request a written declaration that the date or contingency has occurred.

**Attorney may be declarant**

6(3) The donor may in the power of attorney name the attorney as the declarant or one of the declarants.

**Doctors may declare mental incompetence**

6(4) Where a power of attorney provides that it comes into force on the mental incompetence of the donor, two duly qualified medical practitioners may act as the declarant if the donor does not name a declarant in the power of attorney or if the named declarant is unable or unwilling to provide a declaration.

**Release of confidential information**

6(5) Despite any statutory or other restriction relating to the disclosure of information, if a power of attorney provides that it comes into force on the mental incompetence of the donor, information respecting the donor's health may be disclosed to the extent necessary for a declarant, a duly qualified medical practitioner or the court to determine whether the specified contingency has occurred.

16.290 The Law Commission of New Zealand recommended the adoption of a similar requirement. It suggested that a certificate from a registered medical practitioner that the principal has become 'mentally incapable' should be required

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<sup>766</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 124.

<sup>767</sup> *Powers of Attorney Act*, RSA 2000, c P-20, s 5; *Powers of Attorney Act*, CCSM c P97, s 6(1)–(4); *Powers of Attorney Act*, 2002, SS 2002 c P-20.3 ss 9.1, 9.2.

before the attorney can act under the power.<sup>768</sup> It considered that the requirement would help protect principals from having power exercised before they have lost capacity and, by establishing the attorney's authority to act, would also protect attorneys and third parties. It acknowledged, however, that:<sup>769</sup>

The wording of section 98(3) suggests that the attorney's powers cease if the donor should recover capacity, so that a relapse will require a new certificate. It will be necessary to protect innocent third parties who rely on a certificate unaware of a subsequent recovery of capacity.

16.291 The South African Law Commission noted that a declaration may not reflect a 'correct' determination of the principal's capacity.<sup>770</sup> It proposed, instead, that an affidavit as to the principal's loss of capacity be filed with the application for registration of the enduring power of attorney and that the registering authority be able to call for further evidence as to the principal's mental capacity before registering the instrument.<sup>771</sup>

16.292 An issue to consider is whether any similar provision should be made in Queensland. It may be desirable, for example, to require a medical certificate or declaration from the Tribunal for the power to commence. This may help prevent misuse of enduring powers of attorney and may give the principal, the principal's family members and other interested parties an opportunity to scrutinise the enduring power before it comes into effect. Such a preventative approach may be useful.

16.293 On the other hand, it may be more appropriate to retain the flexibility of the existing provisions, whereby a medical certificate or declaration may, but need not, be sought. A mandatory requirement would add further formality to what is intended to be a simple, inexpensive method of advance planning. It may also lead to an unwarranted intrusion into private affairs. The possible delay involved in seeking a medical certificate or declaration may also have deleterious consequences for the adult, for example, if the onset of impaired capacity is sudden and a decision needs to be made quickly. It is also likely to present significant difficulties for a person with fluctuating capacity.

16.294 An alternative measure may be to inform people about the opportunity to seek a medical certificate or a declaration. For example, it may be useful to include information about the ability to seek a declaration from the Tribunal (or the Supreme Court) in the approved forms for making an enduring document. The approved forms might state, for example, that, if the attorney is in some doubt about whether he or she can commence acting under the power, it is advisable to seek a declaration from the Tribunal. This approach has the advantage that it puts people on notice about the procedure but does not arbitrarily impose a formal procedure in all cases.

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<sup>768</sup> Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [30].

<sup>769</sup> *Ibid* [31].

<sup>770</sup> South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.89].

<sup>771</sup> *Ibid* [7.103].

## Discussion Paper

16.295 In the Discussion Paper, the Commission sought submissions on the following:<sup>772</sup>

- whether the *Powers of Attorney Act 1998* (Qld) should require a medical certificate or a declaration from the Tribunal before an attorney can act under an enduring power of attorney, and why or why not; and
- alternatively, whether the approved forms for making an enduring power of attorney should explain a person's ability to seek a medical certificate as to the principal's capacity or a declaration from the Tribunal or the Supreme Court if there is some doubt about whether an attorney's authority has commenced.

## Submissions

16.296 The submissions received by the Commission were divided on this issue.

16.297 The Queensland Law Society and one other respondent considered it preferable for an attorney to obtain a medical certificate about the principal's capacity rather than seek a declaration by the Tribunal.<sup>773</sup>

16.298 The Queensland Law Society proposed that an attorney should be required to obtain a medical certificate from a 'list of court recommended geriatric specialists' to ensure a comprehensive assessment is made.<sup>774</sup> It further considered that an attorney should also be able to seek a declaration by the Tribunal 'to mitigate any current or future claims that the attorney acted outside the scope of the enduring power of attorney'. In addition, the Queensland Law Society advocated for the development of a standard form for completion by a medical practitioner or the Tribunal in relation to the principal's capacity.

16.299 A number of submissions opposed the inclusion of a requirement in the Act for a medical certificate or a declaration from the Tribunal before an attorney can act under an enduring power of attorney.<sup>775</sup> The Perpetual Group of Companies considered that the current provisions in the Act provide flexibility in practice.<sup>776</sup>

16.300 The Christian Science Committee on Publication for Queensland considered that it is important and appropriate to retain the flexibility of the existing provisions, whereby a medical certificate or declaration may, but need not, be

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<sup>772</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 189.

<sup>773</sup> Submissions 54A, 168.

<sup>774</sup> Submission 168.

<sup>775</sup> Submissions 105, 155.

<sup>776</sup> Submission 155.

sought.<sup>777</sup> It considered that a mandatory requirement would add further formality to what is intended to be a simple, inexpensive method of advance planning and may also lead to an unwarranted intrusion into private affairs. It also contended that a requirement to seek medical diagnosis or treatment could serve to violate an individual's religious beliefs:

Individuals should be allowed to specify in an advance directive for health care someone, other than a physician or other health professional, to determine if the principal lacks capacity or has regained capacity to make their own health care decisions.

16.301 The Adult Guardian agreed that a formal Tribunal process would be too formal and time consuming.<sup>778</sup>

16.302 The Public Trustee distinguished between an enduring power of attorney that is activated immediately upon acceptance by the attorney of the appointment and an enduring power of attorney that is activated upon the donor's loss of capacity.<sup>779</sup> In the Public Trustee's experience, the majority of enduring powers of attorney take effect upon acceptance by the attorney of the appointment.

16.303 He considered that, for those enduring powers of attorney for which there are concerns, it is more likely that a donor will be encouraged to prepare a document which takes effect upon execution rather than incapacity. The Public Trustee considered that 'a requirement for a declaration or certificate will also reflect additional steps, time and expense which will not apply if the attorneyship takes effect upon execution'. He suggested that, if necessary, it would be preferable to deal with the problem of financial abuse through the 'prudential oversight of attorneys as well as administrators and guardians'.

16.304 In the context of an enduring power of attorney that is activated upon the loss of the donor's capacity, the Public Trustee commented that it may be useful to clarify the position of an attorney who is unaware of the donor's loss of capacity:

The issue of medical certificates and declarations for the commencement of attorneys drawn in that context (that is operative only on a loss of capacity) has a different dimension however. The reality is that attorneys might not be aware of a loss of incapacity by a Donor. There is some discussion and indeed advices offered that an attorney may be liable for not determining the commencement of an EPA in circumstances where the Donor has lost capacity. This issue might usefully be addressed in legislation to offer greater comfort to attorneys who are not aware that the Donor has lost capacity.

16.305 Instead of taking the approach that the Act should require a medical certificate or Tribunal declaration that the principal has impaired capacity before the attorney's powers are activated, several submissions considered that the approved forms for making an enduring power of attorney should explain a person's ability to seek a medical certificate as to the principal's capacity or a declaration from the

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<sup>777</sup> Submission 151.

<sup>778</sup> Submission 160.

<sup>779</sup> Submission 156A.

Tribunal or the Supreme Court if there is some doubt about whether an attorney's authority has commenced.<sup>780</sup> On the other hand, the Perpetual Group of Companies suggested that, rather than include such information in the already lengthy approved forms, it would be more useful to include a conspicuous notice early in the forms directing attorneys to a place where they can obtain guidance about these issues.<sup>781</sup>

### The Commission's view

16.306 The Commission considers it preferable to retain the flexibility currently provided under sections 33(5) and 115 of the *Powers of Attorney Act 1998* (Qld), under which a medical certificate or a declaration as to the principal's capacity may, but need not, be sought. While a mandatory requirement (such as a written declaration as to the principal's loss of capacity for powers that are activated only if the principal has impaired capacity) may provide a level of certainty about the commencement of an enduring power of attorney, it would also have some significant negative impacts on the operation of the scheme for enduring powers of attorney.

16.307 Accordingly, the Act should not be amended to require a medical certificate or a declaration from the Tribunal before an attorney can act under an enduring power of attorney. However, it would be desirable if the approved forms for making an enduring power of attorney included explanatory information about a person's ability to seek a medical certificate as to the principal's capacity or a declaration from the Tribunal or the Supreme Court if there is some doubt about whether an attorney's authority has commenced.

## THE REMOVAL OF AN ATTORNEY APPOINTED UNDER AN ENDURING POWER OF ATTORNEY

16.308 The Tribunal has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.<sup>782</sup> This includes giving the Court or Tribunal broad powers under section 116 of the *Powers of Attorney Act 1998* (Qld) to remove an attorney or a power from an attorney or to change or revoke an enduring document.<sup>783</sup>

16.309 Section 116 provides:<sup>784</sup>

<sup>780</sup> Submissions 54A, 160, 165, 174.

<sup>781</sup> Submission 155.

<sup>782</sup> *Guardianship and Administration Act 2000* (Qld) s 82(2). Section 109A of the *Powers of Attorney Act 1998* (Qld) gives the Tribunal the same jurisdiction and powers for enduring documents as the Supreme Court.

<sup>783</sup> The exercise of power under that section in relation to an attorney appointed under a general power of attorney is outside the scope of this review.

<sup>784</sup> Section 116 is based on one of the Commission's recommendations in its original 1996 report and implemented by clause 66 of the draft Assisted and Substituted Decision-Making Bill 1996 in that report: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 146–7. See [16.311] below.

### 116 Order removing attorney or changing or revoking document

The court may, by order—

- (a) remove an attorney and appoint a new attorney<sup>81</sup> to replace the removed attorney; or
- (b) remove a power from an attorney and give the removed power to another attorney or to a new attorney; or

...

81 The court is not limited to appointing an *eligible attorney* (defined in section 29).

16.310 Section 116 is based on one of the Commission's recommendations in its original 1996 report and reflected in clause 66 of the draft Assisted and Substituted Decision-Making Bill 1996 in that report.<sup>785</sup>

16.311 Clause 66(1)(a) of the Commission's draft Bill empowers the Supreme Court or the Tribunal to remove a chosen decision-maker (an attorney) under an adult's enduring power of attorney and appoint an appointed decision-maker (a guardian or an administrator) to replace the removed chosen decision-maker.<sup>786</sup> Clause 66(1)(b) of the Commission's draft Bill empowers the Supreme Court or the Tribunal to remove a power from a decision-maker and give the power to another decision-maker or an appointed decision-maker (a guardian or an administrator). Clause 66(1)(a) and (b) provide:

#### Order changing or revoking power of attorney

66(1) The tribunal may, by order—

- (a) remove a chosen decision-maker<sup>787</sup> under an adult's enduring power of attorney and appoint an appointed decision-maker<sup>788</sup> to replace the removed chosen decision-maker; or
- (b) remove a power from a decision-maker and give the removed power to another decision-maker or to an appointed decision-maker; or

... (notes added)

16.312 The Commission's draft Bill, which reflected the Commission's recommendations for a comprehensive legislative scheme for substitute decision-making, included provisions for both the scheme for enduring powers of attorney

<sup>785</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 146–7.

<sup>786</sup> Ibid 49–50.

<sup>787</sup> The Commission's draft Bill defined a 'chosen decision-maker' as a substitute decision-maker chosen by an adult in an enduring power of attorney or an advance health directive: Assisted and Substituted Decision-Making Bill 1996 sch 2.

<sup>788</sup> The Commission's draft Bill defined an 'appointed decision-maker' as a substitute decision-maker appointed by the Tribunal: Assisted and Substituted Decision-Making Bill 1996 sch 2. A person in this category would be a guardian or an administrator.



and the appointment of guardians and administrators. However, the *Powers of Attorney Act 1998* (Qld) (which deals with enduring documents) was enacted prior to the *Guardianship and Administration Act 2000* (Qld) (which established the Guardianship and Administration Tribunal and deals with the appointment of guardians and administrators). It may be for that reason that section 116 refers to the appointment of a 'new attorney' rather than the appointment of a guardian or an administrator. A similar drafting issue arises in section 113(3) of the *Powers of Attorney Act 1998* (Qld), which is discussed at [16.329]–[16.331] below.

### The grounds for removing an attorney appointed under an enduring power of attorney

16.313 Section 116 of the *Powers of Attorney Act 1998* (Qld) does not limit the grounds on which the Court or Tribunal may make an order for the removal of an attorney or the revocation of an enduring document.<sup>789</sup>

16.314 This approach differs from the recommendation made by the Commission in its original 1996 report that the Tribunal should not make an order appointing a decision-maker (a guardian or an administrator) for the person unless there are grounds for removing a chosen decision-maker (an attorney) or revoking the enduring power of attorney.<sup>790</sup>

16.315 In contrast to section 116 of the *Powers of Attorney Act 1998* (Qld), section 31 of the *Guardianship and Administration Act 2000* (Qld) specifies that the Tribunal may remove a guardian or an administrator *only* if the Tribunal considers that the appointee is no longer competent or that another person is more appropriate for appointment.<sup>791</sup>

16.316 The *Guardianship and Administration Act 2000* (Qld) also gives the Tribunal power to suspend all or some of the powers of a guardian or an administrator if the Tribunal suspects, on reasonable grounds, that the appointed person is not competent.<sup>792</sup> The Adult Guardian has a similar power in relation to

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However, s 117 of the *Powers of Attorney Act 1998* (Qld) provides that, without limiting the grounds on which the Court (or Tribunal) may make an order changing the terms of a power of attorney, enduring power of attorney or advance health directive, or revoking all or part of one of those documents, the Court (or Tribunal) may make the order if the Court considers the principal's circumstances or other circumstances have changed to the extent that one or more terms of the document are inappropriate.

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Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 146–7. The Commission considered the relationship between an enduring power of attorney and an order made by the proposed Tribunal. It noted that one possible approach would be to provide that an enduring power of attorney is revoked by or becomes 'subject to' a subsequent Tribunal order. However, the Commission considered this would give insufficient weight to the wishes of the person who made the enduring power of attorney at a time when he or she had the capacity to do so. The Commission recommended that, if a person has made an enduring power of attorney, the Tribunal should not make an order appointing a decision-maker (guardian or administrator) for the person unless there are grounds for removing a chosen decision-maker (attorney) or revoking the enduring power of attorney. The Commission's recommendation was reflected in clause 66(2) and (3) of the Commission's draft Assisted and Substituted Decision-Making Bill 1996: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 2, 49–50.

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*Guardianship and Administration Act 2000* (Qld) s 31(3)(b)(ii), (4), (5).

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*Guardianship and Administration Act 2000* (Qld) s 155.

the suspension of an attorney's powers under an enduring document.<sup>793</sup> For the purposes of these provisions, a guardian, an administrator or an attorney (as the case may be) is not competent if, for example:

- a relevant interest of the adult has not been, or is not being, adequately protected;
- the guardian, administrator or attorney has neglected his or her duties or abused his or her powers, whether generally or in relation to a specific power; or
- the guardian, administrator or attorney has otherwise contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

16.317 The removal of an adult's attorney or the attorney's powers or the revocation of an adult's enduring document may give rise to the appointment of a guardian or an administrator for the adult.<sup>794</sup> For example, in *Re MLB*,<sup>795</sup> the Tribunal removed the adult's attorney on the basis that he was not competent to act as the adult's substitute decision-maker and appointed an administrator for the adult to ensure that the needs of the adult would be adequately met.<sup>796</sup>

The Tribunal is satisfied, however, that there is the need for the appointment of an administrator to manage the proper investigation and possible pursuit of the various claims already identified by the Public Trustee. Although WD holds an Enduring Power of Attorney, his position as attorney and as the major beneficiary under the 2003 Will of his late mother, his stated intention not to pursue the claim against his late mother's estate, and his previous conduct in relation to MLB's financial affairs, shows that he is unlikely to act in MLB's best interests in terms of pursuing legal matters on her behalf.

...

The Tribunal is satisfied that WD's conduct justifies his removal as attorney, as permitted by section 116. As the effect of his removal would mean there is no continuing attorney under the Enduring Power of Attorney, the Tribunal revokes the Enduring Power of Attorney made by MLB in November 2003.

...

The Tribunal's jurisdiction is a protective one, aiming to protect the rights of a vulnerable sector of the community. The Tribunal sympathises with MLB and understands her wish to regain control of her own money. However, the Tribunal considers that, consistent with section 7(5) of Schedule 1 of the Act, the order achieves a proper balance between ensuring MLB has as much

<sup>793</sup> *Guardianship and Administration Act 2000* (Qld) s 195.

<sup>794</sup> If the Tribunal or the Supreme Court has removed some of the powers of an attorney or has revoked part of the enduring power of attorney under s 116, the attorney may exercise his or her powers only to the extent authorised by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 22.

<sup>795</sup> [2004] QGAAT 59.

<sup>796</sup> *Ibid* [62], [64].

control over her affairs as is possible in the circumstances of her particular case, while at the same time protecting her assets surplus to day to day living expenses and ensuring that a proper investigation of possible legal claims open to her is undertaken.

16.318 In his submission to the Commission, the Public Trustee proposed that the grounds on which the appointment of an attorney under an enduring power of attorney may be 'overtaken' by the subsequent appointment of a guardian or an administrator should be limited to where the attorney has contravened the *Powers of Attorney Act 1998 (Qld)*:<sup>797</sup>

The scheme which operates in Queensland is to allow individuals to appoint attorneys who can continue in that role after the individual loses capacity. If no such appointment is made or in circumstances where the person appointed attorney is inappropriate then an administrator might be appointed.

There have been some matters where the Public Trustee's appointment as administrator has been strongly criticised by former attorneys whose appointments are said to be 'overtaken' by the Tribunal exercising its powers.

The Public Trustee's view is that an administrator (including the Public Trustee) should only be appointed and an attorney's role 'overtaken' when it is determined by the Tribunal (on factual enquiry) that the attorney has not complied with the [*Powers of Attorney Act 1998 (Qld)*].

This legislative amendment might go some way to quelling the very reasonable complaints the Commission says it has received in respect of how family conflict is dealt with.

An illustration might assist. In a recent matter (at this stage unreported) before the Tribunal a wife of an adult who had suffered a stroke needed to be hospitalised. The wife was the attorney under an enduring power for her husband. Arrangements were made for the husband with an incapacity to be cared for by his sister.

In circumstances where that adult clearly did not have capacity the Tribunal was advised that the husband through solicitors had initiated property settlement proceedings, adding that the husband no longer wished to reside with his wife.

The sister had had a fresh power of attorney prepared and signed by the husband.

The Tribunal determined that the later document was invalid for want of capacity and in the ordinary course the attorney wife should have reassumed financial management (as well as the caring role for her husband).

The Tribunal faced with family conflict appointed the Public Trustee.

In that matter the Public Trustee holds the view now, some months after appointment that there was no conduct, indeed no allegation that the wife holding the power of attorney had acted inappropriately. The husband was

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Submission 156A.

highly susceptible to influence and now resides (again) happily with his wife, a position which continues a marriage of some 36 years.

Had there been a requirement that the Tribunal find (in order to overtake the enduring power of attorney of the wife) that there was some breach of the [*Powers of Attorney Act 1998* (Qld)] the administration order likely would not have been made.

### **The power to appoint a new attorney**

16.319 Although section 116(a) and (b) of the *Powers of Attorney Act 1998* (Qld) give the Court or a Tribunal a power to remove an existing attorney and appoint a new attorney, or to remove a power from an attorney and give the removed power to another attorney or to a new attorney, there are no other substantive provisions in the Act that specify the mechanics of how the Court or Tribunal is to make such an appointment or to give such powers. The conferral on the Court or Tribunal of a power to appoint a new attorney is also inconsistent with the legislative scheme for making enduring documents, which is designed to enable an adult to appoint an attorney of his or her choice.

### **The Commission's view**

#### ***The grounds for removing an attorney appointed under an enduring power of attorney***

16.320 Given that the adult's attorney is the person who the adult has chosen as his or her substitute decision-maker, it is important to ensure that the adult's autonomy is preserved to the greatest possible extent by only enabling the removal of the adult's attorney in limited circumstances.

16.321 The Commission considers that the only circumstance which would justify the removal of an adult's attorney under section 116 of the *Powers of Attorney Act 1998* (Qld) is where the Supreme Court or Tribunal considers that the attorney is no longer competent to discharge his or her duties. This is because the attorney's lack of competence may result in a situation where the needs of the adult are not being adequately met or the adult's interests are not being adequately protected. Accordingly, section 116 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Supreme Court or the Tribunal may make an order to remove an attorney only if it considers that the attorney is no longer competent to act in that position.

16.322 Section 116 of the *Powers of Attorney Act 1998* (Qld) should also be amended to include examples of when an attorney is no longer competent which are similar to those provided in section 31 of the *Guardianship and Administration Act 2000* (Qld) for the removal of a guardian or an administrator, including that:

- a relevant interest of the adult has not been, or is not being, adequately protected;
- the attorney has neglected his or her duties or abused his or her powers, whether generally or in relation to a specific power; or

- the attorney has otherwise contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

16.323 The Commission also notes that, where there is family conflict, an attorney's ability to exercise his or her powers in accordance with the requirements of the *Powers of Attorney Act 1998* (Qld) will depend on the particular circumstances of each case. While, in some cases, the attorney may no longer be suitable or competent to act as the adult's substitute decision-maker due to the effect of the family conflict, in others, the attorney may continue to be a suitable and competent substitute decision-maker notwithstanding the existence of family conflict. The critical issue will be whether the family conflict impedes the attorney's ability to act in the adult's interests and to comply with the other requirements of the Act.

***The power to appoint a new attorney or to give an attorney's power to another attorney***

16.324 If an attorney who is appointed under an enduring power of attorney is removed and there is a need for a formal appointment to be made,<sup>798</sup> the Tribunal may appoint a guardian or an administrator or both under section 12 of the *Guardianship and Administration Act 2000* (Qld) to exercise the relevant powers for the adult. This was not possible when the *Powers of Attorney Act 1998* (Qld) was originally enacted, as the Guardianship and Administration Tribunal was not established until some two years later when the *Guardianship and Administration Act 2000* (Qld) was enacted.<sup>799</sup>

16.325 The *Guardianship and Administration Act 2000* (Qld) provides a comprehensive scheme for the appointment of guardians and administrators. For example, it deals with the Tribunal's power to make an appointment (section 12), the eligibility requirements for appointment (section 14), the appropriateness of the appointee (section 15), and the periodic review of the appointment (section 28).

16.326 While the Tribunal and the Supreme Court would no doubt consider the suitability of a proposed new attorney before deciding whether to appoint a new attorney under section 116(a) of the *Powers of Attorney Act 1998* (Qld), the Commission considers it preferable, where the need for the appointment of a substitute decision-maker arises from the removal of an attorney under an enduring power of attorney, for the appointment to be made under the *Guardianship and Administration Act 2000* (Qld), which specifically regulates the appointment of substitute decision-makers and the review of those appointments.

16.327 To the extent that section 116(a) of the *Powers of Attorney Act 1998* (Qld) empowers the Supreme Court or the Tribunal to appoint a new attorney to replace an attorney who has been removed under an enduring power of attorney, it is not necessary to retain that power and section 116(a) should be amended accordingly.

<sup>798</sup> If there is no continuing attorney under the advance health directive, the principal will have a statutory health attorney under s 63 of the *Powers of Attorney Act 1998* (Qld).

<sup>799</sup> From 1 December 2009, the Guardianship and Administration Tribunal was replaced by the Queensland Civil and Administrative Tribunal.

16.328 For consistency, section 116(b) of the *Powers of Attorney Act 1998* (Qld), to the extent that it applies to an attorney appointed under an enduring power of attorney, should also be amended so that it does not empower the Supreme Court or the Tribunal to give a power that has been removed from an attorney to another attorney or to a new attorney. If the Tribunal or the Supreme Court considers that a power should be removed from an attorney and given to another person, the appropriate course is for the Tribunal or the Supreme Court to remove the power from the attorney under section 116(b) of the *Powers of Attorney Act 1998* (Qld) and for the Tribunal to appoint the other person as a guardian with the relevant power under section 12 of the *Guardianship and Administration Act 2000* (Qld).<sup>800</sup>

### THE POWER TO MAKE A DECLARATION ABOUT THE VALIDITY OF AN ENDURING DOCUMENT

16.329 Section 113 of the *Powers of Attorney Act 1998* (Qld) deals with the power of the Tribunal or the Supreme Court to declare that a power of attorney, enduring power of attorney or advance health directive is invalid.<sup>801</sup> It provides:

#### 113 Declaration about validity

- (1) The court may decide the validity of a power of attorney, enduring power of attorney or advance health directive.
- (2) The court may declare a document mentioned in subsection (1) invalid if the court is satisfied—
  - (a) the principal did not have the capacity necessary to make it; or
  - (b) it does not comply with the other requirements of this Act; or
  - (c) it is invalid for another reason, for example, the principal was induced to make it by dishonesty or undue influence.
- (3) If the court declares the document invalid, the court may, at the same time, appoint 1 or more attorneys<sup>80</sup> for the principal.

80 The court is not limited to appointing an *eligible attorney* (defined in section 29).

16.330 Section 113(3) of the Act provides that, if the Court or Tribunal declares that an enduring document is invalid, the Court or Tribunal may, at the same time, appoint one or more attorneys for the principal. A literal reading of this section would give an anomalous result, particularly given that section 114 of the Act provides that, 'if the court declares a document invalid under section 113, the document is void from the start'. Section 113 is based on clause 63(1) of the Commission's draft Assisted and Substituted Decision-Making Bill 1996, which provided that 'If the tribunal declares an adult's enduring power of attorney invalid,

<sup>800</sup> If s 245 of the *Guardianship and Administration Act 2000* (Qld) applies, the Supreme Court may exercise all the powers of the Tribunal under ch 3 of the Act: s 245(2). This would include the power to appoint a guardian under s 12 of the Act.

<sup>801</sup> *Guardianship and Administration Act 2000* (Qld) s 82(2). Section 109A of the *Powers of Attorney Act 1998* (Qld) gives the Tribunal the same jurisdiction and powers for enduring documents as the Supreme Court.

the tribunal may, at the same time, appoint 1 or more substitute decision makers for the adult'. The inclusion of this paragraph in the section would appear to be a drafting error.

### The Commission's view

16.331 The Commission considers that section 113 of the *Powers of Attorney Act 1998* (Qld) should be amended either by deleting section 113(3) or by amending section 113(3) to clarify that, if the adult's enduring document is declared invalid, the Court or Tribunal may appoint a guardian or an administrator for the adult under section 12 of the *Guardianship and Administration Act 2000* (Qld).

## INTERSTATE RECOGNITION

### The law in Queensland

16.332 Section 34 of the *Powers of Attorney Act 1998* (Qld) deals with the extent to which an enduring power of attorney made in another Australian jurisdiction has effect in Queensland. It provides:

#### **34 Recognition of enduring power of attorney made in other States**

If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.

16.333 Accordingly, for an interstate enduring power of attorney to be effective in Queensland it must comply with the requirements in the jurisdiction in which it was made.<sup>802</sup> It will then be treated as an enduring power of attorney made under the Queensland Act to the extent that it gives powers that could validly have been given by an enduring power of attorney under the Queensland Act. This means that, if an interstate enduring power of attorney appoints an attorney to make 'all health care decisions' for the principal, that will be effective to appoint the attorney to make decisions about health matters.<sup>803</sup> However, because an attorney cannot be given the power under the *Powers of Attorney Act 1998* (Qld) to make decisions about special health care, the interstate enduring power of attorney will not give the attorney power to make decisions about special health care.

16.334 If a principal makes an enduring power of attorney in another Australian jurisdiction and subsequently makes an enduring power of attorney under the *Powers of Attorney Act 1998* (Qld), the effect of the interstate enduring power of attorney involves a two-step process.

802 However, an interstate enduring power of attorney is not required to comply with the execution requirements of the *Powers of Attorney Act 1998* (Qld).

803 A 'health matter, for a principal' is a matter relating to health care, other than special health care, of the principal: *Powers of Attorney Act 1998* (Qld) sch 2 s 4.

16.335 The first step is to determine the effect of the interstate enduring power of attorney under section 34 of the *Powers of Attorney Act 1998* (Qld). If section 34 treats it as an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld), the second step is to consider the effect of section 50(1) of that Act. Section 50(1) provides that a 'principal's enduring power of attorney is revoked, to the extent of an inconsistency, by a later enduring document of the principal'. If, for example, the interstate enduring power of attorney appoints an attorney for financial matters and the subsequent enduring power of attorney appoints an attorney for personal matters, both enduring powers of attorney will be effective as there is no inconsistency between the two instruments. However, if the interstate enduring power of attorney appoints an attorney for financial matters and the subsequent enduring power of attorney appoints a different attorney for the same financial matters, the later enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld) will revoke the interstate enduring power of attorney to the extent that it appoints an attorney for financial matters.

### The law in other jurisdictions

16.336 In the ACT, New South Wales, the Northern Territory and Victoria, the legislation recognises an enduring power of attorney made in another Australian jurisdiction 'to the extent that the powers it gives could validly have been given' by an enduring power of attorney in the recognising jurisdiction.<sup>804</sup>

16.337 In Victoria, an interstate instrument will be recognised only if it complies with the requirements of the interstate jurisdiction in which it was made.<sup>805</sup> Similarly, in Tasmania, an instrument made in another State, Territory or other place that is of the same, or substantially the same, effect as an enduring power of attorney made in Tasmania may be registered, but only if it was executed in accordance with the law of the other jurisdiction.<sup>806</sup>

16.338 In contrast, under recent amendments made in Western Australia, an attorney appointed under a power of attorney made in another Australian State or Territory or another country may apply to the State Administrative Tribunal for an order recognising the instrument as an enduring power of attorney.<sup>807</sup> The Tribunal may make the order if it is satisfied that the power of attorney sufficiently corresponds in form and effect to an enduring power of attorney created under the Western Australian legislation and that it is appropriate to do so.<sup>808</sup>

804 *Powers of Attorney Act 2006* (ACT) s 89; *Powers of Attorney Act 2003* (NSW) s 25; *Powers of Attorney Act* (NT) s 6A(4), (5); *Instruments Act 1958* (Vic) s 116. In relation to instruments appointing enduring guardians see *Guardianship Act 1987* (NSW) s 6O; *Guardianship Regulation 2010* (NSW) s 8; *Guardianship and Administration Act 1995* (Tas) s 81A.

805 *Instruments Act 1958* (Vic) s 116.

806 *Powers of Attorney Act 2000* (Tas) ss 43, 47(1).

807 *Guardianship and Administration Act 1990* (WA) s 104A(1).

808 *Guardianship and Administration Act 1990* (WA) s 104A(2). Similar provision is made for the recognition of an instrument appointing an enduring guardian: s 110O. Section 110O of the *Guardianship and Administration Act 1990* (WA) was inserted by the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.



16.339 The South Australian legislation is silent on the issue of interstate recognition.

16.340 The key problems with the recognition of enduring powers of attorney were recently summarised by the Western Canada Law Reform Agencies.<sup>809</sup>

The non-recognition of EPAs from one province to another impinges on the mobility rights of persons who rely on EPAs. Because the formalities and content of EPAs are not uniform across provinces, an attorney may encounter difficulties dealing with the donor's affairs when the donor owns property in, or moves to, a province other than the province where the EPA was made. Persons or institutions with whom the attorney needs to transact business may refuse to recognize the foreign EPA. Some donors may have the foresight to prepare two separate EPAs — one that complies with the formalities of the originating jurisdiction and one that complies with the formalities of the jurisdiction they will end up in. However, this precaution is unlikely to be carried out unless a lawyer has been involved in the preparation of the initial EPA and knows that the donor has property in another jurisdiction or anticipates that the donor is likely to move to another jurisdiction. Unlike the donor of a non-enduring power of attorney, a donor who is incapacitated cannot cure the defect by making a new EPA.

16.341 This echoes the tenor of the concerns expressed in Australia.<sup>810</sup>

16.342 The recognition of interstate powers of attorney has been on the agenda of the Standing Committee of Attorneys-General ('SCAG') since 2000 when it recommended the implementation of draft mutual recognition provisions.<sup>811</sup> While many jurisdictions have implemented such provisions, the approach is not uniform and difficulties persist.<sup>812</sup> In 2007, the Australian Parliament's Standing Committee on Legal and Constitutional Affairs recommended that SCAG encourage the States and Territories to amend legislation to maximise the recognition of enduring powers of attorney.<sup>813</sup> SCAG is continuing to examine the issue as part of its national

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809 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008) [26]. See also South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.161]:

The most pressing problem usually relates to the possible non-validity of an enduring power because of differences in execution formalities of enduring powers in different jurisdictions.

810 See eg Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.17]–[3.18], [3.26]–[3.43].

811 Ibid [3.34]–[3.35]. SCAG comprises the Attorneys General of the Commonwealth, States and Territories of Australia and the Attorney General of New Zealand. It provides a forum for discussion of matters of mutual interest with a view to achieving uniform or harmonised action within the portfolio responsibilities of its members: Lawlink New South Wales, 'Standing Committee of Attorneys-General (SCAG)' <<http://www.scag.gov.au/>> at 8 September 2010.

812 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.37]–[3.46].

813 Ibid [3.46] rec 17.

harmonisation agenda and has 'agreed to undertake a project to improve the effectiveness of mutual recognition of powers of attorney between jurisdictions'.<sup>814</sup>

### Discussion Paper

16.343 In the Discussion Paper, the Commission raised the issue of whether section 34 of the *Powers of Attorney Act 1998* (Qld), which deals with the recognition of interstate enduring powers of attorney, might be improved.<sup>815</sup> It noted two matters in this regard.

16.344 First, unlike some of the other Australian jurisdictions, Queensland's provision does not extend to New Zealand or, indeed, to any other foreign jurisdiction.

16.345 Secondly, the provision requires interpretation of individual documents; it does not provide automatic recognition.<sup>816</sup> In particular, an attorney seeking to rely on a power given under an interstate document would need to satisfy third parties that the document was validly made in the other jurisdiction and that the powers are compatible with those that may be granted under the Queensland legislation. Without detailed legal knowledge, this would seem to present a significant hurdle.<sup>817</sup> In Western Australia, this is addressed by requiring an application to the Tribunal.

16.346 Accordingly, the Commission sought submissions in the Discussion Paper about whether:<sup>818</sup>

- there any difficulties with section 34 of the *Powers of Attorney Act 1998* (Qld) and, if so, how they could be addressed;
- recognition of interstate enduring powers of attorney should:
  - depend on the instrument having been validly made in the other jurisdiction;

814 Standing Committee of Attorneys-General, Summary of Decisions November 2008 <[http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/SCAG\\_Communique\\_6-7\\_November\\_2008\\_FINAL.DOC/\\$file/SCAG\\_Communique\\_6-7\\_November\\_2008\\_FINAL.DOC](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_6-7_November_2008_FINAL.DOC/$file/SCAG_Communique_6-7_November_2008_FINAL.DOC)> at 8 September 2010.

815 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [9.131]–[9.133].

816 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 2]–[LCA 3] (Brian Herd).

817 It has been suggested, for example, that banks 'are loathe to recognise an enduring power of attorney made in another state': Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 3] (Brian Herd).

818 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 191–2.

- depend on the instrument conferring powers compatible with those that could be conferred by an enduring power of attorney in Queensland;
  - require a declaration from the Tribunal; or
  - depend on some other requirement; and
- the *Powers of Attorney Act 1998* (Qld) should provide for recognition of enduring powers of attorney made in New Zealand or in any other foreign jurisdiction.

## Submissions

16.347 The Adult Guardian considered that the operation of section 34 of the *Powers of Attorney Act 1998* (Qld) raised no difficulties in practice.<sup>819</sup> However, a number of other submissions disagreed.<sup>820</sup> The former Acting Public Advocate considered that difficulties with the interstate recognition of enduring powers of attorney may be due to factors including a lack of consistency between the States and Territories in relation to their legislative provisions dealing with enduring powers of attorney.<sup>821</sup>

16.348 The former Acting Public Advocate, the Queensland Law Society, the Endeavour Foundation, the Council on the Ageing (Queensland), the Trustee Corporations Association of Australia and the Perpetual Group of Companies supported the introduction of improved mutual recognition arrangements between the States and Territories.<sup>822</sup> The former Acting Public Advocate considered this to be an essential requirement, 'particularly given the mobility of the population, and the potential for attorneys, for example, to be responsible for the administration of assets in other jurisdictions'.<sup>823</sup>

16.349 The Public Trustee made the observation that the solution to the difficulties arising under interstate recognition is to have, at least within Australia, harmonised laws in respect of enduring powers of attorney:<sup>824</sup>

The issue at hand is only problematic in respect of attorneyships or agency documents taking effect after the loss of capacity of the donor principal, because before that point a power of attorney is a document reflective of the appointment of an agent. If laws were identical throughout the relevant jurisdictions then recognition would be a straightforward matter.

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819 Submission 164.

820 Submissions 60, 155, 159, 160, 168.

821 Submission 160.

822 Submissions 60, 155, 158, 160, 162, 165, 168.

823 Submission 160.

824 Submission 156A.

16.350 The Public Trustee also observed, in relation to section 34 of the *Powers of Attorney Act 1998* (Qld) that, given the difficulties in respect of different laws applying in different jurisdictions, ‘it is appropriate that the instrument must be validly made in that other jurisdiction (for it would be a curious result if an enduring powers of attorney is invalid where it is made but effective in Queensland)’. The Public Trustee also considered it appropriate that the powers granted must be contemplated by the Act.

16.351 The Adult Guardian commented that, in the experience of her Office, there has been no pressing need to recognise international instruments.<sup>825</sup> She suggested that it would be more appropriate for an adult, who is proposing to live in a particular jurisdiction, to regularise their legal affairs in accordance with the requirements of that jurisdiction. She noted that, if an adult is visiting Australia and loses capacity, generally decisions about health care may be made by the statutory health attorney and, after treatment, the adult is repatriated to their home.

16.352 Disability Services Queensland considered that the *Powers of Attorney Act 1998* (Qld) should provide for recognition of enduring powers of attorney made in New Zealand or in any other foreign jurisdiction.<sup>826</sup> The Public Trustee supported the recognition of enduring powers of attorney made in New Zealand.<sup>827</sup>

16.353 The Registrar of Titles explained that the practice of the Land Titles Registry is to register enduring powers of attorney made in another jurisdiction if the enduring power of attorney complies with the requirements in the other jurisdiction:<sup>828</sup>

The *Land Title Act 1994* does not limit the application of sections 133 to 135 to powers of attorney made in Queensland. Titles registry practice is that a power of attorney made in another jurisdiction, including an overseas jurisdiction, will be registered, if the registrar is satisfied that the power of attorney complies with the requirements of that jurisdiction. A written statement may be required from the lodger that the document complies with the requirements of the jurisdiction in which it was made.

16.354 A respondent who is a long-term Tribunal member considered that there should be a provision for countries whose enduring powers of attorney are to be recognised as prescribed by regulation (in a similar way to section 167 of the *Guardianship and Administration Act 2000* (Qld)).<sup>829</sup>

16.355 A few submissions addressed the possible criteria for recognition of interstate instruments.

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825 Submission 164.

826 Submissions 93, 169.

827 Submission 156A.

828 Submission 166.

829 Submission 179.

16.356 The Adult Guardian considered that the recognition of interstate enduring powers of attorney should depend on the instrument having been validly made in the other jurisdiction and conferring powers compatible with those that could be conferred by an enduring power of attorney in Queensland.<sup>830</sup> She commented that:

Reliance on tribunal applications creates cost, delay and formality which is contra-indicated, and is a response to a need created by the short falls within the State legal systems as opposed to a protective measure for the adult. The Adult Guardian (Qld) is the national chair of the Australian Guardianship and Administration Council who have been making submissions to SCAG for a lengthy period about resolution of this issue. Perhaps the easiest way to proceed in the absence of uniform laws is for the adoption by each state of a uniform or national EPA.

16.357 Two respondents considered that the recognition of interstate enduring powers of attorney should depend on the instrument having been validly made in the other jurisdiction.<sup>831</sup>

16.358 In contrast, the Department of Communities considered that interstate recognition should require a declaration from the Tribunal.<sup>832</sup>

### The Commission's view

16.359 Section 34 of the *Powers of Attorney Act 1998* (Qld) specifies two conditions that must be satisfied for an interstate enduring power of attorney to be recognised under the Act. These conditions are that the enduring power of attorney complies with the requirements of the jurisdiction in which it was made and gives powers that could validly have been given by an enduring power of attorney under the Act.

16.360 If an interstate enduring power of attorney does not satisfy the first condition because it has not been properly executed under the requirements of its original or 'home' jurisdiction, it would not be appropriate for it to be valid in Queensland when it is not valid in the other jurisdiction. The second condition is necessary to ensure that recognition is given only to a provision in an interstate enduring power of attorney that could be included in a Queensland enduring power of attorney.

16.361 In light of these matters, the Commission considers that it is unnecessary to alter the terms of section 34 of the *Powers of Attorney Act 1998* (Qld).

16.362 However, while section 34 deals with the recognition of an enduring power of attorney made interstate and complying with the legislation of that other jurisdiction, it is important for the legislation to clarify that, if a person living interstate or overseas makes an enduring power of attorney under the *Powers of*

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830 Submission 164.

831 Submissions 54A, 155.

832 Submission 169.

*Attorney Act 1998* (Qld), the instrument will be effective in Queensland. Accordingly, in addition to retaining section in its current terms, the *Powers of Attorney Act 1998* (Qld) should be amended to provide that it does not matter whether an enduring power of attorney made under that Act is made in or outside Queensland.<sup>833</sup> The Commission has made a similar recommendation in relation to the interstate recognition of advance health directives.<sup>834</sup>

16.363 The Commission also considers that the *Powers of Attorney Act 1998* (Qld) should be amended to provide for the recognition of enduring powers of attorney made under the New Zealand legislation.<sup>835</sup>

## COMPLAINTS AND INVESTIGATIONS OF AN ATTORNEY'S WRONGDOING

16.364 Financial abuse has been identified as one of many forms of 'elder abuse' that occur in Australia.<sup>836</sup> The former Public Advocate has also noted the particular vulnerability of adults with impaired capacity to financial abuse,<sup>837</sup> much of which may occur through the misuse of enduring powers of attorney. Indeed, most investigations conducted by the Adult Guardian relate to financial abuse by attorneys under enduring powers of attorney.<sup>838</sup>

16.365 It has been suggested that 'the fundamental problem with financial abuse is the lack of detection'.<sup>839</sup> Adults with impaired capacity may not be aware of abuse or of their options for seeking help, and third parties may be reluctant to report abuse. For example:<sup>840</sup>

they may be unaware of the reporting options open to them or they may feel that the older person with dementia would have intended for their family members to inherit their assets anyway.

833 For a similar provision see s 24 of the *Powers of Attorney Act 2006* (ACT).

834 See Recommendation 9-14 of this Report.

835 *Protection of Personal and Property Rights Act 1988* (NZ) pt 9.

836 Eg Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 15; Department of Human Services Victoria, Alzheimer's Association Victoria and La Trobe University School of Nursing, *Overcoming Abuse of Older People with Dementia and Their Carers*, Discussion Paper (2000) [4.4.4].

837 Public Advocate, *Annual Report 2006-07* (2007) 68. In the year 2007-08, the Elder Abuse Prevention Unit Helpline in Queensland received 834 calls; of those, 30% reported financial abuse and 134 calls (16%) identified the abused person as having dementia, mental illness or intellectual disability: Elder Abuse Prevention Unit, *Annual Report 2007-2008* (2008) 7, 8, 13.

838 Office of the Adult Guardian, *Annual Report 2006-07* (2007) 18. See also [16.35]–[16.41] above.

839 J Gardner, Public Advocate Victoria, 'Uncovering elder abuse: powers of attorney, administration orders and other issues for banks' (Paper presented at the Banking and Financial Services Ombudsman Annual Conference, 25 November 2005).

840 Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 15.

16.366 People may also fear that the consequences of reporting abuse may place the adult in a worse position, such as being removed from his or her home.<sup>841</sup> Continuing community and professional education, for example, for staff at banking institutions, is an important part of addressing these concerns.<sup>842</sup> Auditing requirements and measures to encourage reporting of abuse might also be appropriate.

### **Audits of accounts**

16.367 In its recent report on Older People and the Law, the Australian Parliament's Standing Committee on Legal and Constitutional Affairs suggested the introduction of a system of random audits of enduring powers of attorney to assist in detecting financial abuse. It noted that:<sup>843</sup>

Guardianship agencies can require attorneys to produce their records when reviewing a power of attorney once a concern has been raised. However, these agencies do not have a monitoring function. It is difficult to assist older people being abused through enduring powers of attorney if they do not have family and friends that are aware of the abuse and willing to notify authorities.

16.368 It considered, therefore, that 'there is potential value in establishing a system of periodic random audit to identify abuse of powers of attorney'.<sup>844</sup>

16.369 An issue to consider is whether the current system for auditing attorneys' accounts in Queensland could be improved.

16.370 Under section 180 of the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian has power to investigate complaints that an adult is being or has been neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements.<sup>845</sup> Referrals for investigation about abuse or inappropriate decision-making arrangements can be made to the Adult Guardian by any person, such as family members, service providers, friends and neighbours.<sup>846</sup>

16.371 Both the Adult Guardian and the Tribunal also have power to initiate an audit of an attorney's accounts.<sup>847</sup> Section 182 of the *Guardianship and Administration Act 2000* (Qld) provides:

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841 Law and Justice Foundation of New South Wales (S Ellison et al), *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (2004) vol 1, 284.

842 Eg J Gardner, Public Advocate Victoria, 'Uncovering elder abuse: powers of attorney, administration orders and other issues for banks' (Paper presented at the Banking and Financial Services Ombudsman Annual Conference, 25 November 2005).

843 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.100].

844 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.106].

845 See also *Guardianship and Administration Act 2000* (Qld) s 174(2)(b).

846 Office of the Adult Guardian, *Adult Guardian Annual Report 2006–07* (2007) 18.

847 The functions and powers of the Adult Guardian and the Tribunal are examined in more detail in Chapters 20 and 23 of this Report.

**182 Records and audit**

- (1) The adult guardian may, by written notice to an attorney for an adult under an enduring power of attorney who has power for a financial matter or to an administrator for an adult, require that by the date stated in the notice the attorney or administrator file with the adult guardian a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, for the adult for a specified period.
- (2) The date by which the summary or accounts must be filed must be a date that the adult guardian considers gives the attorney or administrator reasonable time to comply with the notice.
- (3) The attorney or administrator must comply with the notice, unless the attorney or administrator has a reasonable excuse.

Maximum penalty—100 penalty units.

- (4) The summary or accounts filed may be audited by an auditor appointed by the adult guardian. (note omitted)

16.372 Section 122 of the *Powers of Attorney Act 1998* (Qld) provides:

**122 Records and audit**

- (1) For an attorney for a financial matter under an enduring power of attorney, the court may make an order that—
  - (a) the attorney files in the court, and serves on the applicant, a summary of receipts and expenditure under the power for a specified period; or
  - (b) the attorney files in the court, and serves on the applicant, more detailed accounts of dealings and transactions under the power for a specified period; or
  - (c) the accounts be audited by an auditor appointed by the court and that a copy of the auditor's report be given to the court and the applicant; or
  - (d) the attorney present a plan of management for approval.
- (2) The court may make the order on its own initiative or on the application of the principal or another interested person.<sup>848</sup>
- (3) The court may make an order about payment of the auditor's costs, including security for the costs. (note added)

16.373 The guardianship legislation therefore permits auditing of accounts either by the Adult Guardian or the Tribunal or Court. It does not, however, require that random audits be conducted. Nor is there any requirement for periodic review by the Tribunal, or the Adult Guardian, of an attorney's activities. This is in contrast to

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An interested person is defined as a person who has a sufficient and continuing interest in the other person: *Powers of Attorney Act 1998* (Qld) sch 3. In relation to the Commission's recommendation to amend the definition of 'interested person', see Recommendation 21-2 of this Report.



the appointment of an administrator, which must be reviewed by the Tribunal at least once every five years and may be reviewed at any other time on the Tribunal's own initiative.<sup>849</sup> Arguably, periodic review of an attorney's actions is an important safeguard once the principal has lost capacity and is unable to supervise the attorney's actions personally.

16.374 Such measures, however, may be 'unnecessarily complex and onerous for the attorney, and costly for the State' especially if misuse of enduring powers of attorney occurs infrequently.<sup>850</sup> Alzheimer's Australia has noted, for example, that the percentage of abuse is not high in relation to the number of appointments made.<sup>851</sup>

16.375 A recent report in relation to a review of the South Australian system of enduring documents has recognised that the need to ensure that a solution to the problem of abuse and fraud does not cause other problems.<sup>852</sup> The report explained:<sup>853</sup>

A heavy-handed approach to eliminating abuse and fraud risks penalising ignorance or inexperience, discouraging those willing to take on the role of agents, thereby reducing the uptake of [enduring documents] and overloading government agencies with oversight responsibilities. The Review Committee was keen to find solutions that would not unduly add to the workload of the Office of the Public Advocate, the Public Trustee and the Guardianship Board, but that supported financial agents to perform their role well rather than imposing overbearing scrutiny. It is only when fraud occurs or disputes arise that protection is required, at which stage Guardianship Board involvement is appropriate.

Some interstate laws allow or encourage the person to appoint the Public Guardian or the Public Trustee as their agent, or as one of their agents, to ensure good decision-making. However such arrangements place an inordinately large load on government agencies and cannot adequately replace the insight of an agent who knows the person well. Oversight of an agent's

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849 *Guardianship and Administration Act 2000* (Qld) ss 28, 29.

850 Law and Justice Foundation of New South Wales (S Ellison et al), *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (2004) vol 1, 319.

851 Alzheimer's Australia, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (30 November 2006) 11 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub55.pdf>> at 8 September 2010. Also Caxton Legal Centre Inc has noted that '[w]hile we sometimes encounter abuse of EPAs, we tend to see even more problematic cases where people have never made an EPA': Caxton Legal Centre Inc, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (February 2007) 22 <<http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub112.pdf>> at 8 September 2010. Also, in a study by the Australian Institute of Criminology of older people's knowledge and experiences of substitute decision-making processes and abuse most participants whose relatives used an enduring power of attorney on their behalf reported positive experiences: D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 4.

852 Advance Directives Review Committee (SA), *Advance Directives Review — Planning ahead: your health, your money, your life: Second Report of the Review of South Australia's Advance Directives, Stage 2 Proposals for implementation and communication strategies*, 46 <[http://www.agd.sa.gov.au/news/pdfs/2009/Stage\\_2\\_report\\_final.pdf](http://www.agd.sa.gov.au/news/pdfs/2009/Stage_2_report_final.pdf)> at 8 September 2010.

853 Ibid.

decision-making may be desirable in many personal or family situations, but that should not translate to a requirement for government or official oversight.

16.376 Accordingly, the report recommended that a principal should be able to appoint a trusted individual as a monitor for financial and other decisions, or a company such as a law firm or a financial institution as a monitor to oversee their agent's financial management.<sup>854</sup> It also recommended that the guidelines should advise the principal to document specific reporting arrangements for the agent in the instrument when the principal appoints a monitor.<sup>855</sup>

## Discussion Paper

16.377 The Commission sought submissions in the Discussion Paper on whether the *Powers of Attorney Act 1998* (Qld) should provide for mandatory, periodic auditing of attorneys' accounts, or review of attorneys' activities and the reasons why or why not.<sup>856</sup> The Commission also sought submissions on whether, if the Act were to require periodic auditing or review, such auditing or review should be required in respect of every attorney or occur randomly.<sup>857</sup>

## Submissions

16.378 The submissions received on this issue were divided in their views about whether the *Powers of Attorney Act 1998* (Qld) should provide for mandatory, periodic auditing of attorneys' accounts or review of attorneys' activities.

16.379 One respondent noted that the question of monitoring an attorney is a dilemma: while it may help to reduce some abuse, it does not eliminate it and also introduces costs to the system.<sup>858</sup>

16.380 Several respondents considered that it would be appropriate for an attorney's accounts or activities to be subject to annual review, either by the Tribunal or an appropriately qualified independent person (for example, a chartered public accountant).<sup>859</sup>

16.381 Given that an administrator appointed by the Tribunal and an attorney appointed under an enduring power of attorney have similar roles and functions, the Public Trustee proposed that the legislation should be amended to ensure that an attorney, who is acting under an enduring power of attorney for an adult who has lost capacity, should, like an administrator, be subject to the oversight of the

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854 Ibid Recommendation 25.

855 Ibid.

856 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 209.

857 Ibid.

858 Submission 54A.

859 Submissions C59, 47, 48, 105, 160.

Tribunal.<sup>860</sup> The Public Trustee also noted that such oversight, or at least the review of an attorney's accounts, would have resource implications for the Tribunal.

16.382 The former Acting Public Advocate considered it desirable to increase the level of monitoring and regulation of enduring powers of attorney to enhance the protection of adults with impaired capacity from abuse, neglect and exploitation. It suggested that the Tribunal should be given powers to monitor an attorney's records (similar to those for the monitoring of administrator's records in relation to the administration of a deceased estate under succession law), and powers to approve financial management plans.<sup>861</sup>

16.383 Another respondent considered that a report on the results of the audit should be provided to the adult's family.<sup>862</sup>

16.384 On the other hand, the Perpetual Group of Companies noted that 'it is difficult to see how any requirement to monitor attorney's actions might be implemented if there is no way of knowing what enduring powers of attorney are being acted on'.<sup>863</sup> It observed that:

If a principal executes an enduring power of attorney for financial matters expressed to be effective immediately, but the principal in fact retains full control of his/her affairs for the time being, perhaps not even providing the attorney with a copy of the document for the time being, what obligation should there be on the attorney, even if the tribunal has some way of knowing that the enduring power of attorney exists? The tribunal would also need substantial additional resources to monitor attorneys' actions more extensively than at present. We submit that the incidence of misconduct is not sufficient to warrant additional provisions, and that any additional resources would be better employed educating attorneys and potential whistleblowers. The principal can include in the instrument provisions for the attorney to be monitored if he or she considers it appropriate. However in our experience this is rare in practice. The tribunal is unlikely to become involved except in conjunction with some application for relief under the *Powers of Attorney Act*.

16.385 In relation to auditing of attorney's accounts, the NSW Guardianship Tribunal noted that, in its experience, it is essential to consider both the costs of the audit and who bears those costs.<sup>864</sup>

A professional audit is expensive and consideration needs to be given to who bears the costs of this. The more complex the estate involved and the more detailed the audit then the higher the cost of the audit.

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860 Submission 156A.

861 Submission 160.

862 Submission 105.

863 Submission 155.

864 Submission 147.

If the Tribunal is ordering the audit, there needs to be clarity around whether the Tribunal can order the parties to pay the costs. If the expectation is that the Tribunal will bear the costs, then significant resources need to be made available to meet these expenses.

16.386 The Trustee Corporations Association of Australia made a similar observation:<sup>865</sup>

Attempting to monitor the actions of attorneys under all EPAs would be a time consuming and costly exercise. However, the principal should have the right to require an accountant or some other person to monitor the performance of the attorney, if the principal believes that the cost justifies the perceived benefit in their particular circumstances.

16.387 It also observed that:

If the principal has lost capacity, the audit report could be provided to the Guardianship Tribunal for assessment. Such a provision need not cover trustee corporations acting as attorney, given that the principal has the protection of the regulatory regime within which those professional entities operate.

### The Commission's view

16.388 In the Commission's view, the flexibility of the present system strikes an appropriate balance by providing mechanisms for the review of an attorney's actions when it appears necessary,<sup>866</sup> but not otherwise burdening attorneys with time-consuming procedures that are likely to involve significant costs for the State. Accordingly, the guardianship legislation should not be amended to require the periodic auditing of attorney's accounts or review of attorneys activities by either the Tribunal or the Adult Guardian.

16.389 Instead, the Commission considers it preferable to encourage people who make enduring powers of attorney to establish their own protections within the enduring power of attorney. This could be done by making provision in the approved forms for an enduring power of attorney for the principal to nominate one or more persons to whom the attorney must, on a regular basis, provide a summary report of records and accounts of all dealings and transactions made by the attorney under his or her power for the adult.<sup>867</sup> Ideally, the principle would nominate a person who the principal trusts and is independent of the attorney. It is anticipated that this approach would not add greatly to the attorney's load, given that the attorney is required to keep those records in any event. The person who receives the accounts should not have any duty or liability to take any action regarding the accounts. However, it is hoped that a nominated person who

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865 Submission 158.

866 These review processes include the power of the Tribunal and the Adult Guardian to initiate an audit of an attorney's accounts, the Tribunal's power to remove an attorney and the Adult Guardian's power to investigate complaints that an adult has been neglected, exploited or abused.

867 The obligation on the attorney to comply with the obligation to account would arise under the attorney's obligation to exercise his or her power subject to the terms of the document: *Powers of Attorney Act 1998* (Qld) s 67.

suspects or finds financial mismanagement would take appropriate action to resolve the situation, for example, by making an application to the Tribunal for the removal of the attorney or by making a complaint to the Adult Guardian.

16.390 Finally, it is especially important to draw the attention of attorneys to their continuing duties in exercising powers for the principal, including the duty to act honestly and with reasonable diligence to protect the principal's interests and the duty to keep records and accounts of all dealings and transactions made by the attorney under his or her power for the adult, and the consequences of non-compliance with those duties. As the Commission has recommended earlier in the Chapter, comprehensive information about these duties and about how to obtain further information and advice about them should be provided in the approved forms.

## RECOMMENDATIONS

### *Eligible attorneys*

- 16-1 Section 29(1)(b) of the *Powers of Attorney Act 1998 (Qld)* should be amended to provide that an eligible attorney should have capacity for the matter.
- 16-2 Section 29(1)(b) of the *Powers of Attorney Act 1998 (Qld)* should be amended to provide that, for a matter under an enduring power of attorney, the Public Trustee is an eligible attorney for a financial matter only.
- 16-3 Section 29(1)(c) of the *Powers of Attorney Act 1998 (Qld)* should be amended to provide that, for a matter under an enduring power of attorney, a trustee company is an eligible attorney for a financial matter only.
- 16-4 Section 29(1) of the *Powers of Attorney Act 1998 (Qld)* should be amended to include, as an additional eligibility criterion, that an eligible attorney is not a person who has been a paid carer for the principal within the previous three years.
- 16-5 Section 29(1) of the *Powers of Attorney Act 1998 (Qld)* should be amended to include, as an additional eligibility criterion, that an eligible attorney is not a person who has been convicted on indictment of an offence involving personal violence or dishonesty in the previous 10 years.

**16-6** The *Powers of Attorney Act 1998* (Qld) should be amended to provide that, if an attorney is convicted on indictment for an offence of involving personal violence or dishonesty, the enduring document is revoked to the extent it gives power to the attorney.

***The number of attorneys***

**16-7** Section 43 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a principal may appoint a maximum of four joint attorneys for a matter under an enduring power of attorney.

***Gifts***

**16-8** Section 88 of the *Powers of Attorney Act 1998* (Qld) should be amended. The amended provision should be modelled on section 54 of the *Guardianship and Administration Act 2000* (Qld).

***The effectiveness of a health care decision made by an attorney***

**16-9** Section 32 of the *Powers of Attorney Act 1998* (Qld) should be amended by inserting a new subsection to the effect that:

An attorney's exercise of power for a health matter for the principal is as effective as, but no more effective than, if:

- (a) the principal exercised the power for the matter when a decision about the matter needed to be made; and
- (b) the principal then had capacity for the matter.

**16-10** Section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(4) is subject to section 32 of the *Powers of Attorney Act 1998* (Qld).<sup>868</sup>

***The approved form***

**16-11** The approved forms for an enduring power of attorney should be redrafted.

**16-12** The explanatory information and notes about the key features of the enduring power of attorney document and the roles, functions and duties of the principal, attorney and the witness should continue to be included in the approved forms. It should also be included in a separate booklet.

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See also the related recommendations that deal with the effect of s 66(2), (3) and (5) of the *Guardianship and Administration Act 2000* (Qld): Recommendations 9-19, 9-20, 10-7, 15-6 of this Report.

**16-13** The clause in the approved forms that deals with the commencement of the attorney's power should include various examples of standard words for the commencement of power for a financial matter on the principal's loss of capacity. These examples should particularly draw the principal's attention to the type of evidence that will be required to establish his or her incapacity (for example, a report by the adult's general practitioner, by the adult's treating psychiatrist or geriatrician or by two independent health professionals).

***Copies and proof***

**16-14** The explanatory notes for the approved forms for an enduring power of attorney should:

- (a) encourage the principal to give a certified copy of the form to the principal's attorney, doctor, solicitor, accountant and stockbroker; and
- (b) explain how a copy of the enduring power of attorney should be certified in order to comply with section 45 of the *Powers of Attorney Act 1998* (Qld).

***Registration***

**16-15** The *Powers of Attorney Act 1998* (Qld) should not be amended to require that all enduring powers of attorney be registered.

***Notice provisions***

**16-16** The approved forms for an enduring power of attorney should explain that the principal may give a specific instruction in his or her enduring power of attorney which expresses the principal's wishes about notification. For example, the principal may express the wish that the attorney notify one or more persons, nominated by the principal, of all decisions made or transactions undertaken as the principal's attorney in relation to the matters for which they have been appointed.

***Declaration of impaired capacity***

**16-17** The approved forms for making an enduring power of attorney should explain that a person's ability to seek a medical certificate as to the principal's capacity or a declaration from the Tribunal or the Supreme Court if there is some doubt about whether an attorney's authority has commenced.

***The removal of an attorney***

**16-18** Section 116 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Supreme Court or the Tribunal may make an order to remove an attorney only if it considers that the attorney is no longer competent to act in that position.

**16-19** Section 116 of the *Powers of Attorney Act 1998* (Qld) should be amended to include examples of when an attorney is no longer competent which are similar to those provided in section 31 of the *Guardianship and Administration Act 2000* (Qld) for the removal of a guardian or an administrator, including that:

- (a) a relevant interest of the adult has not been, or is not being, adequately protected;
- (b) the attorney has neglected his or her duties or abused his or her powers, whether generally or in relation to a specific power; or
- (c) the attorney has otherwise contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

**16-20** Section 116(a) and (b) of the *Powers of Attorney Act 1998* (Qld), in so far as those provisions apply to an attorney appointed under an enduring power of attorney, should be amended so that:

- (a) section 116(a) does not empower the court to appoint a new attorney to replace an attorney who has been removed; and
- (b) section 116(b) does not empower the court to give a power that has been removed from an attorney to another attorney or to a new attorney.

***The power to make a declaration about the validity of an enduring document***

**16-21** Section 113 of the *Powers of Attorney Act 1998* (Qld) should be amended either by deleting section 113(3) or by amending section 113(3) to clarify that, if the adult's enduring document is declared invalid, the Court or Tribunal may appoint a guardian or an administrator for the adult under section 12 of the *Guardianship and Administration Act 2000* (Qld).



***Interstate Recognition***

**16-22** Section 34 of the *Powers of Attorney Act 1998* (Qld) should generally be retained in its present terms, except that it should be amended so that it also applies to an enduring power of attorney made under the New Zealand legislation.

**16-23** In addition to retaining section 34 of the *Powers of Attorney Act 1998* (Qld), the *Powers of Attorney Act 1998* (Qld) should be amended to provide that it does not matter whether an enduring power of attorney made under that Act is made in or outside Queensland.

**16-24** The *Powers of Attorney Act 1998* (Qld) should be amended to provide for the recognition of enduring powers of attorney made under the New Zealand legislation.

***Complaints and investigations of an attorney's wrongdoing***

**16-25** The *Powers of Attorney Act 1998* (Qld) should not be amended to provide for mandatory, periodic auditing of attorneys' accounts or review of attorneys' activities.



# Chapter 17

## Conflict transactions

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### INTRODUCTION

17.1 The Commission's terms of reference direct it to review the law relating to decisions about personal, financial, health matters and special health matters under the guardianship legislation, including the law relating to enduring powers of attorney and the powers of guardians and administrators.<sup>869</sup> A review of these matters requires consideration of the duties imposed under the legislation on attorneys and administrators.

17.2 The *Powers of Attorney Act 1998* (Qld) makes provision for attorneys appointed under an enduring power of attorney to comply with a number of duties when exercising power for an adult for a matter. Similar duties are imposed on

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The terms of reference are set out in Appendix 1.

administrators appointed by the Tribunal under the *Guardianship and Administration Act 2000* (Qld).

17.3 The primary statutory duty of an attorney or an administrator is to exercise power honestly and with reasonable diligence to protect the adult's interests.<sup>870</sup> An attorney for a financial matter and an administrator are also subject to a number of other specific duties. One of these is the duty to avoid 'conflict transactions', which, for the purposes of the guardianship legislation, are transactions in which there may be conflict, or which results in conflict, between the person's duty towards the adult and either the interests of the person or other specified persons or another duty of the person.<sup>871</sup>

17.4 This chapter deals with the provisions of the guardianship legislation which prohibit conflict transactions, namely section 73 of the *Powers of Attorney Act 1998* (Qld) and section 37 of the *Guardianship and Administration Act 2000* (Qld) respectively. For convenience, these provisions will be referred to in this chapter as the 'conflict transaction provisions'. This chapter also deals with the consequences of non-compliance with the conflict transaction provisions.

## THE FIDUCIARY DUTY TO AVOID A CONFLICT OF DUTY AND INTEREST

17.5 It has been established by the courts that certain relationships, including that of trustee and beneficiary, executor and beneficiary, company director and company, and agent and principal are fiduciary in nature.<sup>872</sup> Other fiduciary relationships may arise from the facts of particular cases and, in such cases, the relationship arises because the parties are not dealing with each other at arm's length, and one party is particularly vulnerable to unfair dealing by the other.<sup>873</sup>

17.6 Within these types of relationships, the law imposes stringent duties of loyalty and propriety. These obligations are known as 'fiduciary obligations'. They are imposed upon 'fiduciaries' — those who are placed in positions of trust and confidence.

17.7 Fiduciaries are in a special position of trust and loyalty characterised by a general obligation to act honestly in what they consider to be the interests of the other party (the 'beneficiary').<sup>874</sup> This overriding obligation is given expression by a number of specific duties. Rather than specifying positive steps the fiduciary must undertake, these duties generally state what a fiduciary must not do in order to avoid a conflict with the beneficiary's interests and to ensure the fiduciary acts in

870 *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35(1).

871 *Powers of Attorney Act 1998* (Qld) s 73(1); *Guardianship and Administration Act 2000* (Qld) s 37(1).

872 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96; *Breen v Williams* (1996) 186 CLR 71, 133 (Gaudron and McHugh JJ). See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) ch 3; P Parkinson (ed), *The principles of equity* (2003), [1001].

873 M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) ch 3; P Parkinson (ed), *The principles of equity* (2003), [1001], [1004].

874 PD Finn, *Fiduciary Obligations* (1997) [15], [27]; P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (1996) [1001].

the beneficiary's interests and not in the interests of any other person.<sup>875</sup> These key duties have been articulated as the duties not to obtain any unauthorised benefit from the relationship (the 'profit' or 'misuse of fiduciary position' rule) and not to be in a position of conflict (the 'conflict rule').<sup>876</sup>

In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations — not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits made and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.

17.8 The conflict rule is concerned with the situation where a fiduciary has obtained a benefit in circumstances where there is 'a conflict or a real or substantial possibility of a conflict' between the fiduciary's duty and his or her personal interest in pursuit or possible receipt of such a benefit.<sup>877</sup> In *Pilmer v Duke Group Ltd (in liq)*,<sup>878</sup> the High Court explained that:<sup>879</sup>

The fiduciary is under an obligation, without informed consent, not to promote the personal interest of the fiduciary by making or pursuing a gain in circumstances in which there is a 'conflict or a real or substantial possibility of a conflict' between the personal interests of the fiduciary and those to whom the duty is owed. ... Similar reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction.

17.9 Accordingly, a fiduciary is under an obligation, without informed consent, not to promote his or her personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his or her personal interest and a person to whom he or she owes a fiduciary duty.

17.10 A fiduciary who breaches this obligation is accountable to the beneficiary for any benefit or profit which has been obtained or received within the scope and

875 PD Finn, *Fiduciary Obligations* (1997) [28], [30]; M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.180]. See also, eg, *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 137–8 (Gummow J).

876 *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ). See also *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J); *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165. See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.180] citing PD Finn 'Fiduciary Reflections' 13 Commonwealth Law Conference, Melbourne, Australia 13-17 April 2003.

Although they are distinct obligations, the conflict and profit rules are overlapping in the sense that, in most cases, where there has been a profit made from a fiduciary position, there has also been a conflict of duty and interest: *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J). However, in many situations, there will have been a conflict of duty and interest which did not result in a profit to the fiduciary from misuse of a fiduciary position: P Parkinson (ed), *The principles of equity* (2003), [1012].

877 *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165, 199. See also *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J); *Breen v Williams* (1996) 186 CLR 71, 135.

878 (2007) 207 CLR 165.

879 *Ibid* 199 (McHugh, Gummow, Hayne and Callinan JJ).

ambit of the fiduciary's duty.<sup>880</sup> Where the breach of fiduciary duty results in a loss to the party to whom the duty was owed, there is an obligation to account for the loss by the provision of equitable compensation.<sup>881</sup>

17.11 A fiduciary will not be liable to account for any benefit or profit if it is established that the beneficiary gave informed consent to the course of action proposed by the fiduciary.<sup>882</sup> In obtaining such consent, full and frank disclosure of all the material facts must be made to the beneficiary.<sup>883</sup> In addition, a court of equity has inherent jurisdiction or power to authorise, in some cases, entry into transactions which would otherwise be a breach of fiduciary duty.<sup>884</sup>

17.12 The conflict and profit rules are not founded upon 'principles of morality'.<sup>885</sup> Their objective is to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage.<sup>886</sup> There is no requirement that there be any detriment to the beneficiary or fraud or dishonesty on the part of the fiduciary in order to establish liability although these matters may be relevant when determining the appropriate remedy.<sup>887</sup>

17.13 The conflict rule does not require the avoidance of all conflicts. The High Court has explained that the conflict rule is not to be applied inflexibly:<sup>888</sup>

[I]f the doctrine be inexorably applied and without regard to the particular circumstances of the situation, every transaction will be condemned once it be shown that the fiduciary had such a hope or expectation, however unlikely to be realised it may be, and however trifling an inducement it will be if it is realised. ... We have found no decisions that have applied this rule inflexibly to every occasion to which the fiduciary has been shown to have a personal interest that might in fact have conflicted with his loyalty. On the contrary, in a number of situations courts have held that the rule does not apply, not only when the

880 *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J); *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).

881 *Nocturn v Lord Ashburton* [1914] AC 932, 956; *McKenzie v McDonald* [1927] VLR 134, 146–8; *Breen v Williams* (1996) 186 CLR 71, 135–6. In *Warman International Ltd v Dwyer* (1995) 182 CLR 544, the High Court observed (at 559) that if the loss suffered by the plaintiff exceeds the profits made by the fiduciary, the plaintiff may make a binding election to have a compensatory remedy against the fiduciary.

882 *Breen v Williams* (1996) 186 CLR 71, 125, 135. In *Breen v Williams*, Gummow J (at 135) observed that 'one answer to what would otherwise be a breach of fiduciary duty is the presence of informed consent'. See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [7.30]–[7.40].

883 *New Zealand Netherlands Society Oranje Inc v Kuys* [1973] 1 WLR 1126, 1131–2; *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 398; *Maguire v Makaronis* (1997) 188 CLR 449, 466.

884 *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32.

885 *Bray v Ford* [1896] AC 44, 51–2 (Herschell LJ).

886 *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J); *Warman International v Dwyer* (1994–1995) 182 CLR 544, 557–8 (Mason CJ, Brennan, Deane, Dawson, Gaudron JJ).

887 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Phipps v Boardman* [1967] 2 AC 46; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 394; *Warman International Ltd v Dwyer* (1995) 182 CLR 544. See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.110].

888 *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165, 199 (McHugh, Gummow, Hayne and Callinan J).

putative interest, though in itself strong enough to be an inducement, was too remote, but also when, though not too remote, it was too feeble an inducement to be a determining motive.

17.14 The scope of any fiduciary obligation will depend on the precise nature and scope of the relationship and the facts of each particular case.<sup>889</sup> A fiduciary is not accountable for profits derived outside the scope of the relationship or required, outside that scope, to prefer the principal's interests over those of the beneficiary.<sup>890</sup> The conflict rule may be varied or modified by a contract or an arrangement that gave rise to the relationship between the parties.<sup>891</sup>

17.15 There are a range of remedies for a breach of fiduciary duty. An account of profits will lie where a fiduciary has improperly profited from the fiduciary position or otherwise made some gain in circumstances involving a conflict between fiduciary duty and interest.<sup>892</sup> Equitable compensation is the most appropriate remedy where the breach of fiduciary duty has caused the beneficiary to suffer loss, rather than provided the fiduciary with some improper gain.<sup>893</sup> Other remedies include a constructive trust,<sup>894</sup> and rescission.<sup>895</sup> A finding of a fiduciary relationship also gives rise to a right of tracing.<sup>896</sup> Generally, as mentioned above, a fiduciary, who has received an unauthorised benefit in breach of the conflict or profit rules, will not escape liability for the breach by virtue of the fact that the beneficiary suffered no loss.<sup>897</sup>

17.16 As mentioned earlier, the Queensland guardianship legislation imposes a general duty on attorneys, guardians and administrators to exercise power for an

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889 *Maguire v Macaronis* (1997) 188 CLR 449, 464.

890 *Blythe v Norwood* [2005] NSWCA 221, [94], [211].

891 M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.110].

892 *Warman International Ltd v Dwyer* (1995) 182 CLR 544. See also Thomson Reuters, *The Laws of Australia, Equity, Fiduciaries, Remedies* [15.2.1170]. Whether an account of profits will be decreed is a matter for the court's discretion, and will depend on whether it is more appropriate than equitable compensation or a constructive trust in the circumstances of the case: *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

893 Equitable compensation (or monetary restitution) is an equitable remedy which is based on the loss suffered by the plaintiff: Thomson Reuters, *The Laws of Australia, Equity, Fiduciaries, Remedies* [15.2.1180].

894 A constructive trust is a trust imposed by operation of law, regardless of the intentions of the parties concerned, whenever equity considers it unconscionable for the party holding title to the property in question to deny the interest claimed by another. A fiduciary who profits from his or her position as fiduciary by making some improper gain or who enters into some engagement in circumstances of conflicting interests and derives a benefit may be held to be a constructive trustee of the improper gain or benefit: Thomson Reuters, *The Laws of Australia, Equity, Fiduciaries, Remedies* [15.2.1100]–[15.2.1101].

895 Any transaction which has been obtained in breach of a fiduciary duty may be rescinded at the election of the party to whom the fiduciary duties are owed: Thomson Reuters, *The Laws of Australia, Equity, Fiduciaries, Remedies* [15.2.1200].

896 Tracing is a right available to a party to whom a fiduciary obligation is owed, and enables a successful claimant to follow or trace property into the hands of third parties who have received it, or trace it into whatever different form it has taken by way of exchange or otherwise: Thomson Reuters, *The Laws of Australia, Equity, Fiduciaries, Remedies* [15.2.1220].

897 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

adult ‘honestly and with reasonable diligence to protect the adult’s interests’.<sup>898</sup> This duty appears to reflect the fiduciary standard of responsibility ordinarily expected from a person who acts as another’s agent.<sup>899</sup> The fiduciary nature of such relationships has been recognised by the Supreme Court and the Tribunal.<sup>900</sup> For example, in *Smith v Glegg*,<sup>901</sup> the Supreme Court found that an attorney under an enduring power of attorney owed fiduciary duties to the adult because the adult was totally dependent upon the attorney particularly in relation to the very extensive powers of the attorney under an enduring power of attorney.<sup>902</sup>

17.17 Many of the other obligations imposed on a person who is an attorney or an administrator are also specific expressions of the general duty to exercise power for an adult honestly and with reasonable diligence to protect the adult’s interests. These include the obligations to keep the adult’s property separate from the adult’s,<sup>903</sup> to make gifts of the adult’s property only in certain circumstances<sup>904</sup> and to avoid conflict transactions.<sup>905</sup>

898 *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35. The maximum penalty for breach of this duty is a fine of \$15 000: *Powers of Attorney Act 1998* (Qld) s 66(1); *Guardianship and Administration Act 2000* (Qld) s 35; *Penalties and Sentences Act 1992* (Qld) s 5 (meaning of ‘penalty unit’).

Attorneys and administrators must also comply with the General Principles: *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. For example, General Principle 7 provides that the adult’s views and wishes are to be sought and taken into account and that ‘if, from the adult’s previous actions, it is reasonably practicable to work out what the adult’s views and wishes would be’, those views and wishes are to be taken into account (that is, ‘substituted judgment’): *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(b), (4); *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(b), (4). In addition, the adult’s right to make his or her own decisions, to the greatest extent practicable, is to be recognised: *Powers of Attorney Act 1998* (Qld) sch 1 s 7(2); *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(2). General Principle 7 also provides, however, that attorneys and administrators (as the case may be) must exercise power in a way that is consistent with the adult’s care and protection: *Powers of Attorney Act 1998* (Qld) sch 2 s 7(5); *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5). This requires a balance between giving effect to the adult’s views and wishes and ensuring that decisions protect the adult’s welfare and interests. See now the redrafted General Principles recommended in Chapter 4 of this Report.

899 Agency is a form of fiduciary relationship: FMB Reynolds, *Bowstead and Reynolds on Agency* (17th ed 2001) [6-032], [6-034]. See also the discussion in relation to attorneys (but not guardians or administrators) in the debate of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1022 (Hon DE Beanland, Attorney-General and Minister for Justice).

900 Eg *Smith v Glegg* [2004] QSC 443, [60]; *Re BAB* [2007] QGAAT 19, [50]; and *Re JK* [2005] QGAAT 58, [48]–[53] in which the Tribunal commented that attorneys and administrators, respectively, are in a fiduciary relationship with the principal.

901 [2004] QSC 443.

902 Ibid [60].

903 *Powers of Attorney Act 1998* (Qld) s 86; *Guardianship and Administration Act 2000* (Qld) s 50.

904 *Powers of Attorney Act 1998* (Qld) s 88; *Guardianship and Administration Act 2000* (Qld) s 54. Section 89 of the *Powers of Attorney Act 1998* (Qld) also provides that an attorney for financial matters is authorised to provide from the principal’s estate for the needs of a dependant of the principal but only with respect to what is reasonable in the circumstances. A similar provision applies to administrators: *Guardianship and Administration Act 2000* (Qld) s 55. These gifting provisions are discussed in Chapter 16 of this Report.

905 *Powers of Attorney Act 1998* (Qld) s 73; *Guardianship and Administration Act 2000* (Qld) s 37.



## THE CONFLICT TRANSACTION PROVISIONS

### The law in Queensland

#### *The conflict transaction provisions*

17.18 Section 73 of the *Powers of Attorney Act 1998* (Qld) imposes a duty on an attorney for a financial matter to avoid conflict transactions.<sup>906</sup> Under that provision, an attorney may enter into a conflict transaction only if it is authorised by the principal.<sup>907</sup> Section 73 provides:

#### **73 Avoid conflict transaction**

- (1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.<sup>67</sup>
- (2) A **conflict transaction** is a transaction in which there may be conflict, or which results in conflict, between—
  - (a) the duty of an attorney towards the principal; and
  - (b) either—
    - (i) the interests of the attorney, or a relation, business associate or close friend of the attorney;<sup>908</sup> or
    - (ii) another duty of the attorney.

#### *Examples—*

- 1 A conflict transaction happens if an attorney for a financial matter buys the principal's car.
- 2 A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.

906 *Powers of Attorney Act 1998* (Qld) s 73 applies to an attorney under a general power of attorney made under the Act; an enduring document (an enduring power of attorney or an advance health directive); or a power of attorney made otherwise than under the Act, whether before or after its commencement: *Powers of Attorney Act 1998* (Qld) s 65. Section 73 of the *Powers of Attorney Act 1998* (Qld) was based on recommendations made by the Queensland Law Reform Commission in its original 1996 Report and on the then existing provision dealing with conflict transactions in s 175E of the *Property Law Act 1974* (Qld), reprint 4A. That provision was repealed by s 181 of the *Powers of Attorney Act 1998* (Qld). As to the draft provision proposed by the Commission see Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 2, Draft Assisted and Substituted Decision Making Bill 1996 cl 188.

907 In addition, the Supreme Court or the Tribunal may authorise a conflict transaction by an attorney if the Court or the Tribunal considers that it is in the best interests of the principal: *Powers of Attorney Act 1998* (Qld) s 118(2). See [17.22] below.

908 A relation is defined as '(a) a spouse of the first person; (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; (c) a person on whom the first person is completely or mainly dependent; (d) a person who is completely or mainly dependent on the first person; or (e) a person who is a member of the same household as the first person'; a close friend is defined as 'another person who has a close personal relationship with the first person and a personal interest in the first person's welfare': *Powers of Attorney Act 1998* (Qld) sch 3. 'Business associate' is not defined in the Act.

- (3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—
- (a) deals with an interest in property jointly held; or
  - (b) acquires a joint interest in property; or
  - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

- (4) In this section—

**joint interest** includes an interest as a joint tenant or tenant in common. (note added)

- 67 However, see section 105 (Relief from personal liability).

17.19 A similar provision, which applies to administrators, is included in section 37 of the *Guardianship and Administration Act 2000* (Qld).<sup>909</sup> Under that provision, an administrator may enter into a conflict transaction only if it is authorised by the Tribunal.<sup>910</sup> Section 37 provides:

### 37 Avoid conflict transaction

- (1) An administrator for an adult may enter into a conflict transaction only if the tribunal authorises the transaction, conflict transactions of that type or conflict transactions generally.
- (2) A **conflict transaction** is a transaction in which there may be conflict, or which results in conflict, between—
- (a) the duty of an administrator towards the adult; and
  - (b) either—
    - (i) the interests of the administrator or a person in a close personal or business relationship with the administrator;<sup>911</sup> or
    - (ii) another duty of the administrator.

909 *Guardianship and Administration Act 2000* (Qld) s 37 was based on the recommendation of the Commission in its original 1996 Report: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 296.

910 However, see *Guardianship and Administration Act 2000* (Qld) s 58, which provides that, if a guardian or an administrator is prosecuted in a court for a failure to comply with ch 4 of the Act, the court may excuse the failure if it considers the guardian or administrator has acted honestly and reasonably and ought fairly to be excused for the failure. Section 58 is considered at [17.163] below.

911 This wording of s 37(2)(b)(i) of the *Guardianship and Administration Act 2000* (Qld) differs from the wording used in s 73(2)(b)(i) of the *Powers of Attorney Act 1998* (Qld). The application of these provisions to transactions involving a conflict between the adult's interests and the interests of a relation or close associate of the decision-maker was based on the recommendation of the Commission in its original 1996 Report: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 296.

*Examples—*

- 1 A conflict transaction happens if an administrator buys the adult's car.
  - 2 A conflict transaction does not happen if an administrator is acting under section 55 to maintain the principal's dependants.
- (3) However, a transaction is not a conflict transaction only because by the transaction the administrator in the administrator's own right and on behalf of the adult—
- (a) deals with an interest in property jointly held; or
  - (b) acquires a joint interest in property; or
  - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).
- (4) A conflict transaction between an administrator and a person who does not know, or have reason to believe, the transaction is a conflict transaction is, in favour of the person, as valid as if the transaction were not a conflict transaction.
- (5) In this section—

**joint interest** includes an interest as a joint tenant or tenant in common. (note added)

17.20 While drafted in generally similar terms, there are some differences between the conflict transaction provisions. The key difference is that section 73 of the *Powers of Attorney Act 1998* (Qld) refers to authorisation by the principal, while section 37 of the *Guardianship and Administration Act 2000* (Qld) refers to authorisation by the Tribunal. This difference arises because a principal may authorise conflict transactions in the enduring power of attorney itself and, for a power that commences immediately or before the principal loses capacity, at any time when the principal has capacity; on the other hand, a person who is the subject of an administration order has no capacity to give such an authorisation. There is also no equivalent provision to section 37(4) of the *Guardianship and Administration Act 2000* (Qld) in section 73 of the *Powers of Attorney Act 1998* (Qld).

### **Related provisions**

*The power to authorise conflict transactions*

17.21 Section 152 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to authorise conflict transactions. It provides:

#### **152 Tribunal authorisation or approval**

- (1) The tribunal may authorise a conflict transaction, a type of conflict transaction or conflict transactions generally.

...

17.22 Under section 118(2) of the *Powers of Attorney Act 1998* (Qld), the Supreme Court may authorise a conflict transaction by an attorney if the Court considers that it is in the best interests of the principal. By virtue of section 109A of the *Powers of Attorney Act 1998* (Qld), the Tribunal may also exercise the same power.<sup>912</sup> Section 118 provides:

**118 Advice, directions and recommendations etc.**

- (1) On an application about a matter, the court may give directions or advice or make a recommendation, order or declaration about the matter or another matter related to this Act, including about—
  - (a) the interpretation of the terms of, or another issue involving, a power of attorney, enduring power of attorney or advance health directive; or
  - (b) the exercise of an attorney's power or another issue involving an attorney's power.
- (2) Without limiting subsection (1), if the court considers it in the best interests of the principal, the court may, by order and subject to the terms the court considers appropriate, authorise an attorney, either generally or in a specific case, to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake.

17.23 In addition to authorisation by the Supreme Court or the Tribunal, the legislation also recognises that the principal may authorise an attorney to undertake conflict transactions.<sup>913</sup>

*Non-compliance with the conflict transaction provisions*

17.24 There is no specific offence provision in the guardianship legislation for a failure to comply with the conflict transaction provisions. However, non-compliance with the conflict transaction provisions may amount to a breach of the general duty imposed on attorneys and administrators to act honestly and with reasonable diligence to protect the adult's interests, to which there is attached a statutory penalty. In addition, an attorney or administrator may be ordered to compensate the adult, or the adult's estate, for a loss caused by his or her failure to comply with the legislation.<sup>914</sup> The Tribunal or the Court may, however, excuse an attorney from liability for a breach of the Act if it considers that the attorney 'has acted

<sup>912</sup> Under s 109A(1) of the *Powers of Attorney Act 1998* (Qld), the Tribunal is given the same jurisdiction and powers for enduring documents as the Supreme Court. Section 109A(2) provides that, for s 109A(1), the Act applies, with necessary changes, as if references to the Supreme Court were references to the Tribunal.

<sup>913</sup> *Powers of Attorney Act 1998* (Qld) ss 31(1)(a), (b), 73(1). In *Re MV* [2005] QGAAT 46, [61]–[63], [69] the Tribunal held that the adult did not understand the 'full nature and effect' of the enduring power of attorney because of his 'inability to understand an essential clause in the document namely the clause authorising conflict transactions'.

<sup>914</sup> *Powers of Attorney Act 1998* (Qld) s 106; *Guardianship and Administration Act 2000* (Qld) s 59.

honestly and reasonably and ought fairly to be excused for the breach'.<sup>915</sup> A breach of the conflict transaction provisions might also be relevant in the Tribunal's consideration of whether or not an attorney's or an administrator's power should be removed.<sup>916</sup>

## The law in other jurisdictions

17.25 Like Queensland, the ACT legislation has provisions which specifically deal with conflict transactions. Section 42 of the *Powers of Attorney Act 2006* (ACT), which applies to attorneys, relevantly provides:<sup>917</sup>

### 42 Conflict transactions

- (1) For this section, a conflict transaction is a transaction that results, or may result, in conflict between—
  - (a) the duty of an attorney towards the principal; and
  - (b) either—
    - (i) the interests of the attorney, or a relative, business associate or close friend of the attorney; or
    - (ii) another duty of the attorney.
- (2) However, a transaction is not a conflict transaction only because, by the transaction, the attorney in the attorney's own right and on behalf of the principal—
  - (a) deals with an interest in property jointly held; or
  - (b) acquires a joint interest in property; or
  - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

<sup>915</sup> *Powers of Attorney Act 1998* (Qld) s 105; *Guardianship and Administration Act 2000* (Qld) s 58. See eg *Ede v Ede* [2007] 2 Qd R 323. The wording used in s 105 of the *Powers of Attorney Act 1998* (Qld) differs from that in s 106 of the Act. Under s 106, an attorney may be ordered to pay compensation with respect to a 'failure to comply with this Act', whereas s 105 provides for an attorney to be relieved of personal liability 'for a breach of this Act'.

<sup>916</sup> Under the *Powers of Attorney Act 1998* (Qld) s 116, the Court or Tribunal has power to remove an attorney, remove a power from an attorney, change the terms of an enduring power of attorney or revoke all or part of an enduring power of attorney. Section 116 does not stipulate or limit the circumstances in which that power may be exercised. The powers exercisable under s 116 are discussed in Chapter 16 of this Report. Under the *Guardianship and Administration Act 2000* (Qld) s 31(3), (4), the Tribunal has power to remove an administrator only if the Tribunal considers that the person is no longer competent or another person is more appropriate for appointment. The reasons for finding that a person may be no longer competent include that a relevant interest of the adult has not been, or is not being, adequately protected; or that the person has neglected his or her duties or abused his or her powers; or that the person has otherwise contravened the *Guardianship and Administration Act 2000* (Qld): s 31(4).

<sup>917</sup> The Act also provides that an enduring power of attorney does not authorise the attorney to give a benefit to himself or herself unless it is expressly authorised: *Powers of Attorney Act 2006* (ACT).

- (3) An attorney may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that kind or conflict transactions generally, in the power of attorney.
- (4) In this section:

**joint interest** includes an interest as a joint tenant or tenant in common.

17.26 Subject to one particular variation, section 42 of the *Powers of Attorney Act 2006* (ACT) is in generally similar terms to the equivalent Queensland provision, section 73 of the *Powers of Attorney Act 1998* (Qld). The ACT provision specifies that the principal's authorisation must be made in the power of attorney instrument. In contrast, the Queensland provision has no such restriction. As a result, that provision enables a principal to authorise a conflict transaction either in the power of attorney instrument or by another means while the principal still retains capacity.

17.27 Section 14 of the *Guardianship and Management of Property Act 1991* (ACT), which applies to administrators, is in more general terms:

**14 Restrictions on manager about property**

- (1) Unless the ACAT, on application, orders otherwise—
  - (a) a manager of a person's property must not enter into a transaction in relation to the property if the interests of the manager are in conflict, or may conflict, with the interests of the person; and
  - (b) a manager of a person's property must keep the manager's property separate from the person's property.
- (2) Subsection (1)(b) does not apply to property owned jointly by the manager and person.

17.28 Apart from the ACT and Queensland, none of the other Australian jurisdictions has provisions which specifically deal with conflict transactions. In most of these other jurisdictions, attorneys and administrators are subject to more general statutory duties.

17.29 In South Australia and Tasmania, the legislation sets out an extensive list of powers which may be conferred on an administrator, including the power to sell, buy, mortgage, lease, charge or sever a joint interest in the adult's property.<sup>918</sup> In Tasmania, Victoria and Western Australia, the legislation specifies that an administrator must act in the best interests of the adult.<sup>919</sup> The South Australian legislation provides that an administrator has the duties and obligations of, and is

<sup>918</sup> *Guardianship and Administration Act 1993* (SA) s 39; *Guardianship and Administration Act 1995* (Tas) s 56.

<sup>919</sup> *Guardianship and Administration Act 1995* (Tas) s 57(1); *Guardianship and Administration Act 1986* (Vic) s 49(1); *Guardianship and Administration Act 1990* (WA) s 70.

accountable as, a trustee in relation to the adult and the adult's estate.<sup>920</sup> In the Northern Territory, the legislation generally provides that, where the Public Trustee is the manager of the adult's estate, the Public Trustee is a trustee.<sup>921</sup> In New South Wales, there are no general statutory duties imposed on administrators.

17.30 In South Australia, Tasmania and Western Australia, an attorney is under a general duty to exercise power with reasonable diligence to protect the interests of the adult and, if he or she fails to do so, is liable for any loss occasioned by the failure.<sup>922</sup> In New South Wales, the legislation specifies that the powers and duties of an attorney are governed by the general law.<sup>923</sup> In Northern Territory and Victoria, there are no general statutory duties imposed on attorneys.

17.31 The Western Canada Law Reform Agencies recently reviewed the powers of attorney legislation in five Canadian provinces.<sup>924</sup> They identified various problems arising under the Canadian law in relation to two of the duties of an attorney: the duty not to benefit personally in carrying out the functions of an attorney; and the duty to make full disclosure to the donor of any interests that may conflict with the attorney's responsibilities under the power of attorney.<sup>925</sup>

17.32 They noted the argument that, although it is obvious that attorneys ordinarily should not use the donor's property for their own benefit, strict compliance with the 'no personal benefit' duty may be unrealistic, and even unjust:<sup>926</sup>

For example, the duty may be impossible to meet where household expenses are shared because the donor and attorney are spouses, or because the attorney lives with the donor as the donor's caregiver. Indeed, it may be at times unavoidable for the attorney to derive some personal benefit as a side effect to maintaining a beneficial lifestyle for the donor.

17.33 The Western Canada Law Reform Agencies also considered that the duty to avoid conflict was not explicit enough and that a conflict would be hard to define in some circumstances. They further considered that trying to give this duty

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920 *Guardianship and Administration Act 1993 (SA)* s 39(1)(b).

921 *Aged and Infirm Persons' Property Act (NT)* ss 17, 18. The Supreme Court may require the manager of a protected estate (the Public Trustee excepted) to give such security to the Public Trustee as the Supreme Court thinks fit for the due performance of the duties of the manager: s 13(2). Subject to the Act, the manager of a protected estate shall have such other powers and duties in respect of the protected estate as are specified in the protection order: s 16(2). Subject to the Act and the terms of the protection order in relation to the protected estate, the Public Trustee has, in the administration of a protected estate, all the powers, duties and obligations conferred or imposed on him or her by the *Public Trustee Act*: s 16(3).

922 *Powers of Attorney Act 1984 (SA)* s 7; *Powers of Attorney Act 2000 (Tas)* s 32(1); *Guardianship and Administration Act 1990 (WA)* s 107(1). The Tasmanian legislation also specifies that an attorney under an enduring power of attorney, during any period of mental incapacity of the donor, is taken to be a trustee of the property and affairs of the donor according to the tenor of the power: *Powers of Attorney Act 2000 (Tas)* s 32(1)(a).

923 *Powers of Attorney Act 2003 (NSW)* s 7.

924 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008).

925 *Ibid* 92.

926 *Ibid*.

substance would necessitate 'an extremely elaborate provision with many exceptions'.<sup>927</sup>

17.34 In order to avoid the difficulties of expressing each of these rules as a prohibition accompanied by all the possible exceptions to it that might exist, Western Canada Law Reform Agencies recommended that the rules should be expressed as a positive duty on the attorney to 'use assets for the benefit of the donor'. It suggested that, if desired, a donor could carve out exceptions in the enduring power of attorney giving the attorney the authority to depart from the rule.<sup>928</sup>

17.35 The Western Canada Law Reform Agencies also suggested that, while, technically, a duty to use assets for the benefit of the donor could be conceptually subsumed under the larger duty of acting in the donor's best interests, there is 'much practical value in focussing an attorney's attention on the specific concept that the donor's assets exist for the benefit of the donor, not the attorney'.<sup>929</sup>

17.36 However, it should be noted that the Canadian law on fiduciary obligations is very different from the Australian law. In Canada, the courts have tended to apply fiduciary principles in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs.<sup>930</sup> They have also tended to view fiduciary obligations as both proscriptive and prescriptive.<sup>931</sup> However, the Australian courts only recognise fiduciary obligations as proscriptive rather than prescriptive in nature. The High Court of Australia has explained that, in Australia, the conflict and profit rules are the hallmark of the fiduciary's duty of loyalty; the law does not otherwise impose on the fiduciary a duty to make full disclosure or a quasi-tortious duty to act in the best interests of the beneficiary.<sup>932</sup>

## THE PROBLEM OF FINANCIAL ABUSE

17.37 Because conflict transactions involve putting other interests or duties ahead of the adult's interests, they may amount to financial abuse. Research in Queensland, for example, has shown that, while some Tribunal cases that were identified as involving suspected financial abuse concerned the person's ignorance

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927 Ibid.

928 Ibid.

929 Ibid 94.

930 Eg *McInerney v MacDonald* [1992] 2 SCR 138, 150, 152 (La Forest J). See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.180].

931 Ibid.

932 *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ); *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165, 198 (McHugh, Gummow, Hayne and Callinan JJ). In *Breen v Williams*, Gaudron J (at 125) indicated that informed consent is 'an answer to circumstances which would otherwise indicate disloyalty, not a mainspring of equitable liability'. See also M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) [2.180].



of expected asset management procedures, the majority involved ‘asset stripping’ where the older person lost assets:<sup>933</sup>

through such mechanisms as mixing monies in one account, mortgaging the older person’s house or giving a loan or using his/her property without paying rent or outgoings.

17.38 The loss of assets, or the loss of even small amounts of money, can have significant detrimental consequences for the adult.<sup>934</sup> It may affect the adult’s general standard of living and quality of life, and markedly restrict the adult’s independence. Inappropriate financial decision-making might also contribute to other forms of abuse or neglect. Use of the adult’s money or property for personal gain and at the detriment of the adult is a serious abuse of an appointee’s position of trust, even if the appointee is not conscious of the wrongdoing.<sup>935</sup>

17.39 While the protection of the adult’s interests is fundamental, it is also important to consider the ability of attorneys and administrators — who are often appointed in their capacity as family members or close friends of the adult and not as professional decision-makers — to comply with the duties imposed on them. If those duties are confusing or too wide in their scope, private attorneys and administrators may be found in breach of their duties in unreasonable circumstances.

## CONFLICT TRANSACTIONS IN A FAMILY CONTEXT

17.40 The position of a family attorney or administrator differs from that of an agent appointed in a commercial setting to act on behalf of a principal, such as an employer or business associate. As a generalisation, in the latter scenario, the relationship between the agent and principal is typically one of arm’s length dealings.

17.41 However, particularly in the case of a family attorney, such arrangements may be made with the idea that the attorney will step into the adult’s shoes and that decisions will be made in accordance with what the adult would have wanted or done. This may occur, for example, when an adult child is made attorney for a parent who has ordinarily taken care of the family’s finances and made provision for other family members. The attorney may consider that his or her role, in accordance with the adult’s intention in appointing him or her as an attorney, is to carry on where the adult left off. This might involve the transfer of property to other family members or the transfer of money to maintain the adult’s spouse or other dependants. However, depending on the circumstances, such transactions may fall foul of the rule against conflict transactions despite the attorney’s apparently good intentions. The position of a spouse may be particularly difficult. While it is

933 A-L McCawley et al, ‘Access to assets: Older people with impaired capacity and financial abuse’ (2006) 8(1) *The Journal of Adult Protection* 20, 26.

934 Eg Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 8; Alzheimer’s Australia, *Decision making in advance: Reducing barriers and improving access to advance directives for people with dementia*, Discussion Paper No 8 (2006) [4.4.4].

935 *Eg Ede v Ede* [2007] 2 Qd R 32; *Re OAC* [2008] QGAAT 72, [49]–[55].

usual for many spouses to make financial decisions 'between themselves over the kitchen table', the relationship alters when one spouse begins to act for the other under an enduring power of attorney:<sup>936</sup>

The best way to explain it is with an example:

- Mr and Mrs Jones were both in their mid-70s and took their marriage vows some 57 years ago;
- They own their own home as joint tenants and have lived in it for over 45 years;
- They have appointed each other as their Enduring Power of Attorney;
- One day Mr Jones has an adverse medical event and has to be admitted to a hostel and they require him to pay an accommodation bond of \$150,000.00, money, of course, they don't have;
- Mr Jones has also lost the capacity to make his own decisions and Mrs Jones now has to perform her role as Mr Jones' Enduring Attorney;
- She decides to sell their joint home for \$600,000.00 and, from the proceeds, she pays the accommodation bond for Mr Jones and he moves into the hostel;
- She then uses the rest of the money from the sale (\$450,000.00) to buy another home just in her name.

... almost without exception, most people cannot see a problem with what Mrs Jones did. The trouble with what she did, however, is that she has breached the law. In acting in her capacity as Mr Jones' Enduring Attorney she had a duty to avoid what are known as conflict transactions. As Mr Jones was a half owner of the home, half the money from the sale was his. By using it as she has, Mrs Jones has taken some of Mr Jones's money.

17.42 Breaches of the duty to avoid conflict transactions might also be a symptom, however, of more unacceptable attitudes. It has been noted more generally, for example, that financial abuse of older people may occur, in part, because of stereotypical misconceptions about older people:<sup>937</sup>

For instance common assumptions drawn about older people are that: they have large amounts of disposable cash and easily liquidated assets; their relatives or close family friends are entitled to those assets; they do not contribute to society; and they have no real need for money. These assumptions are instrumental in creating a particular perception of older people and may serve to provide current or potential perpetrators with a much needed justification for committing the abuse. (notes omitted).

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B Herd, 'A marriage mutated', *National Seniors Magazine* (February/March 2008) 20.

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Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 8.

17.43 Research in Queensland has demonstrated the operation of such assumptions in some cases.<sup>938</sup>

The societal attitude that 'money is a family matter' has been suggested in the literature to promote misunderstanding and provide excuses for financial abuse. In some cases, there is a clear conflict of interest between the rights of the older person with impaired capacity to have their money and to use it for their benefit until they die and the belief of their children and relatives about the same assets as a form of inheritance or shared asset. ... in some cases, the analysis of the Tribunal data seemed to support a presumption by some adult children that the older person with impaired capacity would not mind if they used the assets of the older person even if that use meant that the older person had little money left to support their own care or the older person suffered a detriment. (note omitted)

17.44 The research also highlighted a need for increased support and better education for attorneys in carrying out their duties:<sup>939</sup>

Families are managing the assets of older people with impaired capacity and most are doing so in a capable fashion. However, there are some who are using their formal and semi-formal mechanisms in abusive ways either through ignorance of legal requirements or an intentional decision to take over the older person's assets. Best practice would ensure that the family members are supported and monitored in their asset management. The tension in such situations is [between] ensuring that the older person with impaired capacity is safeguarded against financial abuse whilst not making the task of supporting the older person so onerous that a family is not willing to undertake the task.

## COMMON SCENARIOS FOR CONFLICT TRANSACTIONS

17.45 There are several, sometimes overlapping, scenarios which arise commonly in the context of Tribunal proceedings involving conflict transactions.

17.46 Some attorneys and administrators may enter into conflict transactions with deliberate or reckless disregard for the adult's rights and interests.

17.47 For example, in *Re WCD (No 2)*<sup>940</sup> the adult was an 89 year old man with dementia who had appointed his nephew as attorney under an enduring power of attorney. The Tribunal found that the attorney had breached numerous provisions of the *Powers of Attorney Act 1998* (Qld) when he transferred the adult's money into a family trust and used the money to purchase property and cars. He also arranged loans to a member of his own family out of the funds. In addition to removing the attorney and appointing the Public Trustee as the adult's administrator, the Tribunal also ordered the attorney to compensate the adult for his loss in the amount of approximately \$420 000.

938 A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *The Journal of Adult Protection* 20, 29.

939 A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *The Journal of Adult Protection* 20, 30.

940 QGAAT 44. See also *Re WCD* [2006] QGAAT 27.

17.48 In other cases, particularly within family situations, attorneys or administrators may enter into a conflict transaction without realising the impropriety. Often this occurs because the substitute decision-maker misunderstands, or is ignorant of, the prohibition on entering conflict transactions.

17.49 For example, in *Re MAG*<sup>941</sup> an intellectually disabled adult's mother and brother were appointed as joint administrators for the adult's financial matters by the Tribunal. The administrators both agreed to make loans to themselves from the adult's funds. The loans amounted to \$10 000 and \$6500, respectively. Neither administrator applied to the Tribunal for authorisation of the loans, with the mother contending that she did not realise they were conflict transactions because the loans were 'within the family'. When, on the filing of accounts, the Tribunal uncovered the transactions, the loan of \$6500 had already been repaid to the adult by his brother and the mother informed the Tribunal of her intention and capacity to repay the \$10 000. However, the Tribunal found that the administrators had failed to comply with the conflict transaction provisions. The administrators were removed and the Public Trustee was appointed as administrator for the adult.

17.50 Some administrators or attorneys may also be acting on the basis of socially unacceptable attitudes. Queensland research, involving an analysis of suspected financial abuses cases in Tribunal files, has found that:<sup>942</sup>

In most cases where the family was suspected of financially abusing the older person with impaired capacity and statements of the abuser were available on the Tribunal file, the abuser argued that the abuse was a form of early inheritance. For example, in one such case, the proceeds from the sale of the older person's house were distributed between the two children by the daughter who was the Attorney under the enduring power of attorney. In other cases, statements made also expressed a clear sense of entitlement within the family in relation to assets. Some examples of these beliefs are:

'I am the eldest child and only son. I have two younger sisters. My Dad told me before he died I was to take over all the family responsibilities and on his death my mother asked the same request of me and I was doing this.'

Statement by son: 'Re: possibilities of sale of house ... Contemplating sale. Mum said she doesn't need money therefore should sell. 'If house is sold, money would go into estate therefore goes to grandchildren ...'

Such comments imply that the abusers believed, or at least argued, that their improper use of the older person's assets was acceptable.

17.51 In other cases, attorneys and administrators may be acting in what they perceive are the adult's best interests and in ways that would, in an informal setting, be considered appropriate.

941 [2009] QGAAT 61. See also *Re PAA* [2009] QGAAT 18.

942 A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *The Journal of Adult Protection* 20, 29.

17.52 For example, in *Re FAA*<sup>943</sup> an 82 year old widow with dementia had appointed four of her children as her attorneys under an enduring power of attorney. Her property assets included several adjoining fruit farms, with an estimated worth of approximately \$22.5 million.

17.53 For a generation, the members of the family had operated the farms with few formal financial arrangements in place. The children of the adult (and her now deceased husband) had moved into various residences on the properties, living rent free whilst working the farms and receiving a percentage of the profits generated from the sale of the crops.

17.54 In deciding to authorise a variety of proposed conflict transactions which benefited the attorneys (including the continued receipt of free accommodation and a share of profits from the business), the Tribunal stated:<sup>944</sup>

The nature of the farming business relationship between [the adult and her husband] and those children who remained on the farm when they became adults, might appear to some, unacquainted with the family history, as being peculiar. However, the evidence before the Tribunal is that [the adult and her husband] built up their considerable farming holdings over many years with the express purpose of benefiting their children. This was made apparent by the actions of [the adult] before she lost capacity.

[The adult and her husband] appear to have been quite content, indeed there is a strong indication of active encouragement, for those of their children who wanted to stay on the farm to do so. They were very family orientated and wanted their children to continue on the tradition of the farming enterprise in which they had been so successful.

The various properties that made up the farm appear to have been regarded by them in much in the same way as many parents regard their family home — as a place for their children to be able to come home to.

In other rural situations, the notion of a child or children continuing to work the family property, running their own cattle and growing their own crops under very loose, if any, financial arrangements and with only the expectation being a just inheritance, is not an unusual concept.

This appears to be the case in relation to the family.

In the same way that an attorney is bound by the General Principles, so is the Tribunal. These draw attention to the fact that the regime established by the *Powers of Attorney Act 1998* (and the *Guardianship and Administration Act 2000*) is essentially a substituted decision making regime where in terms of General Principle 7(4) the principle of substituted judgement must be applied.

This means that the Tribunal must endeavour to ascertain from the evidence, where it is reasonably practical to do so, what the views and wishes of the adult would have been in the matter.

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943 [2008] QGAAT 3.

944 [2008] QGAAT 3, [106]–[113].

The evidence of the past history would seem to suggest that [the adult] would have wanted the situation, at least as it applied at the time she lost capacity, to continue. Enabling the family to continue the relationship with the farm is consistent with maintaining her best interests.

17.55 However, the Tribunal also highlighted the ongoing obligations of the attorneys to act to protect the interests of their mother:<sup>945</sup>

It is nevertheless important that the attorneys ensure that use of the land does not contradict their obligation to act honestly and with reasonable diligence to protect their mother's interests.

17.56 Sometimes, a failure to comply with the conflict transaction provisions may be relevant to the Tribunal's or the Court's consideration of whether or not an attorney or an administrator should be removed. For example, the Tribunal has power to remove an administrator if the Tribunal considers the person is no longer competent because a relevant interest of the adult has not been, or is not being, adequately protected; or that the person has neglected his or her duties or abused his or her powers; or that the person has otherwise contravened the *Guardianship and Administration Act 2000* (Qld).<sup>946</sup> Each of these grounds may be relevant to a purported contravention of the conflict transaction provisions. While the outcome of each case will depend on its particular facts, in deciding whether or not to remove an attorney or administrator who has entered into a conflict transaction, the Tribunal has taken into account one or more of a number of factors in making its determination. These factors, which are generally reflective of the obligation to protect the adult's interests, include whether or not:

- the transaction was at market value;<sup>947</sup>
- the transaction benefited directly the attorney or administrator in any way;<sup>948</sup>
- there was an element of dishonesty or fraud in the transaction;<sup>949</sup>
- there was disclosure of the transaction by the attorney or administrator to other relevant parties;<sup>950</sup> and
- the transaction was reflective of how the principal conducted business when he or she had capacity.<sup>951</sup>

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945 [2008] QGAAT 3, [116].

946 *Guardianship and Administration Act 2000* (Qld) s 31(4).

947 Eg *Re NM* [2005] 55, [35].

948 Eg *Re HAF* [2007] QGAAT 80, [33].

949 Eg *Re HAF* [2007] QGAAT 80.

950 Eg *Re NM* [2005] QGAAT 55, [35]; *Re MAG* [2009] QGAAT 61, [28].

951 Eg *Re FAA* [2008] QGAAT 3, [113].

17.57 While these factors are relevant to a consideration of whether the duty to avoid conflict transactions has been breached, they also provide some guidance as to the types of considerations that may be relevant as to the question whether a particular transaction is likely to be authorised by the Tribunal.

## CLARIFYING THE OBLIGATION TO AVOID CONFLICT TRANSACTIONS

17.58 The guardianship legislation imposes a duty on attorneys and administrators to avoid conflict transactions. Because the attorney or administrator will often be a member of the adult's family, the guardianship legislation also recognises that some qualifications of the rule against conflict transactions may be necessary in certain situations.

17.59 Given that serious consequences may flow from failing to comply with the conflict transaction provisions, it is essential that the provisions are expressed as clearly as possible and deal appropriately with the types of conflict situations which commonly arise, particularly in family situations, so that being appointed as an attorney or an administrator does not become an unattractive proposition. This is especially important given that many attorneys are family members who serve without any monetary compensation.

### Reframing the duty to avoid conflict transactions

17.60 It has been recognised by the Supreme Court and the Tribunal that attorneys and administrators owe fiduciary duties towards the adults for whom they are appointed.<sup>952</sup>

17.61 As mentioned earlier in this chapter, a fiduciary is under an obligation, without informed consent, not to promote his or her personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his or her personal interest and a person to whom he owes a fiduciary duty. This fundamental duty is cast in proscriptive terms, so that it specifies what a fiduciary cannot do. Its purpose is to ensure that the fiduciary is motivated by a duty of honesty and loyalty to act in the interests of the person whom the fiduciary is bound to protect.

17.62 The conflict transaction provisions reflect this fundamental fiduciary duty. However, a criticism of the current provisions is that they do not sufficiently encapsulate the proscriptive nature of the duty.

17.63 When it recommended the inclusion of the conflict transaction provisions in its original 1996 Report, the Queensland Law Reform Commission expressed the duty in terms of a general prohibition on conflict transactions.<sup>953</sup> It also provided for

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See n 900 above.

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Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 295–8. Clause 188(1) of the draft Bill to that Report provided:

the exception that a relevant decision-maker may enter into a conflict transaction only in certain circumstances.<sup>954</sup>

17.64 Section 73(1) of the *Powers of Attorney Act 1998* (Qld) and section 37(1) of the *Guardianship and Administration Act 2000* (Qld), which set out the duty to avoid conflict transactions, are both expressed in permissive language. They respectively provide that an attorney, or an administrator, for an adult *may* enter into a conflict transaction only if the principal, or the Tribunal, authorises the transaction, conflict transactions of that type or conflict transactions generally.

17.65 The problem with using permissive language in this context is that it may confuse the distinction between the attorney's or administrator's power to enter into a transaction and his or her duty to avoid conflict transactions. Whereas a power authorises an attorney or an administrator to act, a duty requires the attorney or an administrator to act in a particular way. The authority establishes the limits of the powers that may be exercised by an attorney or administrator. The duties set out the minimum legal requirements for the exercise of those powers. Therefore, the wording of these provisions may have the practical effect of weakening the prohibition on entering into a conflict transaction.

17.66 This circumstance suggests that these provisions should be redrafted so that they avoid the use of permissive language and thereby better reflect the proscriptive, or prohibitive, nature of the fiduciary duty to avoid conflict transactions.

## The scope of a 'conflict transaction'

### *The definition*

17.67 The conflict transaction provisions include a definition of a 'conflict transaction'. Section 73(2) of the *Powers of Attorney Act 1998* (Qld) relevantly provides:

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- 188(1) Generally, a substitute decision-maker who may make a financial decision or a decision about a legal matter for an adult must not enter into a conflict transaction.
- (2) A substitute decision-maker may enter into a conflict transaction only if—
- (a) the transaction provides for the person's needs and—
    - (i) the adult might reasonably be expected to provide for the needs; and
    - (ii) what is provided is not more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances; or
  - (b) the substitute decision-maker obtains the tribunal's consent; or for a chosen decision-maker empowered by an enduring power of attorney — the enduring power of attorney includes the adult's consent to the transaction.

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Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 298.



A **conflict transaction** is a transaction in which there may be conflict, or which results in conflict, between—

- (a) the duty of an attorney towards the principal; and
- (b) either—
  - (i) the interests of the attorney, or a relation, business associate or close friend of the attorney;<sup>955</sup> or
  - (ii) another duty of the attorney.

*Examples—*

- 1 A conflict transaction happens if an attorney for a financial matter buys the principal's car.
- 2 A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.

17.68 Section 37(2) of the *Guardianship and Administration Act 2000* (Qld) defines a conflict transaction in nearly identical terms.<sup>956</sup>

17.69 This definition is analogous to the equitable concept of a conflict of duty and interest.

### **Limiting factors**

#### *Joint interests*

17.70 The conflict transaction provisions also specify that a transaction is not a conflict transaction only because the attorney or administrator deals with property held jointly with the adult, acquires a joint interest in property or obtains a loan or gives a guarantee or indemnity in relation to the dealing or the acquisition.<sup>957</sup> Section 73(3) and (4) of the *Powers of Attorney Act 1998* (Qld) relevantly provides:

- (3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—
  - (a) deals with an interest in property jointly held; or
  - (b) acquires a joint interest in property; or

<sup>955</sup> A relation is defined as '(a) a spouse of the first person; (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; (c) a person on whom the first person is completely or mainly dependent; (d) a person who is completely or mainly dependent on the first person; or (e) a person who is a member of the same household as the first person'; a close friend is defined as 'another person who has a close personal relationship with the first person and a personal interest in the first person's welfare': *Powers of Attorney Act 1998* (Qld) sch 3. 'Business associate' is not defined in the legislation.

<sup>956</sup> The second example in s 37(3) refers to s 55 of the *Guardianship and Administration Act 2000* (Qld).

<sup>957</sup> This modification was not included in the body of the conflict transaction provisions which were recommended by the Queensland Law Reform Commission in its original 1996 Report for inclusion in the guardianship legislation: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 295–8.

(c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

(4) In this section—

**joint interest** includes an interest as a joint tenant or tenant in common. (note added).

17.71 Section 37(3) and (5) of the *Guardianship and Administration Act 2000* (Qld) are in similar terms.

17.72 The effect of these provisions is that they make it clear that an attorney or an administrator who enters into a transaction involving property owned jointly with the adult does not, by that act alone, enter into a conflict transaction. These provisions take into account that often, in family situations, the substitute decision-maker's and the adult's property may be held jointly.

#### *Beneficiaries and relations*

17.73 When it recommended the inclusion of the conflict transaction provisions in its original 1996 Report, the Queensland Law Reform Commission also recommended the inclusion of two clarifying provisions. First, it considered that the legislation should provide that the fact that the decision-maker might be a beneficiary of the principal's estate on the principal's death does not, of itself, create a conflict of interest. The Commission considered this important because:<sup>958</sup>

in many instances, a financial decision-maker for a person with impaired decision-making capacity would be a friend or relative who may be a beneficiary under the person's will or entitled to a share of the person's estate if the person died intestate. In such a case, almost every transaction which involved spending the person's money could create a conflict of interest because it would result in a depletion of the available estate.

17.74 Secondly, the Commission recommended a provision to the effect that the fact that a person is a relation of the adult does not of itself create a conflict between the decision-maker's duty to the adult and the decision-maker's interests.<sup>959</sup>

17.75 The purpose of such provisions, therefore, is to protect attorneys and administrators from allegations of conflict of interest based only on their status as a relative or possible beneficiary.

17.76 Provisions to this effect do not appear in the conflict transaction provisions in the guardianship legislation. However, the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to take account of these matters when considering the appropriateness of a person for appointment as an administrator. Under

<sup>958</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 295.

<sup>959</sup> *Ibid* 298.

section 15(1)(c) of that Act, the Tribunal must consider the extent to which the adult's and person's interests are likely to conflict. Section 15(2)–(3) then provides:

- (2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.
- (3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.

### Relationship with the gifting and maintenance provisions

17.77 The guardianship legislation contains provisions which enable an attorney or an administrator to make gifts and to maintain the adult's dependants from the adult's property. These provisions recognise that provision from the adult's property for the benefit of others is appropriate in some circumstances.

17.78 Section 88 of the *Powers of Attorney Act 1998* (Qld) (which is similar to section 54 of the *Guardianship and Administration Act 2000* (Qld)) authorises an attorney to give away the principal's property in certain circumstances.<sup>960</sup>

#### 88 Gifts

- (1) Unless there is a contrary intention expressed in the enduring power of attorney, an attorney for financial matters for an individual may give away the principal's property only if—
  - (a) the gift is—
    - (i) to a relation or close friend of the principal; and
    - (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or
  - (b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make;
 

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.
- (2) The attorney or a charity with which the attorney has a connection is not precluded from receiving a gift under subsection (1).

17.79 Similarly, section 89 of the *Powers of Attorney Act 1998* (Qld) (which is similar to section 55 of the *Guardianship and Administration Act 2000* (Qld)) specifies that an attorney may provide from the principal's estate for the needs of a

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Similar provision is made in the ACT, Tasmania and the United Kingdom: *Powers of Attorney Act 2006* (ACT) ss 38, 39; *Powers of Attorney Act 2000* (Tas) s 31(3)–(5); *Mental Capacity Act 2005* (UK) s 12.

dependant of the principal providing it is no more than what is reasonable in the circumstances.<sup>961</sup>

17.80 One of the examples to section 73(2) provides that a conflict transaction 'does not happen' if an attorney is acting under section 89 of the Act to maintain the adult's dependants. Section 37(2) of the *Guardianship and Administration Act 2000* (Qld), which applies to administrators, includes a similar example.

17.81 The Tribunal's decision in *Re JAC*<sup>962</sup> provides an example of the interaction of the conflict transaction provisions with the provisions for maintaining an adult's dependants. In that case, the Tribunal considered an application for authorisation of a conflict transaction in relation to maintenance and repairs to a house which was owned by the adult and her husband as tenants in common. The adult had received head injuries as a result of a motor vehicle accident and was consequently awarded a substantial sum of damages in a personal injuries action. The adult's husband and a private trustee company had been appointed as joint administrators for the adult and the bulk of the proceeds of the damages award were held by the private trustee company. The payment for the maintenance and repairs was proposed to be made from the adult's damages award. The husband was actively involved in the repairs and constructions. The Tribunal found that the husband, who was adult's full-time carer, was a dependant of the adult. Because of this, the Tribunal held that the transactions were not conflict transactions. The Tribunal also commented that:<sup>963</sup>

The Tribunal is satisfied that DJ has as a result of his decision to devote his time to caring for his wife become her dependant for the purposes of section 55 of the *Guardianship and Administration Act 2000* as he has no independent means of financial support. He is reliant on her for the payment of his day-to-day expenses and also for the maintenance and repair of his major asset, his share in the family house, which he owns as tenant in common with JAC. The Tribunal notes that the contribution of DJ and JAC to the purchase of the property was unequal to the extent of \$143,764.51 and that a pool and associated works were constructed on the property in the amount of \$41,571.80. JAC has and will continue to obtain benefits both from the house and the pool. In particular in regard to the house, the Tribunal accepts that while JAC's financial contribution was greater than DJ's, the value of the house at its completion was substantially more than the total purchase price and construction costs. The provision for maintenance of dependants is particularly apposite where the breadwinner in a family loses capacity and an administrator is appointed and the other members of the family continue to require financial support from the adult. Here DJ, in choosing to provide care for JAC has become dependant but has also saved JAC considerable expense as paid carers would be required if he did not provide those services.

17.82 While, as mentioned above, the conflict transaction provisions include an example that a conflict transaction 'does not happen' if an attorney or administrator

961 A dependant is defined as 'a person who is completely or mainly dependant on the principal': *Powers of Attorney Act 1998* (Qld) sch 3. Similar provision for provision for the adult's dependants is made in the ACT: *Powers of Attorney Act 2006* (ACT) ss 40–41.

962 [2008] QGAAT 58.

963 Ibid [55].

is acting under the relevant provision to maintain the adult's dependants, they do not include a similar example with respect to gifts.

### Examples of conflict transactions

17.83 Attorneys, although well-meaning and otherwise diligent, may find themselves in contravention of section 73 of the *Powers of Attorney Act 1998* (Qld) because they have misunderstood its operation by virtue of the explanation given in the approved forms for making an enduring power of attorney. Section 73 includes the following correct example of what constitutes a conflict transaction:<sup>964</sup>

A conflict transaction happens if an attorney for a financial matter buys the principal's car.

17.84 In this situation, the conflict between the attorney's duty and personal interest arises because the attorney's duty to obtain the maximum sale price for the principal's car would conflict with the attorney's personal interest in purchasing the principal's car for the minimum sale price.

17.85 In contrast, the corresponding example in the approved form for making an enduring power of attorney is incorrect. The forms contains the following warning with respect to conflict transactions:<sup>965</sup>

**Duty to avoid transactions that involve conflict of interest.** You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value.

However, you may enter into such a transaction if it has been authorised in this document or by the Court, or if the transaction provides for the needs of someone that the principal could reasonably be expected to provide for, such as his/her child. (emphasis added)

17.86 That explanation suggests, despite section 73, that certain transactions are permissible provided they are made at market value.<sup>966</sup> As explained above, the situation where an attorney buys the principal's car (as described in the example in the conflict transaction provisions), would always fall within the definition of a conflict transaction. An attorney who buys the principal's car, whether or not for full value, would breach the duty to avoid conflict transactions.

<sup>964</sup> *Powers of Attorney Act 1998* (Qld) s 73(2). Section 37(2) of the *Guardianship and Administration Act 2000* (Qld) includes an example in similar terms. It provides that 'A conflict transaction happens if an administrator buys the adult's car'.

<sup>965</sup> *Powers of Attorney Act 1998* (Qld) s 44(1), Department of Justice and Attorney-General, Enduring Power of Attorney Forms <<http://www.justice.qld.gov.au/justice-services/guardianship/enduring-power-of-attorney>> at 13 September 2010.

<sup>966</sup> See also, for example, *Ede v Ede* [2007] 2 Qd R 323 in which the attorney sold the principal's property to the attorney's daughter below market value and was ordered to compensate the principal for the loss caused by the breach of s 73 of the *Powers of Attorney Act 1998* (Qld). In that case, even though the Court found that the attorney had acted honestly and reasonably in seeking and relying on both legal advice and property valuations, the attorney was nevertheless required to account for the profit made in consequence of his breach.

The sale price obtained for the principal's car is relevant only to the extent that the Tribunal or the Supreme Court may take that factor into account in deciding whether to authorise the entry into the transaction; but that does not mean that the transaction is not a conflict transaction.<sup>967</sup>

### The validity of dealings with third parties

17.87 Section 37(4) of the *Guardianship and Administration Act 2000* (Qld) deals with the validity of conflict transactions between an administrator and a third party. It provides:

**37 Avoid conflict transaction**

...

- (4) A conflict transaction between an administrator and a person who does not know, or have reason to believe, the transaction is a conflict transaction is, in favour of the person, as valid as if the transaction were not a conflict transaction.

17.88 Section 37(4) reflects the general proposition that the fact that an administrator has acted in breach of a duty to the adult — for example, has used the authority to benefit himself or herself, or has used the authority in disobedience of the adult's instructions — will not necessarily affect the validity of a third party's dealings with the administrator. This proposition would appear to accord with some analogous case law relating to attorneys.<sup>968</sup> It is irrelevant that the dealing was motivated by improper purposes, provided that the third party has no knowledge of the impropriety.<sup>969</sup>

17.89 There is no corresponding provision to section 37(4) of the *Guardianship and Administration Act 2000* (Qld) included in section 73 of the *Powers of Attorney Act 1998* (Qld).

### Authorisation of conflict transactions

17.90 The Tribunal has power to authorise a conflict transaction under section 152 of the *Guardianship and Administration Act 2000* (Qld). The Supreme Court and the Tribunal also have power under section 118(2) of the *Powers of Attorney Act 1998* (Qld) to authorise an attorney to undertake a conflict transaction if it is in the principal's best interests.

<sup>967</sup> The effect of the Tribunal's authorisation is to excuse the attorney's breach.

<sup>968</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 115, 162 citing *Abbott v UDC Finance Co Ltd* [1992] 1 NZLR 405; *Bank of Bengal v McLeod* (1849) 13 ER 792; *The Margaret Mitchell* (1858) 166 ER 1174.

<sup>969</sup> *The Margaret Mitchell* (1858) 166 ER 1174. In that case the master of a ship who held a power of attorney from the owner authorising him to act generally in relation to affairs of the owner so far as they concerned the ship, sold the ship for his own benefit rather than the benefit of the owner. The Court held that 'It is manifest that [the purchasers] could not be affected by the [master's] conduct towards his owner, save so far as they had actual knowledge of the fact, or knowledge in contemplation of law, and that a bone fide transaction with the holder of a power of attorney must bind the principal, even though the attorney may be to blame, provided that the transaction is within the limits of the power': 1185.

### **Factors taken into account by the Tribunal or the Court**

17.91 The guardianship legislation does not stipulate factors that the Tribunal or the Supreme Court must consider in deciding whether to authorise a conflict transaction. However, in deciding whether to authorise a conflict transaction, the Tribunal has taken into account various factors including whether the transaction reflected the adult's known views and wishes<sup>970</sup> and/or would be detrimental to the adult or the adult's financial position, having regard to the extent of the adult's assets and resources.<sup>971</sup> At least some of these factors reflect aspects of the General Principles, which must be applied by the Tribunal or the Supreme Court when it makes a decision.<sup>972</sup>

17.92 In *Re BAB*,<sup>973</sup> the Tribunal refused the application for authorisation having regard to the extent of the expenditure of the adult's funds as a proportion of the adult's total assets and to the limited benefit to the adult of the expenditure. That case involved a proposal for up to \$30 000 from the proceeds of the sale of the adult's house to be used to renovate the attorney's home to accommodate the adult while waiting for a place to become available at a nursing home. The Tribunal was not satisfied that the expenditure was in the adult's best interests:<sup>974</sup>

taking into account the absence of evidence about the impact of such payment on her financial situation, the time for which it is anticipated she would reside at WB's home, the cost of such renovations in comparison to the total of BAB's assets, the permanent nature of the benefits to WB and the temporary nature of the benefits to BAB.

17.93 In that case, the Tribunal also commented that the market value of the property concerned, for example, where an attorney purchases an adult's property, will also be relevant.<sup>975</sup>

### **The timing of the authorisation**

17.94 Section 152 of the *Guardianship and Administration Act 2000* (Qld) provides that 'the tribunal may authorise a conflict transaction, a type of conflict transaction or conflict transactions generally'. It does not expressly specify whether the Tribunal may authorise a conflict transaction retrospectively.

970 Eg *Re FAA* [2008] QGAAT 3, [107]–[114]; *Re CMB* [2004] QGAAT 20, [26] (in relation to conflict transactions by an administrator).

971 Eg *Re KPL* [2003] QGAAT 12, [24]–[25], [33]; *Re CMB* [2004] QGAAT 20, [28]–[29].

972 See eg *Powers of Attorney Act 1998* (Qld) sch 2 s 7(3)(b), (5); *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(b), (5). See now the new General Principles 7(a), 8(4) recommended in Chapter 4 of this Report.

973 [2007] QGAAT 19.

974 *Ibid* [69].

975 *Ibid* [54], [56].

17.95 In *Re HAF*,<sup>976</sup> the Tribunal held that it did not have power to authorise a conflict transaction retrospectively:<sup>977</sup>

The wording of section 37(1) indicates that Tribunal authorisation is a precondition which must be satisfied before a conflict transaction can be entered into.

Section 83 of the Act provides that the Tribunal has the powers given under the Act or another Act.

The Tribunal's power in relation to conflict transactions is found in section 152, which provides simply that the Tribunal may authorise a conflict transaction, a type of conflict transaction or conflict transactions generally. Again, the wording of section 152 is consistent with that of section 37(1) in that the power to authorise such transactions appears to be limited to authorising transactions which are proposed or contemplated — and not transactions which have already occurred.

This view is reinforced by the fact that the only reference in the Act to the Tribunal's power to ratify an exercise of power is found in section 154 which specifically provides that such power is limited to an exercise of power by an informal decision maker. Section 154(5) provides that an 'informal decision maker' does not include an administrator.

...

The Tribunal concluded that the Act does not specifically empower it to retrospectively authorise a conflict transaction into which an administrator has entered, and therefore the Tribunal cannot do so.

17.96 Subsequently, however, in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd*,<sup>978</sup> the Supreme Court held that a conflict transaction can be authorised retrospectively because the word 'only' in section 37(1) of the *Guardianship and Administration Act 2000* (Qld) applies to the requirement to obtain the authorisation of the Tribunal to a conflict transaction, but does not make it mandatory for that authorisation to be obtained prior to entry by the administrator into a conflict transaction:<sup>979</sup>

There is no doubt that best practice requires an administrator to apply for authorisation under s 37(1) of the GAA before entering into a conflict transaction. That is different, however, from finding that there is no power in the Tribunal to give authorisation retrospectively for entry into a conflict transaction, if the administrator applies for authorisation after entering into the transaction. It is a matter of construction of s 37 in the context of the [*Guardianship and Administration Act 2000* (Qld)].

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976 [2007] QGAAT 80.

977 Ibid [34]–[38].

978 [2008] 2 Qd R 323.

979 Ibid 340.



The language of s 37(1) suggests that the authorisation of the Tribunal to a conflict transaction should be obtained before entry into the transaction. It does not expressly exclude the authorisation being given after the entry into the transaction, unless that is the effect of the use of the word 'only'. What is important about s 37 in the scheme under the [*Guardianship and Administration Act 2000* (Qld)] is that the conflict transaction is authorised by the Tribunal. Note the discussion in QLRC Report 49 at pp 295—297. In contrast to the legislative scheme that was under consideration in *David Grant*, s 37 of the [*Guardianship and Administration Act 2000* (Qld)] does not incorporate any detailed provisions for the making and timing of the application for the authorisation of the conflict transaction or attempt to address the situation where the proposed conflict transaction itself is affected by time constraints that preclude obtaining the authorisation of the Tribunal before the opportunity to enter into the conflict transaction passes.

Sections 58, 59 and 60 of the [*Guardianship and Administration Act 2000* (Qld)] are found in the same chapter of the GAA as s 37.<sup>980</sup> This chapter deals with functions and powers of guardians and administrators. Sections 58, 59 and 60 can apply to matters other than conflict transactions. If s 37 is construed so as not to preclude retrospective authorisation by the Tribunal, the right of an adult to compensation under s 59 of the [*Guardianship and Administration Act 2000* (Qld)] for the administrator's failure to comply with the [*Guardianship and Administration Act 2000* (Qld)] is not complete in respect of the failure of an administrator to obtain the authorisation of the Tribunal to a conflict transaction, until the possibility of retrospective authorisation has been exhausted.

The proper construction of s 37(1) of the [*Guardianship and Administration Act 2000* (Qld)] is that the word 'only' applies to the requirement to obtain the authorisation of the Tribunal to a conflict transaction, but does not make it mandatory for that authorisation to be obtained prior to entry by the administrator into the conflict transaction. That does not mean that it will not be a relevant consideration to the Tribunal in considering whether or not to give the authorisation that the administrator failed to seek the authorisation prior to entering into the conflict transaction.

The answer to question 5 is therefore 'Yes' and the power to authorise retrospectively a conflict transaction is found in s 37 of the [*Guardianship and Administration Act 2000* (Qld)]. (note added)

17.97 The Court in that case was not specifically referred to section 152 of the *Guardianship and Administration Act 2000* (Qld).<sup>981</sup>

17.98 Subsequently, in *Re TAD*,<sup>982</sup> the Tribunal, referring to the Supreme Court's decision in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd*, stated that 'it follows in the opinion of the Tribunal that an administrator who enters into a conflict transaction is not in contravention of section

980 Sections 58 (Power to excuse failure), 59 (Compensation for failure to comply), 60 (Power to apply to court for compensation for loss of benefit in estate).

981 The Court considered a number of questions of law referred to it by the Guardianship and Administration Tribunal in relation to a review of the appointment of an administrator. One of the questions asked 'Whether the Tribunal has power to authorise retrospectively conflict transactions and, if so, whether that power is found in s 37, s 83(2) or some other section of the GAA'. At that time, s 83(2) of the *Guardianship and Administration Act 2000* (Qld) provided that 'The tribunal also may do all things necessary or convenient to be done to perform the tribunal's functions'.

982 [2008] QGAAT 76.

37 of the *Guardianship and Administration Act 2000* (Qld) until authorisation of the transaction by the Tribunal is refused or has been rendered futile by subsequent events':<sup>983</sup>

This conclusion is consistent with the comments of Justice Mullins 'If s 37 is construed so as not to preclude retrospective authorisation by the Tribunal, the right of an adult to compensation under s 59 of the [*Guardianship and Administration Act 2000* (Qld)] for the administrator's failure to comply with the [*Guardianship and Administration Act 2000* (Qld)] is not complete in respect of the failure of an administrator to obtain the authorisation of the Tribunal to a conflict transaction, until the possibility of retrospective authorisation has been exhausted.'<sup>984</sup> (note in original)

17.99 The impact of such a finding is potentially wide as it may have the effect of giving de facto authorisation to transactions for which approval has not been sought. It is doubtful, however, whether the comments of Mullins J in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd*, which were limited to the question of when the right to compensation will be enlivened under section 59 of the *Guardianship and Administration Act 2000* (Qld), were intended to have that effect.

### **Assisting attorneys and administrators to understand their duty to avoid conflict transactions**

17.100 One of the problems that has been identified in Tribunal decisions on conflict transactions is that, sometimes, family attorneys and administrators misunderstand or are ignorant of their obligation to avoid conflict transactions.<sup>985</sup>

17.101 It is also important to recognise that financial abuse by attorneys and administrators is part of a much wider social problem that involves challenges to social attitudes and stereotypes; it cannot be addressed solely through legislative reform. It may be appropriate for further efforts at community education to be made through the guardianship system or for other measures to be taken to assist attorneys and administrators in understanding the scope of their duties with respect to financial transactions.

### **Discussion Paper**

17.102 In the Discussion Paper, the Commission sought submissions about whether there are any difficulties with the operation of the conflict transaction

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983 Ibid [125].

984 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited and ors* BS6519 of 2007 at paragraph 76. (See now [2008] 2 Qd R 323, 340 (Mullins J).)

985 See, eg *Re MAG* [34]–[35]; *Re PAA* [2009] QGAAT 18, [86]; *Re NM* [2005] QGAAT 55, [15]; *Re HAF* [2007] QGAAT 80, [21].

provisions.<sup>986</sup> The Commission also sought submissions on the following matters:<sup>987</sup>

- whether the conflict transaction provisions should include a provision to the effect that:
  - the fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict; or
  - the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean that the adult's and person's interests are likely to conflict;
- whether the conflict transaction provisions should clarify how the prohibition on unauthorised conflict transactions relates to the gifting provisions in guardianship legislation allowing an attorney to make gifts in certain circumstances, and, if so, whether transactions made under the gifting provisions should be excluded from the definition of 'conflict transaction';
- whether the conflict transaction provisions should include further examples of what are, or are not, considered to be prohibited conflict transactions;
- whether the guardianship legislation should stipulate certain matters to which the Tribunal may, or must, have regard in deciding whether to authorise a conflict transaction and, if so, what matters should be included:
  - whether the transaction accords with the adult's known views and wishes;
  - whether the transaction would be detrimental to the adult's financial or other interests; or
  - some other matter; and
- whether further steps should be taken to provide attorneys and administrators with greater assistance in understanding their obligation to avoid conflict transactions and, if so, what sort of assistance should be provided:
  - additional explanation in the approved forms for making an enduring power of attorney;
  - an information package or code of practice; or
  - assistance provided in another way.

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<sup>986</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 204–5.

<sup>987</sup> Ibid.

17.103 The main focus of the questions and submissions received was on section 73 of the *Powers of Attorney Act 1998* (Qld).

## Submissions

17.104 A number of submissions identified problems with the scope and operation of the current conflict transaction provisions, and particularly section 73 of the *Powers of Attorney Act 1998* (Qld).<sup>988</sup> The Adult Guardian commented that, in her experience, it is common for family members to enter into conflict transaction provisions unintentionally.<sup>989</sup>

The Adult Guardian investigates allegations of abuse, neglect and exploitation. The case load primarily self selects to financial abuse of older people suffering from a form of dementia. Of the significant number of enquires made to this office one of the largest proportions relates to families who have inadvertently 'done the wrong thing'. The inadvertence is generally through mixing the adult's money with other family money or unrecognised conflict transactions.

17.105 The Adult Guardian therefore suggested that consideration should be given to limiting the prohibition on conflict transactions to those that harm the adult's financial interests. She also suggested a number of other improvements to address these problems, including a clearer explanation on the prescribed form of the requirements and options, and encouragement to adults to state clearly their wishes in the enduring power of attorney form. The Adult Guardian considered that it would also be of assistance, given the ageing population and the increasing need for adults to choose how they will be supported through substitute decision-making, for the community to provide support for educating attorneys about their responsibilities. The Adult Guardian noted, however, that although she currently has responsibility for education in respect of guardianship, the level of funding is poor and the effect of community education small.

17.106 The Caxton Legal Centre Inc commented that conflict transactions are particularly problematic, especially where an adult is a victim of abuse.<sup>990</sup> It also noted, however, that often, dutiful family members, including spouses of many years' standing, are often themselves adversely affected by the guardianship regime:

We have encountered many ... situations where 'traditional role-playing' has meant that the husband has been the sole registered owner of the family home. If that spouse has not prepared an EPA, suddenly loses capacity (say, through a stroke) and has to immediately go into full-on residential long term nursing care, the wife can suddenly find herself in a very precarious situation where she is deprived of her rights to stay on in the property. Her best avenue to achieve a legal interest in the property arguably would actually be to file for a property settlement in the family court, where she would generally (in standard types of situations) be awarded a half share in the available property pool. A dutiful and committed spouse with 1950s ethics, is not likely to feel comfortable about

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988 Submissions 164, 166, 173.

989 Submission 164.

990 Submission 173.

taking this action as a matter of principle. She then finds herself applying for appointment as administrator and guardian, only to be told she is likely to have a conflict of interest and therefore is rejected as an administrator. Potentially, due to the financial needs to fund the husband's nursing home care, the home can be sold up and all the proceeds used to support the husband's needs. An adult child who is living at home and who may have made improvements to the home because of the parent/s promises that they will get it eventually, are equally displaced. The remedy for such an adult child would be an action in constructive trust, which is extremely expensive and complex. In family situations, where families are already dealing with grief and loss in these sorts of difficult situations, such outcomes arguably are extremely unjust.

Similarly, elderly parents may well wish to provide 'no interest' loans to their adult children (where possible — subject to Centrelink restrictions) in order to 'help out the family'. They may also want these same adult children to act as their attorneys. There may be many other imperatives informing why they are taking such steps — such as the fact that one adult child has had a failed marriage, but has a number of dependent children or because an adult child has a serious health problem and the elderly parent wants to see that child get ahead. Similarly, some older people want to help reduce an adult child's financial burdens so that they are more available to help the aged person with their needs — say, because they may be able to reduce their work hours and dedicate this time to aged parents. In real terms, the assistance provided by a genuine adult child (who is wholly focussed on the aged parent's needs) actually results in major financial savings to the adult, who might otherwise need to pay for professional nursing care, expensive taxi trips, home help etc. ... The conflict of interest transaction debate centres on potential financial losses by the adult — and yet, the support of friends and families may, in fact, be what actually enables the adult to make his/her dollars go further.

People who are properly informed about these issues may well decide to have a family agreement prepared by an experienced solicitor. Such an agreement can provide for payment (in kind) to an adult child in exchange for care provided to the adult. These agreements are complex and very expensive. In our experience, most people do not understand this issue well and are hesitant to pay for such legal advice.

In our experience, many adults provide care and often assist their spouses and children financially at their own expense for a wide variety of reasons. A lot of adults would want these sorts of arrangements to continue if they lose capacity. Indeed, the whole idea of substituted decision making is meant to respect this principle. However, in practice, government bureaucrats and decision-makers are much more likely to take an extremely cautious approach to conflicts.

17.107 The Caxton Legal Centre Inc emphasised the importance of educating adults about these issues and the option of authorising certain types of conflict transactions in an enduring power of attorney if they wish to do so:

Although we appreciate that there are many risks with authorising all conflict of interest transactions, we think that people should have these matters brought to their attention before they sign an EPA so that they can make specific provision for certain types of conflict of interest transactions if they wish to do so. For example, a spouse may well want to authorise a spouse attorney to be allowed to sell the family home and buy a new residence — even if there is an element of conflict in the transaction. Because of the high cost of housing, even a small downsized 1 room flat may well take more than a 50% share of the proceeds.

This may well be what both parties would want and think is fair in the circumstances when one party has to go into care.

We consider that the EPA form should provide more space for people to set out ‘their wishes’ about how they want their affairs conducted. Alternatively, there should be some other recommended way for people to provide guidance about these issues in a more secure way — say in a sworn statement or statutory declaration.

Of course, we are also aware of serious cases of abuse, so we fully support proper checks and balances being maintained to protect vulnerable adults.

17.108 The Queensland Police Service also noted the problem of conflict transactions that involve suspected dishonest conduct which has been represented as a loan from the adult to the attorney but executed by the attorney.<sup>991</sup>

17.109 The Registrar of Land Titles also commented that some attorneys or their legal advisors appear to interpret section 73 of the *Powers of Attorney Act 1998* (Qld) as meaning that no person, including the Registrar of Titles, has a right to question a transaction unless they have grounds to believe the attorney is guilty of improper conduct.<sup>992</sup>

Section 73 in its present form does not assist attorneys or persons dealing with them to determine whether a transaction is a conflict transaction. It would be desirable to require an application to be made to a court or tribunal to sanction any proposed transaction which may be a conflict of interest for the attorney. It would also be desirable to provide further examples in the legislation of what are, or are not, considered to be conflict transactions and in particular an example involving real property.

### **Beneficiaries and relations**

17.110 Three respondents, including the Adult Guardian, supported the amendment of section 73 of the *Powers of Attorney Act 1998* (Qld) to include a provision to the effect that:<sup>993</sup>

- the fact a person is a relation of the adult does not, of itself, mean the adult’s and person’s interests are likely to conflict; or
- the fact a person may be a beneficiary of the adult’s estate on the adult’s death does not, of itself, mean that the adult’s and person’s interests are likely to conflict.

17.111 However, the Perpetual Group of Companies disagreed with that view.<sup>994</sup> It noted that these factors are included in the *Guardianship and Administration Act 2000* (Qld) in the context of considering the appropriateness of a proposed

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991 Submission 173.

992 Submission 166.

993 Submissions 941, 164, 165.

994 Submission 155.

administrator. It considered that, because section 73 is directed at specific transactions, the inclusion of these factors in section 73 of the *Powers of Attorney Act 1998* (Qld) would have little effect or even cause confusion.

### **Relationship with the gifting and maintenance provisions**

17.112 The Adult Guardian, the Public Trustee, the Queensland Police Service and two other respondents considered that section 73 of the *Powers of Attorney Act 1998* (Qld) should clarify how the prohibition on unauthorised conflict transactions relates to the provision in section 88 of the *Powers of Attorney Act 1998* (Qld) allowing an attorney to make gifts in certain circumstances.<sup>995</sup>

17.113 The Public Trustee considered that transactions made under section 88 should be excluded from the definition of ‘conflict transaction’ in section 73.<sup>996</sup>

17.114 The Queensland Police Service commented that:<sup>997</sup>

Consideration needs to be given to expressly prohibiting uncommercial transactions without external approval. For example, an attorney executing loans from the appointer’s property to the attorney or otherwise substantially disposing of the appointer’s property without benefit to the appointer. This prohibition should also be explained in the appointment instrument with examples of inappropriate transactions. The Office of Adult Guardian has the authority to conduct an examination of an attorney and request documents or information. However, it is not clear whether this authority only arises as a result of a complaint. Further, a failure by an attorney to provide information or documents/answers honestly at an examination should subject the attorney to a process leading to disqualification as an attorney. The Office of Adult Guardian should by virtue of the office (without court approval) have the same authority as the appointer to request financial information from third parties to conduct an audit of financial dealing. This authority should exist whether or not a complaint has been made. This authority will provide an extensive ability to audit financial conduct and if appropriate take steps to have the appointment suspended or revoked. The Office of the Adult Guardian should have the express authority to provide documents, obtained under its Act, to the QPS when referring a matter to the QPS for investigation.

17.115 Several respondents considered it unnecessary to amend section 73 to clarify its relationship to section 88 of the Act.<sup>998</sup>

17.116 The Registrar of Titles commented that it would be rare for a gift of real property to satisfy the conditions in section 88(1) of the *Powers of Attorney Act 1998* (Qld) and such a gift would always be treated as a ‘conflict transaction’ if not authorised by the power of attorney instrument.<sup>999</sup>

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995 Submissions 94I, 156A, 164, 165, 173.

996 Submission 156A.

997 Submission 173.

998 Submissions 155, 165, 179.

999 Submission 166.

17.117 A long-term Tribunal member who considered that transactions made under section 88 should not be excluded from the definition of ‘conflict transaction’, advised the Commission that the Tribunal had sometimes relied on section 118(2) of the *Powers of Attorney Act 1998* (Qld) to authorise an attorney’s actions in respect of gifts.<sup>1000</sup>

### **Examples of conflict transactions**

17.118 The Adult Guardian, the Public Trustee, the Registrar of Titles, and one other respondent considered that it would be helpful if section 73 of the *Powers of Attorney Act 1998* (Qld) included further examples of what are, or are not, considered to be prohibited conflict transactions.<sup>1001</sup>

17.119 The Perpetual Group of Companies disagreed, commenting that greater practical assistance to attorneys is likely to be more beneficial than making legislation longer or more prescriptive.<sup>1002</sup>

### **Authorisation of conflict transactions**

17.120 Three submissions considered that the guardianship legislation should stipulate certain matters to which the Tribunal may, or must, have regard in deciding whether to authorise a conflict transaction.<sup>1003</sup>

17.121 The Adult Guardian considered that, in determining whether a transaction is a conflict transaction under the Act, it would be relevant to take into account whether the transaction accords with the adult’s known views and wishes and whether the transaction would be detrimental to the adult’s financial or other interests.<sup>1004</sup> Another respondent suggested that either of those factors may be relevant in determining the issue.<sup>1005</sup>

17.122 A long-term Tribunal member considered it may be appropriate for the Tribunal to have regard to the adult’s previous actions and his or her testamentary intentions.<sup>1006</sup>

### **Assisting attorneys and administrators to understand their obligation to avoid conflict transactions**

17.123 Several respondents specifically considered whether further steps should be taken to provide attorneys with greater assistance in understanding their

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1000 Submission 179. Section 118(2) of the *Powers of Attorney Act 1998* (Qld) is set out at [17.22] above.

1001 Submissions 94I, 156A, 164, 166.

1002 Submission 155.

1003 Submissions 164, 165, 179.

1004 Submission 164.

1005 Submission 165.

1006 Submission 179.



obligation to avoid conflict transactions.<sup>1007</sup> The Department of Communities considered that the additional information could be provided in the approved form for making an enduring power of attorney, while the Public Trustee suggested this information may be provided in an information package or a code of practice.<sup>1008</sup>

17.124 The Adult Guardian suggested that both of these steps would be appropriate, given that it is necessary to strike an appropriate balance between the informality of the current regime for enduring powers of attorney and the significant powers that enduring powers of attorney give to the attorney, the recognised history of abuse that accompanies the loss of capacity in some cases and the inability of adults in those circumstances to recoup either the financial or relationship loss.<sup>1009</sup>

17.125 Another respondent considered that the information should be available on request from the Office of the Adult Guardian.<sup>1010</sup>

17.126 A long-term Tribunal member suggested that either the Tribunal or the Adult Guardian could provide an attorney with explanatory materials on his or her powers and duties.<sup>1011</sup>

## The Commission's view

### ***Reframing the obligation to avoid conflict transactions***

17.127 The Commission is of the view that the conflict transaction provisions, as they are currently drafted, do not clearly articulate the duty to avoid entering into a conflict transaction. It therefore considers that the conflict transaction provisions should be redrafted so that they better reflect the proscriptive, or prohibitive, nature of the fiduciary duty to avoid a conflict of duty and interest.<sup>1012</sup>

17.128 Accordingly, section 73(1) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that:

- an attorney for a financial matter must not enter into a conflict transaction unless the conflict transaction has been prospectively authorised; and
- a conflict transaction may be authorised by the principal.

17.129 It should be noted that such an amendment does not affect the ability of a principal, who has capacity, to authorise (or ratify) a conflict transaction retrospectively. However, to remove any doubt about the issue, section 73(1) should be further amended to provide that nothing in that section prevents a

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1007 Submissions 94I, 156A, 165, 169.

1008 Submissions 156A, 169.

1009 Submission 164.

1010 Submission 165.

1011 Submission 179.

1012 *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165, 199.

principal, who has capacity, from retrospectively authorising (or ratifying) a conflict transaction.

17.130 Further, Section 73(1) should also be amended to include a note to the effect that section 118(2) of the Act also enables the Supreme Court (or the Tribunal) may also authorise an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake.<sup>1013</sup>

17.131 Similarly, section 37(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an administrator for an adult must not enter into a conflict transaction unless the conflict transaction has been prospectively authorised by the Tribunal. Section 37(1) should also be amended to include a note to the effect that the Tribunal may authorise a conflict transaction, a type of conflict transaction or conflict transactions generally under section 152 of the Act.

17.132 The reformulation of the duty to avoid conflict transactions in these terms would make it clear that the conflict transaction provisions will not be complied with if an attorney or an administrator enters into a conflict transaction without prior authorisation. Conversely, the conflict transaction provisions will be complied with if an attorney or an administrator has been given prior authorisation to enter into a conflict transaction.

### ***The scope of a conflict transaction***

#### *The definition of 'conflict transaction'*

#### *Limiting factors*

#### JOINT INTERESTS

17.133 The subsections in the conflict transaction provisions which relate to joint interests — section 73(3) and (4) of the *Powers of Attorney Act 1998* (Qld) and section 37(3) and (5) of the *Guardianship and Administration Act 2000* (Qld) — are clarifying provisions only. Their main purpose is to make it abundantly clear that transactions which involve the joint interests of the attorney or administrator and the adult do not automatically amount to conflict transactions. Although these provisions are not strictly necessary, they may assist persons to understand the scope of the duty to avoid conflict transactions. The Commission is therefore of the view that these provisions should be retained.

#### INVESTMENTS BY TRUSTEE COMPANIES IN RELATED ENTITIES

17.134 In its submission, the Perpetual Group of Companies proposed the amendment of the guardianship legislation to provide expressly that a transaction is

<sup>1013</sup>

*Powers of Attorney Act 1998* (Qld) s 109A(1) provides that the Tribunal has the same jurisdiction and powers for enduring documents as the Supreme Court. For the purposes of s 109A(1) of the *Powers of Attorney Act 1998* (Qld), the Act applies, with any necessary changes, as if references to the Supreme Court were references to the Tribunal: s 109A(2).

not a conflict transaction merely because it involves an enduring attorney which is a trustee company investing the principal's assets in a managed fund or superannuation fund of which a related entity is the manager or trustee.<sup>1014</sup>

Perpetual Trustees Queensland Limited (PTQ) is a Queensland trustee company which is part of a financial services group capable of providing financial planning and investment management services as well as pure administration and attorney services. A separate division of the Perpetual Group also manages Unit Trusts in which people and organisations can invest money, which we will describe generically for present purposes as 'Perpetual Managed Funds'. In order to provide in a cost-effective way what is effectively an operating bank account providing some interest earnings, a trustee company may invest an appropriate small part of the adult's assets in a cash management trust ('CMT'). The purpose is only achieved if the CMT is operated 'in house'. As a related entity derives fees from operating the CMT, there is arguably a conflict transaction, even though the procedure is clearly in the client's interests.

We submit that it would remove a possible source of contention if the legislation expressly provided that a transaction is not a conflict transaction merely because it involves an enduring attorney which is a trustee company investing the principal's assets in a managed fund or superannuation fund of which a related entity is the manager or trustee. This would be consistent with the decision in *Bell v Pfeffer and anor* ([2009] QSC 209), in which Dutney J considered whether the fees charged by the trustee of Perpetual Select Superannuation Fund were part of the administrator's remuneration within s.41(1) of the TCA. His Honour held they were not, and noted (at paragraph [40]), 'I am thus satisfied that both the amounts charged by the Select Fund for its own use and the amounts which it pays to its underlying investment managers can properly be claimed by the Administrator as expenses in addition to the commission payable under s 41 of the Act' [emphasis added]. The same comments apply equally to appointments.

17.135 The Commission does not consider that the guardianship legislation should be amended to provide expressly that a transaction is not a conflict transaction merely because it involves an attorney, who is acting under an enduring power of attorney and who is a trustee company, investing the principal's assets in a managed fund or superannuation fund of which a related entity is the manager or trustee, as was suggested by the Perpetual Group of Companies. There is no compelling reason to quarantine these types of transactions from the duty to avoid conflict transactions. There are three alternative options available in circumstances such as these. First, the attorney has the option to avoid entering the transaction. Secondly, the principal may expressly authorise these types of transactions either in the enduring power of attorney document or otherwise at a time when he or she still retains capacity. Finally, where the principal has not authorised the transaction in the enduring power of attorney document and no longer has the capacity to give his or her authorisation personally, the attorney may apply for authorisation from the Tribunal or the Supreme Court.

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1014

Submission 155.

## BENEFICIARIES AND RELATIONS

17.136 In the Commission's view, the conflict transaction provisions in the guardianship legislation — that is, section 37 of the *Guardianship and Administration Act 2000* (Qld) and section 73 of the *Powers of Attorney Act 1998* (Qld) — should be amended to include a provision to the effect that the fact that a person is a relation of the adult does not, of itself, mean that the adult's and the person's interests are likely to conflict. A provision to this effect would recognise that the existence of close personal ties should not be presumed to create a position of conflict.

17.137 Because a family member or friend of the adult who is appointed as the adult's financial decision-maker may be a beneficiary under the adult's will or entitled to a share of the adult's estate if the adult dies intestate, a conflict of interest may arise whenever the attorney or administrator expends funds from the adult's property. To overcome this issue, the Commission is of the view that the conflict transaction provisions should be amended to include a provision to the effect that the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean that the adult's and person's interests are likely to conflict.

### ***Relationship with the gifting and maintenance provisions***

17.138 An attorney or an administrator is required to exercise power honestly and with reasonable diligence to protect the adult's interests. There may be times when the attorney or administrator may be required to decide whether it is in the interests of the adult to act to benefit another person. The gifting provisions recognise that giving gifts on customary occasions is a normal and important incident of everyday life. In order to protect the adult's interests, however, these provisions limit the extent to which an attorney or an administrator may act to benefit someone other than the adult.

17.139 The Commission is of the view that the definition of 'conflict transaction' in the conflict transaction provisions should be amended to provide specifically that transactions that are made in accordance with the gifting provisions are not conflict transactions. A similar amendment should be made in relation to the provisions for the maintenance of the adult's dependants. The implementation of the latter amendment would remove the need for the existing example in the definition of 'conflict transaction', which provides that a conflict transaction does not happen if an attorney or an administrator (as the case may be) is acting under the provisions to maintain an adult's dependants.

### ***Examples of conflict transactions***

17.140 In the Commission's view, it would be helpful if the conflict transaction provisions were amended to include some additional examples of what are, or are not, considered to be prohibited conflict transactions. The Commission notes that, while the current example provided in the conflict transaction provisions is

correct,<sup>1015</sup> it may also be desirable to explain that the sale price for the transaction does not have to be less than market value for a conflict transaction to occur.<sup>1016</sup>

17.141 As the Supreme Court observed in *Ede v Ede*,<sup>1017</sup> the current example of a conflict transaction in the approved forms for an enduring power of attorney is incorrect and may lead attorneys into error.<sup>1018</sup> The Commission is therefore of the view that this example should be revised as a matter of priority so that it is made consistent with the example provided in the conflict transaction provisions. This is especially important, given that an attorney may be more likely to read the explanation in the approved form than the relevant legislative provisions.

17.142 The Commission has also recommended that attorneys and administrators should be given greater assistance in understanding their obligation to avoid conflict transactions, including the provision of specific examples in the relevant forms and materials used by them.<sup>1019</sup>

### ***The validity of dealings with third parties***

17.143 Section 37(4) of the *Guardianship and Administration Act 2000* (Qld) preserves the validity of a conflict transaction between an administrator and a third party who does not know or have reason to believe that the transaction is a conflict transaction. There is no equivalent provision in relation to attorneys in the *Powers of Attorney Act 1998* (Qld).

17.144 The Commission considers that there should be no distinction made in the guardianship legislation between the protection provided to a third party who deals with an administrator and one who deals with an attorney.

17.145 Accordingly, section 73 of the *Powers of Attorney Act 1998* (Qld) should be amended to include a provision similar to section 37(4) of the *Guardianship and Administration Act 2000* (Qld).

### ***Authorisation of conflict transactions***

#### *The 'best interests' test under section 118(2) of the Powers of Attorney Act 1998 (Qld)*

17.146 Section 118(2) enables the Supreme Court or the Tribunal to authorise a conflict transaction entered into by an attorney if the Court (or Tribunal) considers it

<sup>1015</sup> The example states 'A conflict transaction happens if an attorney for a financial matter buys the principal's car'.

<sup>1016</sup> See eg the example provided in the draft provision proposed by the Commission in its original 1996 Report: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 2, Draft Assisted and Substituted Decision Making Bill 1996 cl 188. That example was in the following terms:

A conflict transaction happens if a substitute decision-maker who may make financial decisions for an adult buys the adult's car. The sale price does not have to be less than market value for the sale to be a conflict transaction.

<sup>1017</sup> [2007] 2 Qd R 323.

<sup>1018</sup> See [17.86] above.

<sup>1019</sup> See Recommendation 17-15. See also Recommendation 16-12 of this Report.

is in the best interests of the adult. The guardianship legislation also requires the Court or Tribunal, when exercising a power under the Act (including the power to authorise a conflict transaction), to apply the General Principles.<sup>1020</sup>

17.147 The Commission is of the view that when it exercises power to authorise a conflict transaction under section 118(2), the Supreme Court (or the Tribunal), should be guided by the General Principles rather than a ‘best interests’ test. This approach would also ensure consistency with the guiding principles applied by the Tribunal when it exercises power under section 152 of the *Guardianship and Administration Act 2000* (Qld), in relation to the authorisation of conflict transactions by administrators.

17.148 Accordingly, section 118(2) of the *Powers of Attorney Act 1998* (Qld) should be amended by deleting the words ‘if the court considers it in the best interests of the principal’.

*Specific factors to be taken into account by the Tribunal or the Supreme Court*

17.149 In the Commission’s view, it is neither necessary nor desirable to amend the guardianship legislation to require that, in deciding whether a transaction is a conflict transaction, the Tribunal or the Supreme Court must take into account specific factors. Such a requirement would unnecessarily fetter the Tribunal’s or the Court’s discretion. In any event, the matters that are generally taken into account when making such a decision — for example, whether the transaction accords with the adult’s known views and wishes or would be detrimental to the adult’s financial and other interests — are largely matters that are already taken into account by the Tribunal or the Supreme Court when they apply the General Principles.<sup>1021</sup>

*The timing of the authorisation*

17.150 Earlier in this chapter, the Commission has recommended that the statutory duty to avoid conflict transactions in section 73(1) of the *Powers of Attorney Act 1998* (Qld) and section 37(1) of the *Guardianship and Administration Act 2000* (Qld) should be reformulated to make it clear that attorneys and administrators must not enter into a conflict transaction unless that transaction has been prospectively authorised. If an attorney or an administrator enters into a conflict transaction without such authorisation, he or she would fail to comply with the conflict transaction provisions.

17.151 This approach reflects the obligation of a fiduciary not to promote his or her personal interest by making or pursuing a gain in circumstances in which there is a conflict, or a real or substantial possibility of a conflict, between his or her personal interest and the interest of the person to whom he or she owes a fiduciary duty, without the informed consent of the person.<sup>1022</sup> For the purposes of the

<sup>1020</sup> *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1).

<sup>1021</sup> The General Principles are discussed in Chapter 4 of this Report.

<sup>1022</sup> See [17.8]–[17.9] above.

conflict transaction provisions, such informed consent is obtained by way of authorisation from the principal, the Tribunal or the Court (as the case may be).

17.152 The Commission considers that the formulation of the duty in express terms that require an attorney or administrator to obtain authorisation before entering into a conflict transaction represents a best practice approach for those persons in the exercise of their powers.

17.153 The Commission does not agree with the Tribunal's statement in *Re TAD*<sup>1023</sup> that, under the current provisions, there can be no contravention unless the possibility of authorisation has been exhausted. This is because the conflict transaction provisions (either in their current form or as amended in accordance with the Commission's recommendations) will not be complied with if the transaction is entered into without authorisation. However, in an appropriate case, the Tribunal or the Supreme Court under section 152 of the *Guardianship and Administration Act 2000* (Qld) or section 118(2) of the *Powers of Attorney Act 1998* (Qld) may exercise its discretion to authorise the entry into a conflict transaction retrospectively. In deciding whether the transaction should be authorised, it is open for the Tribunal or the Supreme Court to take into account the failure of the attorney or administrator to seek authorisation prior to entering into the transaction.<sup>1024</sup>

17.154 In order to clarify the circumstances in which a conflict transaction can be authorised by the Tribunal and the effect of authorisation on whether or not there has been a breach of the duty, and to address the issue raised by the finding in *Re TAD*, section 152 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- the Tribunal may prospectively authorise a conflict transaction, a type of conflict transaction or conflict transactions generally;
- notwithstanding that a transaction was entered into in breach of the duty imposed by section 37 of the Act not to enter into conflict transactions, the Tribunal may ratify the transaction; and
- to avoid doubt, an administrator who has entered into a conflict transaction that has not been prospectively authorised by the Tribunal is in breach of the duty imposed by section 37 of the Act unless and until the transaction is ratified by the Tribunal.

### ***Assisting attorneys and administrators to understand their obligation to avoid conflict transactions***

17.155 The duty to avoid conflict transactions is one of the key duties of an attorney or an administrator. The breach of this duty may not only have serious consequences for the attorney but may also have a significant detrimental effect on the adult. However, one issue that has been identified in Tribunal decisions on

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1023 [2008] QGAAT 76.

1024 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* [2008] 2 Qd R 323, 340 (Mullins J).

conflict transactions is that, sometimes, family attorneys and administrators misunderstand or are ignorant of their obligation to avoid conflict transactions. In addressing these problems, the Commission considers it essential that attorneys and administrators should be given the utmost assistance and support in understanding their obligation to avoid conflict transactions. Such assistance and support could be provided through a training course or a specific information package or code of practice dealing with conflict transactions. In this regard, the Commission notes that the Tribunal holds information sessions for private administrators on a regular basis. One of the purposes of these sessions is to give private administrators information about conflict transactions.<sup>1025</sup> It is important that access to similar information is also provided to financial attorneys. The Commission also notes that the Adult Guardian conducts a free information service for private guardians to educate and assist them in understanding their role as an appointed guardian.<sup>1026</sup> It is especially important that the information provided to attorneys and administrators includes a variety of practical examples of the sorts of transactions that are to be avoided. In particular, as the Commission has recommended in Chapter 16, it may be helpful for such information to be appended to the approved forms for making an enduring power of attorney as well as included in a separate booklet accompanying the form.<sup>1027</sup>

## NON-COMPLIANCE WITH THE CONFLICT TRANSACTION PROVISIONS

17.156 The guardianship legislation specifies that attorneys and administrators are subject to certain obligations when they exercise their powers for an adult.

17.157 Some of the duties imposed under the guardianship legislation specify a maximum penalty for a breach. These include, for example, the duty to act honestly and with reasonable diligence to protect the adult's interests,<sup>1028</sup> and, for financial attorneys and administrators, the duty to keep the person's property separate from the adult's.<sup>1029</sup>

17.158 There are, however, other duties imposed under the guardianship legislation for which there is no penalty for breach. One such duty is the duty to avoid conflict transactions. Because there is no penalty imposed for a breach in

<sup>1025</sup> Queensland Civil and Administrative Tribunal, Administration for adults matters, *Information sessions*, <<http://www.qcat.qld.gov.au/information-sessions.htm>> at 13 September 2010.

<sup>1026</sup> The service commenced in August 2010.

<sup>1027</sup> See Recommendation 16-12 above.

<sup>1028</sup> *Powers of Attorney Act 1998* (Qld) s 66; *Guardianship and Administration Act 2000* (Qld) s 35. Each of these provisions provides for a fine of up to 200 penalty units.

<sup>1029</sup> *Powers of Attorney Act 1998* (Qld) s 86; *Guardianship and Administration Act 2000* (Qld) s 50. Each of these provisions provides for a fine of up to 300 penalty units.



these instances, a failure to comply with the relevant provision does not appear to amount to an offence against the guardianship legislation.<sup>1030</sup>

17.159 The Tribunal or the Court may excuse an attorney from liability for failing to comply with the Act if it considers that the attorney has acted honestly and reasonably and ought fairly to be excused for the failure.

17.160 An attorney or an administrator may be ordered to compensate the adult, or the adult's estate, for a loss caused by his or her failure to comply with the legislation.<sup>1031</sup> However, the guardianship legislation does not empower the Court to order an attorney or an administrator to disgorge profits made as a consequence of his or her failure to comply with the legislation.

17.161 The provisions in the guardianship legislation which deal with relief from personal liability and orders for the payment of compensation, as well as the remedy of an account of profits, are discussed below.

### Relief from personal liability

17.162 Section 106 of the *Powers of Attorney Act 1998* (Qld) gives the Tribunal or the Court a discretion to excuse an attorney from liability for a breach of the Act if the Court or Tribunal considers that the attorney has acted honestly and reasonably and ought fairly to be excused for the breach:

#### 105 Relief from personal liability

(1) If the court considers—

- (a) an attorney is, or may be, personally liable for a breach of this Act; and
- (b) the attorney has acted honestly and reasonably and ought fairly to be excused for the breach;

the court may relieve the attorney from all or part of the attorney's personal liability for the breach.

(2) In this section—

**attorney** means—

- (a) an attorney under a general power of attorney made under this Act; or
- (b) an attorney under an enduring document; or

<sup>1030</sup> See s 41 of the *Acts Interpretation Act 1954* (Qld) which provides, inter alia, that a penalty specified at the end of a subsection indicates that a contravention of the subsection constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) by a penalty not more than the specified penalty.

<sup>1031</sup> *Powers of Attorney Act 1998* (Qld) s 106; *Guardianship and Administration Act 2000* (Qld) s 59. A breach of the conflict transaction provisions might also be relevant in the Tribunal's consideration of whether or not an attorney's or an administrator's power should be removed: see [17.56] above.

- (c) an attorney under a power of attorney made otherwise than under this Act, whether before or after its commencement; or
- (d) a statutory health attorney.

17.163 The corresponding provision for administrators is set out in section 58 of the *Guardianship and Administration Act 2000* (Qld). That section provides:

**58 Power to excuse failure**

If a guardian or administrator is prosecuted in a court for a failure to comply with this chapter, the court may excuse the failure if it considers the guardian or administrator has acted honestly and reasonably and ought fairly to be excused for the failure.

17.164 The Supreme Court has considered the circumstances in which the Court will exercise its discretion under section 105 of the *Powers of Attorney Act 1998* (Qld) to relieve an attorney from personal liability for a contravention of the Act.

17.165 In *Ede v Ede*,<sup>1032</sup> Muir J (as his Honour then was) observed that, while the Court's discretion to excuse an attorney from personal liability for a contravention of the *Powers of Attorney Act 1998* (Qld) is at large, it 'must be exercised judicially'. In that case, the Supreme Court found that an attorney, who sold a parcel of land owned by the principal (the attorney's father) to the attorney's daughter (who retained the profit from the sale), had acted honestly and reasonably but ought not to be relieved of his personal liability for the contravention:

The fact that an attorney is not acting for reward is a highly relevant consideration.<sup>1033</sup> ...

Also highly relevant is the fact that the attorney took and followed legal advice. There is no suggestion that the defendant knew or ought reasonably to have known that the person from whom the advice was taken was lacking in relevant expertise.

These considerations support the defendant's claim for relief. But is it appropriate that the defendant be given relief without making good the loss suffered by the plaintiff through his breach of duty where that loss equates, in effect, to a corresponding benefit to his daughter?

Section 105 is a remedial provision and should not be narrowly construed. Nor should its application in any given case be determined simply by the application of pre-existing equitable principles. The section gives the Court a discretion to relieve an attorney who is or may be personally liable for a breach of the Act from all or part of the attorney's personal liability for the breach. The discretion is at large but must be exercised judicially.

A matter of obvious relevance to the exercise of the discretion is whether the attorney (or relative, friend or associate) has benefited from the breach and whether the attorney has accounted for any such benefit to his principal. A consequence of acceding to the defendant's application would be to excuse his

1032 [2007] Qd R 323, [49].

1033 *Re De Clifford* [1900] 2 Ch 707 at 713.

breach and also, in effect, avoid application of the strict equitable principle that a fiduciary being in breach of his fiduciary duty must account to the person to whom the duty is owed for the profit made in consequence of the breach. In my view, a Court would not readily exercise its discretion to bring about such a result. The equitable principles were developed and have been applied rigorously for good reason. The defendant is now aware that he acted in breach of his fiduciary duty and it has been found that he caused his daughter to profit from the breach. There is no evidence that the defendant will suffer particular hardship if unsuccessful in his claim. It seems to me therefore that the defendant ought not be relieved of his personal liability for the breach unless he accounts for his daughter's gain. (note in original)

17.166 Section 106 of the *Powers of Attorney Act 1998* (Qld) provides for the Supreme Court to make an order for compensation out of an adult's estate for a person whose benefit is lost because of a sale or other dealing with the principal's property by an attorney of the principal. Section 59 of the *Guardianship and Administration Act 2000* (Qld) provides for a similar order to be made against an administrator.

## Remedies for non-compliance

### Compensation

17.167 Where a breach of fiduciary duty results in a loss to the party to whom the duty was owed, the fiduciary is liable to account for the loss by the provision of equitable compensation. The guardianship legislation provides for a statutory remedy of compensation for a breach of an attorney's or an administrator's duty under the legislation.

17.168 Section 106 of the *Powers of Attorney Act 1998* (Qld) empowers the Court to order an attorney to compensate the principal (or if the principal has died, the principal's estate) for any loss caused by an attorney's failure to comply with the Act. This would include a failure to comply with the conflict transactions. Section 106 provides:<sup>1034</sup>

#### **106 Compensation for failure to comply**

- (1) An attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal's estate) for a loss caused by the attorney's failure to comply with this Act in the exercise of a power.
- (2) Subsection (1) applies even if the attorney is convicted of an offence in relation to the attorney's failure.
- (3) If the principal or attorney has died, the application for compensation must be made to a court within 6 months after the death.
- (4) If the principal and attorney have died, the application for compensation must be made to a court within 6 months after the first death.

<sup>1034</sup>

The wording used in s 105 of the *Powers of Attorney Act 1998* (Qld) differs from that in s 106 of the Act. Under s 106, an attorney may be ordered to pay compensation with respect to a 'failure to comply with this Act', whereas s 105 provides for an attorney to be relieved of personal liability 'for a breach of this Act'.

- (5) A court may extend the application time.
- (6) Compensation paid under a court order must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.
- (7) In this section—
  - attorney** means an attorney under—
    - (a) a general power of attorney made under this Act; or
    - (b) an enduring document; or
    - (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

**court** means any court.

17.169 An equivalent provision is found in section 59 of the *Guardianship and Administration Act 2000* (Qld). That section provides:

**59 Compensation for failure to comply**

- (1) A guardian or administrator for an adult (an **appointee**) may be ordered by the tribunal or a court to compensate the adult (or, if the adult has died, the adult's estate) for a loss caused by the appointee's failure to comply with this Act in the exercise of a power.
- (2) Subsection (1) applies even if the appointee is convicted of an offence in relation to the appointee's failure.
- (3) If the adult or appointee has died, the application for compensation must be made to the tribunal or a court within 6 months after the death.
- (4) If the adult and appointee have died, the application for compensation must be made to the tribunal or a court within 6 months after the first death.
- (5) The tribunal or a court may extend the application time.
- (6) If security has been given under section 19 and the tribunal or a court makes an order for compensation under this section, the tribunal or court may also order that the security be applied in satisfaction of the order for compensation.
- (7) Compensation paid under a tribunal or court order must be taken into account in assessing damages in a later civil proceeding in relation to the appointee's exercise of the power.
- (8) In this section—

**court** means any court.

### **Account of profits**

17.170 The primary duty of a fiduciary who has acted in breach of his or her duty is to account to the beneficiary for any profits made in consequence of the breach.<sup>1035</sup> A court of equitable jurisdiction may order a fiduciary to account for profits received where the fiduciary has made a profit in circumstances involving a conflict of fiduciary duty and interest. A cause of action for account and disgorgement of the profit differs from the cause of action for loss, for which the remedy is compensation. The purpose of the requirement that a fiduciary disgorge any unauthorised profit is that it deters the fiduciary from entering into a conflict of interest and duty and purges the conscience of the profit taker.<sup>1036</sup>

17.171 There is no provision in the guardianship legislation for the Supreme Court or the Tribunal to order an account of profits.

### **Submissions**

17.172 The Public Trustee commented on the frequency with which attorneys acting under powers of attorney and administrators enter into conflict transactions in practice:<sup>1037</sup>

Such transactions are of course proscribed but with concerning frequency and in the absence of Tribunal authorization, attorneys and administrators in particular when such transactions are identified seek to be excused for their failure arguing that they have acted honestly and reasonably and ought fairly be excused (section 58 of the [*Guardianship and Administration Act 2000* (Qld)] and its corollary section 105 of the *Powers of Attorney Act 1998* (Qld)), and sometimes that the transaction should be retrospectively authorised.

In many other matters no approach is made to the Tribunal but transactions are entered into in circumstances where the attorney or administrator has personally benefited.

In practice the benefit of the presumption of undue influence in respect of such a transaction is of little utility (the presumption reflected in both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld)).

The presumption can be rebutted and such transactions are often entered into in circumstances where the only person who would otherwise be available to give evidence contrary to the rebuttal evidence is the adult with an incapacity.

...

[u]nfortunately the entry into conflict transactions (and the Public Trustee as administrator's scrutiny of these transactions) is occurring with greater frequency than has happened in the past.

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1035 See n 892 above.

1036 *Re Bulmer* [1937] 1 Ch 499, 503.

1037 Submission 156A.

...

The concern is that this financial abuse should not continue.

17.173 The Public Trustee submitted that the issue of financial abuse arising from conflict transactions should be dealt with by strengthening the conflict transaction provisions by providing a penalty for breaching the duty not to enter into a conflict transaction and limiting the potential for an attorney or an administrator to obtain relief from liability for a breach of duty unless he or she has made full reparation for any financial loss flowing from the breach:

Consideration should be given to permitting the Tribunal or the Court to impose penalties on attorneys and administrators who engage in conflict transactions causing loss to adults with impaired capacity.

The relief available to attorneys and administrators — that they have acted honestly and reasonably and ought to be excused should perhaps be qualified by a requirement that any loss occasioned is made good (in its totality including costs involved in investigating and if necessary litigating in respect of the conflict transaction).

Greater capacity ought to be given in short to the Tribunal and perhaps also the Courts to deter attorneys and administrators who breach their duties and profit from it.

17.174 The Perpetual Group of Companies observed that section 58 of the *Guardianship and Administration Act 2000* (Qld) appears much more restricted in its operation than section 105 of the *Powers of Attorney Act 1998* (Qld), in that it provides relief only on prosecution in a court, whereas section 105 applies where an attorney is ‘personally liable for a breach of [the *Powers of Attorney Act 1998* (Qld)]’.<sup>1038</sup> It submitted that the rationale behind both sections should be that:

- (a) if an administrator or enduring attorney breaches a statutory obligation, the court or tribunal should be able to order that it compensate the adult or principal, as the case may be, for any loss suffered as a result;
- (b) in appropriate cases the court or tribunal should be able to relieve the administrator/attorney from that liability;
- (c) if an administrator or enduring attorney commits an offence under the legislation, the court or tribunal should be able to impose a penalty;
- (d) in appropriate cases the court or tribunal should be able to relieve the administrator/attorney from that liability;

17.175 The Perpetual Group of Companies also considered that the provisions in both Acts should be similar, and that they should both provide the Tribunal and the Court with as much flexibility as possible to deal with each situation on its merits.

## **The Commission's view**

### ***Relief from personal liability***

17.176 Section 105 of the *Powers of Attorney Act 1998* (Qld) and section 58 of the *Guardianship and Administration Act 2000* (Qld) each deal with the Court's power to relieve an attorney or an administrator (as the case may be) from personal liability for a contravention of the relevant Act in certain circumstances. These circumstances are that the attorney or the administrator has acted honestly and reasonably and ought fairly to be excused from personal liability for the contravention.

17.177 These provisions, although dealing with the same power, are worded differently. The use of the word 'prosecutes' in section 58 of the *Guardianship and Administration Act 2000* (Qld) may suggest that the application of that provision is limited to prosecution for an offence. If that is the case, it would limit the application of section 58 to a prosecution for a breach of those duties imposed on guardians and administrators which specify a penalty for breach. Section 105 of the *Powers of Attorney Act 1998* (Qld) avoids these problems because it applies where 'the court considers the attorney is, or may be, personally liable for a breach of this Act', leaving it open for the provision to apply in civil and criminal proceedings generally. For reasons of consistency and clarity, section 58 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that it is modelled on the wording of section 105 of the *Powers of Attorney Act 1998* (Qld).

17.178 The Commission considers it neither necessary nor desirable to amend the guardianship legislation, as suggested by the Public Trustee, to provide that the Court may grant an attorney or an administrator relief from personal liability for a contravention only if the attorney or administrator has compensated the adult for any loss caused by the breach. Such an approach is too inflexible and potentially unfair to apply in every circumstance. While the Supreme Court does not readily exercise its discretion to excuse a person from liability for a breach of the conflict transaction provisions, there may be circumstances in which an attorney or administrator, who has contravened the conflict transaction provisions but has otherwise acted honestly and reasonably, ought fairly to be excused from personal liability.

### ***Statutory power to order an account of profits***

17.179 Currently, the guardianship legislation empowers the Supreme Court or the Tribunal (as the case may be) to order an attorney or an administrator to compensate the adult for any loss caused by the attorney's or the administrator's failure to comply with the relevant Act in the exercise of a power. However, as explained above, there is no provision in the guardianship legislation for the Court or the Tribunal to order an attorney or administrator, who has made a profit as a result of a failure to comply with the relevant Act in the exercise of a power, to disgorge that profit in favour of the adult.

17.180 In the Commission's view, the guardianship legislation should be amended to address this incongruity. Accordingly, Chapter 6 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Court (or the Tribunal) may order

an attorney, who has made a profit as a result of a failure to comply with the Act in the exercise of a power for a financial matter, to disgorge that profit in favour of the adult. A similar provision, which applies in relation to administrators, should be inserted into the *Guardianship and Administration Act 2000* (Qld).

### **Dealing with financial abuse under the criminal law**

17.181 Although non-compliance with the conflict transaction provisions does not amount to an offence under the guardianship legislation, it may amount to a breach of the concomitant duty to act honestly and reasonably to protect the adult's interests, for which a penalty is imposed. The Commission does not consider that the *Guardianship and Administration Act 2000* (Qld) should be amended to specify a penalty for non-compliance with the conflict transaction provisions. There is a diverse range of circumstances in which the conflict transaction provisions may not be complied with. While some of these would warrant the imposition of a penalty, others would not.

17.182 In light of the significant problem of financial abuse of adults with impaired capacity, and indeed, of vulnerable persons generally, the Commission has considered the availability of criminal offences for financial abuse. There is no specific offence of financial abuse or exploitation in the Criminal Code (Qld). Dishonest or fraudulent conduct is commonly prosecuted as stealing or fraud.<sup>1039</sup>

17.183 Section 298 of the Criminal Code (Qld), which sets out the offence of stealing, carries a maximum penalty of 5 years imprisonment. The maximum penalty is increased to 10 years where the offender is the victim's agent (including an attorney under a power of attorney).

17.184 Section 408C of the Criminal Code (Qld), which provides for the offence of fraud, carries a maximum penalty of 5 years imprisonment. The maximum penalty is increased to 12 years imprisonment where, amongst other things, the offender and the victim are in specified types of fiduciary relationships (for example, trustee and beneficiary). Section 408C relevantly provides:

#### **408C Fraud**

- (1) A person who dishonestly—
  - (a) applies to his or her own use or to the use of any person—
    - (i) property belonging to another; or
    - (ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
  - (b) obtains property from any person; or

<sup>1039</sup>

Queensland Law Society, *Elder Abuse: How well does the law in Queensland cope?*, Issues Paper (June 2010).



- (c) induces any person to deliver property to any person; or
- (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
- (e) causes a detriment, pecuniary or otherwise, to any person; or
- (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
- (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
- (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

commits the crime of fraud.

- (2) An offender guilty of the crime of fraud is liable to imprisonment for 5 years save in any of the following cases when the offender is liable to imprisonment for 12 years, that is to say—
  - (a) if the offender is a director or member of the governing body of a corporation, and the victim is the corporation;
  - (b) if the offender is an employee of another person, and the victim is the other person;
  - (c) if any property in relation to which the offence is committed came into the possession or control of the offender subject to a trust, direction or condition that it should be applied to any purpose or be paid to any person specified in the terms of trust, direction or condition or came into the offender's possession on account of any other person;
  - (d) if the property, or the yield to the offender from the dishonesty, or the detriment caused, is of a value of \$30000 or more.

17.185 A current limitation of section 408C is that the list of fiduciary relationships in respect of which an increased penalty will apply does not specifically include the relationships of attorney and principal and administrator and adult.

17.186 To overcome this limitation, the Commission considers that section 408C of the Criminal Code (Qld) should be amended by adding the following to the list of aggravating circumstances in section 408C(2):

- if the offender is an attorney under an enduring power of attorney and the victim is the principal; and
- if the offender is an administrator appointed under the *Guardianship and Administration Act 2000* (Qld) and the victim is the adult.

17.187 A broader limitation of the Queensland criminal law is that, while it recognises the vulnerability of some groups of persons, this has not translated into the creation of specific offences to criminalise the financial abuse and exploitation of vulnerable persons.<sup>1040</sup>

17.188 Some international jurisdictions, particularly the United States of America, have created specific offences for financial abuse or exploitation of older persons, persons with disabilities or other vulnerable adults in their legislation.<sup>1041</sup> In Florida, for example, the criminal law provides for an offence of ‘exploitation of an elderly person or a disabled adult’.<sup>1042</sup> That offence applies in a range of circumstances, including where a breach of fiduciary duty by an attorney or a guardian of an elderly person or disabled adult results in an unauthorised appropriation, sale or transfer of property; and where a person, who stands in a position of trust and confidence with the elderly person or disabled adult, knowingly, by deception and intimidation, obtains or uses the elderly person’s or disabled adult’s funds, assets or property with intent to deprive the elderly person or disabled adult of the funds, assets or property or to benefit someone else. This type of offence has a wider scope than the Queensland criminal offences of stealing and fraud. Several jurisdictions in the United States of America have also developed initiatives to investigate and prosecute cases of abuse of older persons or dependent adults, including specialised laws and training. For example, in California, a specialist division of the Department of Justice and Attorney General deals with elder abuse investigations and prosecutions.<sup>1043</sup>

17.189 The terms of reference of the Commission’s review are limited to a review of the guardianship legislation, which primarily focuses on the rights and interests of adults with impaired capacity. The guardianship legislation does not substantively deal with adults who have capacity but who may nevertheless be vulnerable to abuse. Accordingly, the Commission has not reviewed the broader issue of criminalising behaviour that constitutes financial abuse and exploitation of vulnerable people, including older people, people with impaired capacity and people with disabilities.

17.190 However, the Commission recognises that the financial abuse and exploitation of vulnerable people is a significant and complex problem. Therefore, it recommends that consideration be given, as a matter of priority, to the development of a separate offence dealing with the financial abuse and exploitation of vulnerable persons, including older people, people with impaired capacity and people with disabilities. In coming to this view, the Commission recognises the importance of addressing this issue in a proper and considered way. The question of whether the Queensland criminal law should provide an offence of financial

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1040 Ibid.

1041 See eg CAL Penal Code § 368 (California); FLA STAT ch 825.103 (Florida).

1042 FLA STAT ch 825.103.

1043 This division (the Bureau of Medi-Cal Fraud and Elder Abuse) is supported by a number of statutory offence provisions — some that make specific reference to vulnerable persons — and by provisions requiring mandatory reporting of abuse in certain circumstances. These are listed at [http://ag.ca.gov/bmfea/laws/crim\\_elder.php](http://ag.ca.gov/bmfea/laws/crim_elder.php) at 13 September 2010.

abuse and exploitation of vulnerable persons is a significant one, and warrants specific consideration, a careful evaluation of legislative reforms in other jurisdictions, and consultation with individuals and organisations with experience and expertise in the area of financial abuse and exploitation of vulnerable persons.

## RECOMMENDATIONS

### *Reframing the duty to avoid conflict transactions*

**17-1** Section 73(1) of the *Powers of Attorney Act 1988* (Qld) should be amended to provide that:

- (a) an attorney for a financial matter must not enter into a conflict transaction unless the conflict transaction has been prospectively authorised; and
- (b) a conflict transaction may be authorised by the principal.

**17-2** Section 73 of the *Powers of Attorney Act 1988* (Qld) should be amended to provide that nothing in that section prevents a principal, who has capacity, from retrospectively authorising (or ratifying) a conflict transaction.

**17-3** Section 73 should also be amended to include a note to the effect that ‘under section 118(2), the Supreme Court may also authorise an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake’.

**17-4** Section 37(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an administrator for an adult must not enter into a conflict transaction unless the conflict transaction has been prospectively authorised by the Tribunal.

**17-5** Section 37(1) should also be amended to include a note to the effect that ‘the Tribunal may authorise a conflict transaction, a type of conflict transaction or conflict transactions generally under section 152 of the Act’.

### *The scope of a conflict transaction*

**17-6** The subsections in the conflict transaction provisions which relate to joint interests — section 73(3) and (4) of the *Powers of Attorney Act 1998* (Qld) and section 37(3) and (5) of the *Guardianship and Administration Act 2000* (Qld) — should be retained.

**17-7** Section 73 of the *Powers of Attorney Act 1998* (Qld) and section 37 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include the following additional provisions:

- (a) the fact a person is a relation of the adult does not, of itself, mean that the adult's and the person's interests are likely to conflict; and
- (b) the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean that the adult's and person's interests are likely to conflict.

***Relationship with the gifting and maintenance provisions***

**17-8** The definition of 'conflict transaction' in section 73(2) of the *Powers of Attorney Act 1998* (Qld) should be amended to exclude transactions made in accordance with section 88 of the *Powers of Attorney Act 1998* (Qld).

**17-9** The definition of 'conflict transaction' in section 37(2) of the *Guardianship and Administration Act 2000* (Qld) should be amended to exclude transactions made in accordance with section 54 of the *Guardianship and Administration Act 2000* (Qld).

***Examples of conflict transactions***

**17-10** Section 73 of the *Powers of Attorney Act 1998* (Qld) and section 37 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include further examples of what are, or are not, considered to be prohibited conflict transactions.

**17-11** The current example of a conflict transaction in the approved forms for an enduring power of attorney is misleading and should be revised as a matter of priority so that it is made consistent with the example provided in section 73 of the *Powers of Attorney Act 1998* (Qld) and section 37 of the *Guardianship and Administration Act 2000* (Qld).

***The validity of dealings with third parties***

**17-12** Section 73 of the *Powers of Attorney Act 1998* (Qld) should be amended to include a provision similar to section 37(4) of the *Guardianship and Administration Act 2000* (Qld).

***Authorisation of conflict transactions***

17-13 Section 118(2) of the *Powers of Attorney Act 1998* (Qld) should be amended by deleting the words 'if the court considers it in the best interests of the principal'.

17-14 Section 152 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- (a) the Tribunal may prospectively authorise a conflict transaction, a type of conflict transaction or conflict transactions generally;
- (b) notwithstanding that a transaction was entered into in breach of the duty imposed by section 37 of the Act not to enter into conflict transactions, the Tribunal may ratify the transaction; and
- (c) to avoid doubt, an administrator who has entered into a conflict transaction that has not been prospectively authorised by the Tribunal is in breach of the duty imposed by section 37 of the Act unless and until the transaction is ratified by the Tribunal.

***Assisting attorneys and administrators to understand their duty to avoid conflict transactions***

17-15 Attorneys and administrators should be provided with greater assistance and support in understanding their obligation to avoid conflict transactions.

***Non-compliance with the conflict transaction provisions***

17-16 Section 58 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that it is modelled on the wording of section 105 of the *Powers of Attorney Act 1998* (Qld).

17-17 Chapter 6 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Supreme Court (or the Tribunal) may order an attorney, who has made a profit as a result of his or her failure to comply with the Act in the exercise of a power for a financial matter for an adult, to disgorge that profit in favour of the adult. A similar provision, which applies in relation to administrators, should be inserted in the *Guardianship and Administration Act 2000* (Qld).

**17-18 Section 408C of the Criminal Code (Qld) should be amended by adding the following to the list of aggravating circumstances in section 408C(2):**

- (a) if the offender is an attorney under an enduring power of attorney and the victim is the principal; and**
- (b) if the offender is an administrator appointed under the *Guardianship and Administration Act 2000* (Qld) and the victim is the adult.**

**17-19 The Commission recommends that consideration be given, as a matter of priority, to the development of a separate offence dealing with the financial abuse and exploitation of vulnerable persons, including older people, people with impaired capacity and people with disabilities.**

# Chapter 18

## Binding direction by a parent for the appointment of a guardian or an administrator

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### INTRODUCTION

18.1 The Commission's terms of reference require it to review:<sup>1044</sup>

whether there are circumstances in which the *Guardianship and Administration Act 2000* (Qld) should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

18.2 This chapter considers whether, in light of the existing mechanisms under the *Guardianship and Administration Act 2000* (Qld) for the appointment of guardians and administrators, there is a need for the Act to include an alternative mechanism by which the parent of an adult child with impaired capacity may make a binding direction appointing a guardian or an administrator for the adult child. It also considers whether, before a child with impaired capacity turns 18, the child's parent should be able to make an appointment that takes effect when the child turns 18 or in other specified circumstances after the child has turned 18.

18.3 In this context, the reference to a 'binding direction appointing a person as a guardian ... or an administrator' is taken to refer to a mechanism for the private appointment of a person as a guardian or an administrator, with the same powers as may be conferred by the Tribunal, that would have legal effect until such time as

<sup>1044</sup>

The terms of reference are set out in Appendix 1.

the appointment was varied or revoked by the Tribunal<sup>1045</sup> or revoked by operation of law.<sup>1046</sup>

## BACKGROUND

18.4 An issue that is of concern to many parents who have children with impaired capacity is who will care for, and make decisions for, their children when the parents can no longer do so themselves, whether through death or loss of capacity.

### Minor children

18.5 The *Succession Act 1981* (Qld)<sup>1047</sup> provides that a parent<sup>1048</sup> or guardian<sup>1049</sup> of a child may, by will, appoint a person as a testamentary guardian of the child.<sup>1050</sup> In this context, a 'child' is an individual under the age of 18 who is not, and has never been, married.<sup>1051</sup>

18.6 If the appointor (that is, the parent or guardian making the appointment) is not survived by a parent of the child, the appointment takes effect on the appointor's death.<sup>1052</sup>

18.7 If the appointor is survived by one or more parents of the child, the commencement of the appointment depends on the intention of the appointor. If the appointor's will shows that the appointor intended the appointment to take effect on his or her death, the appointment takes effect on the appointor's death.<sup>1053</sup> In that situation, the parent may apply to the Supreme Court for an order that the appointment be revoked, suspended until the parent's death, or suspended for

<sup>1045</sup> See *Guardianship and Administration Act 2000* (Qld) s 31, which sets out the Tribunal's powers when reviewing the appointment of a guardian or an administrator.

<sup>1046</sup> See *Guardianship and Administration Act 2000* (Qld) s 26, which sets out a number of grounds of automatic revocation.

<sup>1047</sup> Part 5A of the *Succession Act 1981* (Qld), which deals with the appointment of testamentary guardians, had a retrospective commencement date of 23 March 2000. Previously, the appointment of testamentary guardians was dealt with by s 90 of the *Children's Services Act 1965* (Qld). That Act was repealed and replaced by the *Child Protection Act 1999* (Qld) on 23 March 2000.

<sup>1048</sup> For the purpose of pt 5A of the *Succession Act 1981* (Qld), '**parent**, of a child' does not include a parent whose parental authority for the child has been ended by a decision or order of a federal court or a court of a State or a decision or order of another court that has effect in Queensland: *Succession Act 1981* (Qld) s 61A.

<sup>1049</sup> For the purpose of pt 5A of the *Succession Act 1981* (Qld), '**guardian**, of a child' does not include a person who has guardianship of the child, under another Act, in the person's capacity as the chief executive of a department of government of the Commonwealth or a State or as a Minister of the Commonwealth or a State: *Succession Act 1981* (Qld) s 61A.

<sup>1050</sup> *Succession Act 1981* (Qld) s 61C(1). The appointment is of no effect if the appointor is not a parent or guardian of the child immediately before the appointor's death: s 61C(2).

<sup>1051</sup> *Succession Act 1981* (Qld) s 61A.

<sup>1052</sup> *Succession Act 1981* (Qld) s 61D(2).

<sup>1053</sup> *Succession Act 1981* (Qld) s 61D(3)(a).



another period stated in the application.<sup>1054</sup> If the appointor's will does not show that the appointor intended the appointment to take effect on his or her death, the appointment does not take effect on the appointor's death, but instead takes effect on the death of the last surviving parent.<sup>1055</sup> In that situation, a person who has been appointed as a testamentary guardian may apply to the Supreme Court for an order that the appointment take effect immediately.<sup>1056</sup>

18.8 Section 61E of the *Succession Act 1981* (Qld) sets out the powers, rights and responsibilities of a testamentary guardian:

**61E Effect of appointment**

- (1) A testamentary guardian of a child has all the powers, rights and responsibilities, for making decisions about the long-term care, welfare and development of the child, that are ordinarily vested in a guardian.

*Examples of matters concerned with a child's long term care, welfare and development—*

The child's education and religious upbringing.

- (2) The appointment of a person as testamentary guardian of a child gives the person daily care authority for the child if and only if—
- (a) the child has no surviving parent; and
  - (b) no-one else has daily care authority for the child (however described) under a decision or order of a federal court or a court of a State.

- (3) In this section—

**daily care authority**, for a child, means—

- (a) the right to have the child's daily care; and
- (b) the right and responsibility to make decisions about the child's daily care.

## Adult children

18.9 Once a person is 18 years of age, the person is an adult.<sup>1057</sup> As a result, the parents of a child with impaired capacity no longer have the power to make decisions for their child once he or she turns 18. Because a testamentary guardian may be appointed only for a person under the age of 18, any provision in the parents' wills appointing a testamentary guardian for their child will not have effect after their child turns 18.<sup>1058</sup> Similarly, if the child has a testamentary guardian, the

<sup>1054</sup> *Succession Act 1981* (Qld) s 61H.

<sup>1055</sup> *Succession Act 1981* (Qld) s 61D(3)(b).

<sup>1056</sup> *Succession Act 1981* (Qld) s 61G.

<sup>1057</sup> *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'adult').

<sup>1058</sup> See [18.5] above.

testamentary guardian's powers, rights and responsibilities will cease once the child turns 18.

18.10 If the parents of an adult child with impaired capacity are concerned to make financial provision for their adult child in the event that they lose capacity, the parents may make enduring powers of attorney that include specific terms or provisions about how their attorneys are to exercise their powers for financial matters in favour of the parents' adult child (or other children).<sup>1059</sup> However, it is not possible for parents to make directions, whether in an enduring power of attorney or otherwise, about guardianship matters in relation to their adult children:<sup>1060</sup>

Enduring powers of attorney, even one[s] covering 'personal matters' rather than property, are of no assistance at all in realising this wish to delegate 'parenting' powers, since parents of adult children have no formal guardianship responsibility to hand over.

18.11 In a submission to this Commission, the Cerebral Palsy League has referred to the distress experienced by the ageing parents of adult children with impaired capacity:<sup>1061</sup>

Some of the families were mothers who had cared for their disabled children for some 45–50 years. When they realised they had to make other arrangements for their sons/daughters to accommodate their ageing process, they felt vulnerable and unsupported.

18.12 Queensland Advocacy Incorporated has also acknowledged that:<sup>1062</sup>

One of the greatest concerns of the parents of a person with impaired decision-making capacity is what is going to happen when they die or lose capacity themselves to support, decide and advocate for their son or daughter.

18.13 Other respondents have referred to the difficulties faced by parents in caring for, supporting, and advocating for, their children in the absence of a formal appointment as guardian or administrator.

18.14 Carers Queensland commented:<sup>1063</sup>

Care-giving parents face enormous problems and insecurities when their child turns 18 years of age. Currently most families operate under informal arrangements to ensure continuity of care for the adult child. Families report that these arrangements are fraught with stress and uncertainty for the following reasons:

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<sup>1059</sup> See *Powers of Attorney Act 1998* (Qld) s 32(1).

<sup>1060</sup> T Carney and P Keyzer, 'Planning for the Future: Arrangements for the assistance of people planning for the future of people with impaired capacity' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 255, 268.

<sup>1061</sup> Submission C86.

<sup>1062</sup> Submission 162.

<sup>1063</sup> Submission 146.

- there is very little community awareness or understanding of the issue
- informal arrangements are not well regarded by service providers or financial institutions
- informal arrangements do not lead to a least restrictive option but rather greater restrictions, challenges and uncertainty as a parent or family member attempts to negotiate the maze of substitute decision making and field the challenges of 'under whose authority you are operating'.

18.15 Pave the Way also referred to the difficulties facing family members who do not have a formal appointment:<sup>1064</sup>

Families all over Queensland face difficulties acting as informal decision-makers. The problems most commonly occur around financial matters but can also arise in areas of personal decision-making. Family members are routinely asked to produce an enduring power of attorney (EPA) even though their family member does not have the capacity to sign an EPA. Even for health matters, where the family members are statutory health attorneys, many are still asked to produce an EPA.

Regrettably, many families are forced to apply to the Tribunal for a formal appointment when they face a problem over relatively minor financial matters, including contractual situations. Some families apply to the tribunal because they feel they need formal authority to back up their advocacy efforts, which was the situation faced by the family in the *Williams Case*.<sup>1065</sup>

Examples of problems we have been told about include:

- Parents, who have been signatories on their adult family members' bank accounts since those accounts were set up when their family member was a child, have difficulties adding or changing signatories, which they want to do as part of their future planning strategies.
- Parents are unable to sign contracts for private medical insurance for their adult family members, even when the parents undertake to pay the premiums.
- Australia Post has refused to allow parents to sign the documentation required to open a PO Box in the adult's name, again, even when the parents are paying.
- Telecommunication companies refuse to allow parents to open telephone accounts in the adult's name.
- Problems signing private tenancy agreements.
- Numerous problems trying to obtain information from government agencies, private organisations, disability services, businesses, banks in the face of privacy regulations.

<sup>1064</sup> Submission 135. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

<sup>1065</sup> See *Williams v Guardianship and Administration Tribunal* [2003] 1 Qd R 465, which is discussed in Chapter 14 of this Report.

Many parents and other family members are forced to tell 'white lies' (eg, mothers pretending in phone conversations to be their daughter) or put their family members through demeaning exchanges with people who demand to speak to the family member. Some families have, unwisely, obtained signed EPAs knowing that their family member lacks the requisite capacity. (note added)

**Existing mechanisms for appointment (including successive appointments)**

18.16 Before the commencement of the *Guardianship and Administration Act 2000* (Qld), the legal mechanisms for substitute decision-making for an adult with impaired capacity were largely concentrated in the hands of public officers.<sup>1066</sup>

18.17 The *Guardianship and Administration Act 2000* (Qld) has created more choice in terms of formal substitute decision-makers by establishing the Tribunal and enabling it to appoint individuals as guardians and administrators.<sup>1067</sup> Subject to satisfying the requirements in the Act in relation to the grounds for appointment and the eligibility and appropriateness considerations,<sup>1068</sup> a parent may be appointed as a guardian or an administrator for his or her adult child.<sup>1069</sup> In addition, even without formal appointment, the parent of an adult child with impaired capacity may qualify as the adult's statutory health attorney,<sup>1070</sup> in which case the parent is authorised to make decisions in relation to health matters for his or her adult child.

18.18 Although there is considerably greater scope under the *Guardianship and Administration Act 2000* (Qld) for the parents of an adult child with impaired capacity to be formally appointed as their child's guardian or administrator, there is no scope under the Act for parents to make a direction about who should be their child's guardian or administrator when the parents are no longer able to continue in that role or die. The appointment of a guardian or an administrator may only be made by the Tribunal.

18.19 There may, however, be some opportunity under the Act for the parent of an adult child with impaired capacity to have input into the appointment of a future guardian or administrator for his or her adult child if the appointment can be made during the lifetime of the parent and while the parent still has capacity. Section 14

<sup>1066</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 25. See Ch 2 of that report in relation to the then existing law in Queensland. Financial decisions were generally made by the Public Trustee and health decisions were generally made by the Legal Friend, an office established under the *Intellectually Disabled Citizens Act 1985* (Qld).

<sup>1067</sup> Note, however, that the majority of appointments are made to the Adult Guardian and the Public Trustee: see [23.6], [25.7] below.

<sup>1068</sup> See *Guardianship and Administration Act 2000* (Qld) ss 12, 14–15, which are considered in Chapter 14 of this Report.

<sup>1069</sup> Of course, if the adult child had capacity at one time, he or she may have made an enduring power of attorney appointing a person (whether a parent or someone else) as a guardian or attorney. However, the primary concern of this chapter is the appointment mechanism for a substitute decision-maker for an adult who has never had capacity.

<sup>1070</sup> See *Powers of Attorney Act 1998* (Qld) s 63 (Who is the statutory health attorney), which is considered in Chapter 10 of this Report.

of the *Guardianship and Administration Act 2000* (Qld), which deals with the Tribunal's power to appoint guardians and administrators, enables the Tribunal to appoint successive guardians and administrators:

**14 Appointment of 1 or more eligible guardians and administrators**

...

(4) The tribunal may appoint 1 or more of the following—

...

(e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;

18.20 This power is wide enough to enable the Tribunal, when appointing a parent as the guardian or administrator for his or her adult child, to appoint a person to be the adult's guardian or administrator when the parent's appointment ends, whether through death or loss of capacity, although it is not confined to that situation.<sup>1071</sup> It appears, however, that successive appointments are not commonly made.

***Proposals in other jurisdictions***

18.21 In its review of guardianship laws for the ACT, the Australian Law Reform Commission ('ALRC') acknowledged the concern that many parents have about who will be their adult child's substitute decision-maker when the parents are no longer able to perform that role.<sup>1072</sup>

One problem that arises, when a parent is made guardian or manager of an adult incapacitated son or daughter is the parent's concern over making arrangements for the taking over of guardianship or management when the parent either dies or becomes incapacitated.

18.22 The ALRC briefly considered the option of enabling a parent who was a guardian or manager to appoint a new guardian or manager. However, it considered that, as the Tribunal had made the original appointment, the better approach was for the Tribunal, during the life of the parent, to make an appointment that was conditional on the death or incapacity of the parent. This approach would not create a mechanism for private appointments, but would enable a parent to

<sup>1071</sup>

See *Re CMB* [2004] QGAAT 20, [2], where the Tribunal, in setting out the history of the application, noted that when it appointed Mr CMB as administrator for his wife, Mrs CMB, it also appointed Mr R (the son of Mr and Mrs CMB) as successive administrator for when Mr CMB 'was no longer competent or it was appropriate for him to act in that capacity'. See also s 57 of the *Guardianship and Administration Act 2000* (Qld), which imposes notice requirements if the power of a previous appointee ends. If that occurs, the previous appointee must advise the next successive appointee of the ending of the previous appointment and the next successive appointee must advise the Tribunal in writing of the change as soon as practicable.

<sup>1072</sup>

Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.30].

have input into the appointment of a future guardian or administrator for his or her adult child:<sup>1073</sup>

One solution is for the parent to nominate a new guardian or manager. Alternatively, the Tribunal could have the power to appoint an alternative or replacement while the parent is still acting as guardian or manager. The replacement person would then take over upon the parent's death or incapacity. Appointing a replacement ahead of time relieves the existing guardian or manager of worry about what will happen when he or she dies or becomes incapacitated. The latter course of action, whereby the Tribunal rather than the parent appoints a replacement guardian or manager, is preferable because the Tribunal made the original appointment and should make any other appointments. The Tribunal, with its experience, expertise and detachment, will be able to appoint a suitable alternative guardian or manager in consultation with both the incapacitated person and the existing guardian or manager. The simplest way to achieve this objective is for the Tribunal to make an appointment conditional on the death or incapacity of the existing guardian or guardians.

18.23 The ALRC further recommended that, once the conditional appointment became unconditional, the appointment should be reviewed to confirm that the replacement was still suitable:<sup>1074</sup>

Once the condition has been fulfilled and the new guardianship is operating, the Commission recommends that a review should be held to confirm or vary the appointment or, in appropriate cases, to replace the guardian where he or she has ceased to be suitable.

18.24 The ALRC's proposal in relation to conditional appointments is similar in approach to the Tribunal's power under the *Guardianship and Administration Act 2000* (Qld). As explained above, section 14(4) of that Act enables the Tribunal to make successive appointments of guardians or administrators.<sup>1075</sup>

## ISSUES FOR CONSIDERATION

### Direct appointment by a parent

18.25 The main issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended so that the parent of an adult child with impaired capacity may appoint a guardian or an administrator for his or her adult child without resort to the Tribunal — what would, in effect, be a private appointment.

18.26 The private appointment of a substitute decision-maker is provided for by the *Powers of Attorney Act 1998* (Qld). That Act enables an adult with capacity, by

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1073 Ibid.

1074 Ibid. This recommendation is implemented by s 19(3) of the *Guardianship and Management of Property Act 1991* (ACT), which requires the Tribunal to consider the suitability of a person as a replacement guardian or manager as soon as practicable after the person becomes a replacement guardian or manager.

1075 See [18.19]–[18.20] above.

an enduring power of attorney, to appoint a person ('the attorney') to do anything in relation to financial matters or personal matters that the adult could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised.<sup>1076</sup>

18.27 However, a significant difference between the appointment of an attorney under an enduring power of attorney, as provided for in the *Powers of Attorney Act 1998* (Qld), and a parent's appointment of a guardian or an administrator for his or her adult child is that, in the former case, the appointment is made by the adult for whom the powers will be exercised and at a time when the adult has capacity. In the latter case, the person making the direction is appointing a decision-maker for another person, rather than for himself or herself. Further, while an enduring power of attorney is not revoked by the principal's loss of capacity,<sup>1077</sup> it is revoked by the principal's death.<sup>1078</sup> Although a binding direction by a parent would share some similarities with an enduring power of attorney, to be of real value it would need to survive both the loss of capacity and the death of the parent who made it.

18.28 The conferral on a parent of a power to appoint a guardian or an administrator for his or her adult child needs to be considered in light of its consistency with the *Guardianship and Administration Act 2000* (Qld), whether it could provide the same safeguards as apply to appointments made by the Tribunal, and whether it would be consistent with the United Nations *Convention on the Rights of Persons with Disabilities*.

### **Consistency with the *Guardianship and Administration Act 2000* (Qld)**

18.29 The *Guardianship and Administration Act 2000* (Qld) acknowledges several important matters in relation to the rights of adults with impaired capacity.

18.30 First, the Act acknowledges that an adult's right to make decisions is fundamental to the adult's inherent dignity.<sup>1079</sup> As a corollary to this right, the Act provides that an adult 'is presumed to have capacity for a matter'<sup>1080</sup> — the matter being the personal or financial matter to which the decision in question relates. Because the right to make one's own decisions is such a fundamental right, the Act requires that, before the Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, it must be satisfied that the adult has impaired capacity for the matter.<sup>1081</sup>

18.31 Secondly, the Act acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least

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1076 *Powers of Attorney Act 1998* (Qld) s 32(1). Enduring powers of attorney are considered in Chapter 16 of this Report.

1077 *Powers of Attorney Act 1998* (Qld) s 32(2).

1078 *Powers of Attorney Act 1998* (Qld) s 51.

1079 *Guardianship and Administration Act 2000* (Qld) s 5(a).

1080 *Guardianship and Administration Act 2000* (Qld) s 7(a), sch 1 s 1.

1081 *Guardianship and Administration Act 2000* (Qld) s 12(1)(a).

possible extent.<sup>1082</sup> As a corollary to this right, the Act provides that, before the Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, it must be satisfied that:<sup>1083</sup>

- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- without an appointment, either the adult's needs will not be adequately met or the adult's interests will not be adequately protected.

18.32 The requirement for the Tribunal to be satisfied of these matters means that the fact that an adult has impaired capacity is not, of itself, sufficient to enable the Tribunal to appoint a guardian or an administrator. These further requirements ensure that the adult's right to make decisions is not restricted or interfered with unless necessary.

***Consistency with the safeguards in the Guardianship and Administration Act 2000 (Qld)***

18.33 In order to safeguard the interests of adults with impaired capacity, the *Guardianship and Administration Act 2000* (Qld) includes provisions dealing with the eligibility and appropriateness of persons for appointment as guardians and administrators.<sup>1084</sup>

18.34 The eligibility requirements in section 14 of the Act are relatively straightforward, and it might not be particularly difficult for a parent to determine whether they were satisfied. For example, section 14(1)(a) provides that the Tribunal may appoint a guardian for a matter only if the person is:

- a person who is at least 18 years and not a paid carer, or health provider, for the adult; or
- the Adult Guardian.<sup>1085</sup>

18.35 Section 14(1)(b) provides that the Tribunal may appoint a person as an administrator only if the person is:

- at least 18 years, not a paid carer, or health provider, for the adult and not a person taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction; or

<sup>1082</sup> *Guardianship and Administration Act 2000* (Qld) s 5(d).

<sup>1083</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1)(b)–(c).

<sup>1084</sup> *Guardianship and Administration Act 2000* (Qld) ss 14–15. These provisions are considered in Chapter 14 of this Report.

<sup>1085</sup> However, the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter: *Guardianship and Administration Act 2000* (Qld) s 14(2).



- the Public Trustee; or
- a trustee company under the *Trustee Companies Act 1968* (Qld).

18.36 However, section 14(1)(c) further provides that the Tribunal may appoint a person as a guardian or an administrator only if, having regard to the matters mentioned in section 15(1), the Tribunal considers the person appropriate for appointment. The matters mentioned in section 15(1) — referred to in the legislation as the ‘appropriateness considerations’ — are as follows:

- (a) the general principles and whether the person is likely to apply them;
- (b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;
- (c) the extent to which the adult’s and the person’s interests are likely to conflict;
- (d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;
- (e) if more than 1 person is to be appointed—whether the persons are compatible;
- (f) whether the person would be available and accessible to the adult; and
- (g) the person’s appropriateness and competence to perform functions and exercise powers under an appointment order.

18.37 In considering a person’s appropriateness and competence for appointment, the Tribunal must also have regard to:<sup>1086</sup>

- (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult; and
- (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else; and
- (c) if the proposed appointment is of an administrator and the person is an individual—
  - (i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; and

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1086

*Guardianship and Administration Act 2000* (Qld) s 15(4).

- (ii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors under the *Bankruptcy Act 1966* (Cwlth), part 10 or a similar law of a foreign jurisdiction; and
- (iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management, direction or control the person is or was involved.

### ***United Nations Convention on the Rights of Persons with Disabilities***

18.38 The United Nations *Convention on the Rights of Persons with Disabilities* provides in article 12 that:<sup>1087</sup>

- 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

18.39 Upon ratifying the Convention, Australia made the following declaration:<sup>1088</sup>

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

...

18.40 Australia's declaration acknowledges that, while the Convention allows for substitute decision-making, such arrangements should be made only as a last resort and where they will be subject to safeguards.

### ***Discussion Paper***

18.41 In the Discussion Paper, the Commission stated that, if the *Guardianship and Administration Act 2000* (Qld) were to be amended to enable a parent to appoint a guardian or an administrator for his or her adult child, it would need to

<sup>1087</sup> The United Nations *Convention on the Rights of Persons with Disabilities* is available at <<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>> at 17 August 2010.

<sup>1088</sup> Declarations and Reservations, Australia <<http://www.un.org/disabilities/default.asp?id=475>> at 17 August 2010.

ensure that the making of such an appointment was consistent with the rights and principles underlying the legislation and that it ensured the same safeguards as an appointment made by the Tribunal.<sup>1089</sup>

18.42 It suggested, however, that if a mechanism could be developed that was consistent with the rights and principles underlying the legislation and that ensured the same safeguards for the adult as an appointment made by the Tribunal, it would have the potential to:<sup>1090</sup>

- remove the uncertainty and distress for the parents of adult children with impaired capacity about who will make decisions for their children when they are no longer capable of doing so or when they die;
- ensure a smooth transition of decision-making for those adults with impaired capacity whose parents choose to make a binding direction;
- avoid the need for a Tribunal hearing as there would be no need for an application to be made for the appointment of a guardian or an administrator for the adult.

18.43 The Commission acknowledged that, if a parent who wished to make a binding direction appointing a guardian or an administrator for his or her adult child had already been appointed as the adult's guardian or an administrator, then the Tribunal would at some stage have made a finding of impaired capacity and would have been satisfied that there was a need for formal decision-making for the adult.<sup>1091</sup>

18.44 However, it considered that, if a parent could make a binding direction appointing a guardian or an administrator for his or her adult child, regardless of whether the parent had been appointed in that capacity by the Tribunal, there may be a risk that the presumption of capacity might be too readily displaced.<sup>1092</sup> The Commission also suggested that, if the parent had not been appointed as a guardian or an administrator by the Tribunal, there might be a risk that a binding appointment would be made when there was no need for the appointment and that, as a result, the adult child's right to make his or her own decisions would be too readily restricted.<sup>1093</sup>

18.45 In the Discussion Paper, the Commission raised the possibility that, if parents were to be given the power to make a binding direction for the appointment of a guardian or an administrator, the legislation could be amended to provide that a parent may appoint a person as a guardian or an administrator only if the person

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<sup>1089</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.29].

<sup>1090</sup> Ibid [8.30].

<sup>1091</sup> Ibid [8.35].

<sup>1092</sup> Ibid [8.36].

<sup>1093</sup> Ibid [8.37].

would be eligible for appointment by the Tribunal as a guardian or an administrator.<sup>1094</sup>

18.46 The Commission considered the effect of sections 14 and 15 of the *Guardianship and Administration Act 2000* (Qld). It stated that an adult's parent might generally be expected to know whether the adult and the person are compatible,<sup>1095</sup> whether, if more than one person is to be appointed, those persons are compatible,<sup>1096</sup> and whether the person would be available and accessible to the adult<sup>1097</sup> (assuming the person's availability and accessibility remained unchanged between the time of the appointment and the time when it came into effect).<sup>1098</sup>

18.47 However, the Commission suggested that it might be more difficult for the parent to consider matters such as:<sup>1099</sup>

- the General Principles and whether the person is likely to apply them;<sup>1100</sup>
- if the appointment is for a health matter — the Health Care Principle and whether the person is likely to apply it;<sup>1101</sup>
- the extent to which the adult's and the person's interests are likely to conflict;<sup>1102</sup>
- the nature and circumstances of the person's criminal history or history of removal as a guardian, administrator or attorney;<sup>1103</sup> and
- the nature and circumstances of any past bankruptcy.<sup>1104</sup>

18.48 The Commission considered that another relevant factor was that, even if the person nominated by the binding direction was suitable at the time when he or she was appointed by the parent, the person may not be suitable by the time the appointment comes into effect — namely, when the parent loses capacity or dies. It observed, however, that this difficulty was not unique to the concept of a binding

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1094 Ibid [8.38].

1095 *Guardianship and Administration Act 2000* (Qld) s 15(1)(d).

1096 *Guardianship and Administration Act 2000* (Qld) s 15(1)(e).

1097 *Guardianship and Administration Act 2000* (Qld) s 15(1)(f).

1098 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.43].

1099 Ibid.

1100 *Guardianship and Administration Act 2000* (Qld) s 15(1)(a).

1101 *Guardianship and Administration Act 2000* (Qld) s 15(1)(b).

1102 *Guardianship and Administration Act 2000* (Qld) s 15(1)(c). See also s 15(2)–(3).

1103 *Guardianship and Administration Act 2000* (Qld) s 15(4)(a)–(b).

1104 *Guardianship and Administration Act 2000* (Qld) s 15(4)(c).

direction; it would also be relevant if the Tribunal made a successive appointment where the appointee's powers were not exercisable for a considerable period of time.<sup>1105</sup>

18.49 In the Discussion Paper, the Commission sought submissions on the following question:<sup>1106</sup>

Should the *Guardianship and Administration Act 2000* (Qld) be amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child or is it undesirable for guardians and administrators to be appointed other than by the Tribunal?

### **Submissions**

#### *Submissions in favour of binding directions*

18.50 There was widespread support for enabling parents to make a binding direction appointing a guardian or an administrator for their adult child.<sup>1107</sup>

18.51 The parent of a teenager with an intellectual disability commented:<sup>1108</sup>

There is a gap in the law at the present time where persons who are disabled or have an intellectual handicap have someone to apply for them to the Guardianship and Administration Tribunal for the appointment of a guardian or financial administrator. In particular, parents with children who have intellectual disabilities do not have an ability to make decisions for the appointment of such persons.

Legislative action is desired to reform this area. Legislation similar to that by which Enduring Powers of Attorney are created could be expressed with some changes to permit parents to make such appointments. The safeguards could be that an appropriate medical practitioner must certify that the child is unlikely to have that capacity. The legislation should also permit the parents to make guidelines and joint appointments.

Listed below are suggestions for your consideration:

1. The appointment of a guardian for financial and guardianship matters would only be in circumstances where the child is unlikely to be able to make decisions as an adult.
2. The power should be similar to that in the powers granted by an enduring power of attorney.

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1105 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.44]. See the discussion at [18.19]–[18.20] above of the Tribunal's power under s 14(4)(e) of the *Guardianship and Administration Act 2000* (Qld) to make successive appointments.

1106 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 147.

1107 Submissions 27A, 94, 112, 116, 125, 127, 128, 129, 131, 133, 139, 140, 142, 146, 152, 163, 165.

1108 Submission C23A.

3. The form should be similar to the existing documents under the Power of Attorney Act but with the ability for parents to make joint appointments.
4. The aim is to privatise the decision making and to give parents a role in their children's lives after death.
5. The legislation should also permit guidelines to be given to the appointees and should also reflect the principles enshrined in the Guardianship Act.

18.52 Several respondents commented on the advantages of enabling parents to make such an appointment.

18.53 Carers Queensland commented:<sup>1109</sup>

A binding appointment would remove the need for crisis applications and have the benefit of providing:

- greater certainty for a parent or family carer in decision-making;
- an opportunity to bring the new applicants under the principles of the act;
- protection for the new adult through the requirement for knowledge and compliance;
- security for third parties who are currently having difficulties with informal decision-making;
- transparency and accountability through regular review;
- ...
- an orderly movement in substitute decision-making transfer in line with binding direction by a parent for the appointment of a guardian or an administrator as being canvassed by this review.

18.54 The Endeavour Foundation also suggested a number of advantages of binding directions:<sup>1110</sup>

The knowledge that parents have acquired over the years in their capacity as guardian about the needs of their person with an intellectual disability gives them a greater understanding of an appropriate guardian. Often parents are very aware of the need to provide for some succession planning for a guardian. If parents were given the power to appoint a guardian or administrator this would:

1. Reduce the number of applications made to the Guardianship Administration Tribunal

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1109 Submission 146.

1110 Submission 163.

2. Reduce the stress and give security to the succession planning that parents undertake.

18.55 Family Voice Australia was also of the view that parents should be able to make a binding appointment of a guardian or an administrator. It suggested that, for an adult child with impaired capacity, the Act 'should be amended to provide that parents may appoint a guardian in advance with such appointment to take effect only when both parents became incompetent or had died'.<sup>1111</sup>

18.56 A respondent who supported the concept of a binding direction was of the view that there should be some safeguards to ensure that the adult does in fact have impaired capacity.<sup>1112</sup>

18.57 Several people at community forums suggested that 'parent' should be defined to include grandparents who were bringing up their grandchildren<sup>1113</sup> and should be flexible enough to recognise Indigenous relationships.<sup>1114</sup>

#### *Submissions opposed to binding directions*

18.58 A number of respondents, including the former Acting Public Advocate, Queensland Advocacy Incorporated, Speaking Up For You, Pave the Way, the Adult Guardian and the Department of Communities, were of the view that, to safeguard the rights of the adult, only the Tribunal should have the power to appoint a guardian or an administrator for an adult.<sup>1115</sup>

18.59 Although the former Acting Public Advocate recognised the commitment that parents have to their adult children, he suggested that the appointment of a guardian or an administrator by a parent would not necessarily be in the interests of the adult child:<sup>1116</sup>

The Public Advocate recognises the close relationship that parents have with a child with [impaired decision-making capacity], and their significant commitment to providing care and support for the adult/s concerned. The Public Advocate also recognises the benefits of succession planning for parents with an adult child with [impaired decision-making capacity] and the adult, and the potential for certainty and ease in the decision-making transition process between a parent and a new guardian/administrator.

However, it is the people being cared for who have the greatest needs, and who are the most vulnerable parties in such arrangements. The protection of the rights and interests of adults with [impaired decision-making capacity] must remain the paramount consideration and focus in appointing a guardian and administrator. This cohort must not be disadvantaged through the potential for

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1111 Submission 157.

1112 Submission 94.

1113 Forums 10, 11.

1114 Forum 12.

1115 Submissions 54A, 135, 160, 162, 164, 169, 170.

1116 Submission 160.

creation of arrangements which satisfy the concerns and needs of parents and carers rather than the adults.

18.60 The former Acting Public Advocate was of the view that the conferral of a power of appointment on parents was undesirable for the following reasons:

- While binding appointments may in some cases provide appropriate security and care/support for an adult, these arrangements would in effect treat adults with impaired decision-making capacity in the same way as minor children, which offends against their rights to autonomy and dignity.
- The presumption of capacity is fundamental to the operation of the guardianship system. If parents were empowered to make binding directions in circumstances where there is no guardian or administrator formally appointed, the presumption of capacity for the adult concerned would be displaced. The power to make a binding direction provides no mechanism for consideration of the issue of the adult's capacity upon the binding nomination taking effect, and therefore contravenes the requirements of the current regime and the adult's autonomy by restricting the rights of adults to make their own decisions.
- Issues may arise where, on the death or incapacity of the parent, the proposed appointee changes his or her mind and no longer wishes to be the guardian or administrator of the adult, thereby creating uncertainty and instability for the adult until a guardian or an administrator is appointed, or informal decision-making arrangements are finalised.
- While parents generally possess extensive knowledge of the adult, and facilitate supportive and meaningful relationships between the adult and other members of the adult's support network, parents are not necessarily best placed to properly and objectively consider whether the binding appointee is the most appropriate person to act on the adult's behalf. The Public Advocate considered that the Tribunal, as an independent body, is most appropriate to make determinations about the eligibility, suitability and appropriateness requirements for the appointment of guardians and administrators.

18.61 The former Acting Public Advocate recognised, however, that there 'may be some utility in the existence of a binding appointee during an interim period between the death or incapacity of the parent, and a Tribunal hearing to determine threshold issues and the appropriateness/suitability of the binding appointee'. He suggested that the Tribunal could consider the appointment through a duty list or chambers arrangement, and make an interim order only. That would enable the adult's needs, for example, in relation to banking and financial matters, to be met in the interim period.

18.62 The former Acting Public Advocate referred to the Tribunal's power to make successive appointments and suggested that that power was sufficient to enable parents who seek appointment as a guardian or an administrator to request the Tribunal to make a successive appointment. He suggested that, although this power is not frequently used by the Tribunal, it is advantageous to adults with



impaired decision-making capacity as it provides a safeguard against the appointment of a substitute decision-maker who may not be appropriate or suitable.

18.63 The Adult Guardian referred to the principles that underpin the guardianship of adults. In the context of those principles, the Adult Guardian was of the view that it was difficult to see how parents could appoint a decision-maker for their child:<sup>1117</sup>

Adult Guardianship is based upon a presumption of capacity, the presumption being rebuttable in certain circumstances. It is based upon recognition of autonomy of decision making and minimal restrictions. It is also based upon a web of informal supportive decision makers, with formal decision making only being necessary in limited circumstances, and when necessary, being appropriately supervised.

In the context of those principles, while recognising the very real concerns of aging parents and carers, it is difficult to see how parents should appoint or bequeath decision making for their adult children. Rather, recognition and support for planning, education, early engagement of a supportive network of informal decision makers around the adult should be sufficient to support these adults. Ultimately the tribunal is only necessary to appoint formal decision makers and supervise their role in a very relatively limited number of cases. An application can be made to the tribunal at any time if this less formal mechanism is unsuitable.

18.64 A respondent who is a long-term Tribunal member commented that the risk of enabling parents to appoint a guardian or an administrator for their adult child was that the presumption of capacity would be too easily displaced and that the adult's rights would be too readily restricted.<sup>1118</sup>

18.65 Queensland Advocacy Incorporated did not support the concept of a binding appointment by parents. Instead, it favoured using informal decision-making where that was working:<sup>1119</sup>

If the process of an informal guardian is working well, then there is no need to formalise it, which is consistent with the spirit of the Act.

18.66 In particular, it suggested that parents might wish to make their wishes known to the Tribunal in the event that an application for a guardian or an administrator was made at some time:

If parents want to cement a particular guardian in place following their death, then this could still be done with the person's agreement by a private letter which could also be lodged with the Tribunal for future reference. This letter would only be used as part of any deliberations, if the person's role were seen to be put at risk by others questioning the privately negotiated arrangement, or if the person was causing harm to the person and a formal application to the Tribunal were deemed necessary.

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1117 Submission 164.

1118 Submission 179.

1119 Submission 162.

18.67 Queensland Advocacy Incorporated considered, however, that only the Tribunal should be able to appoint a guardian or an administrator:

Regardless of whether or not a letter existed, the Tribunal would still need to determine if the person with impaired decision-making capacity needed a guardian or administrator to be appointed and would either ratify and approve the decisions by the appointed person, or appoint that person formally, or appoint someone else.

18.68 The views of Queensland Advocacy Incorporated were endorsed by Speaking Up For You.<sup>1120</sup>

18.69 Pave the Way suggested that there was an ‘obvious and widespread need for a mechanism that offers a degree of formality but which does not require an application to the Tribunal for a formal appointment’. In that regard, it suggested legislative recognition of a statutory financial decision-maker (similar to a statutory health attorney), who would have ‘the authority to manage pension payments, bank accounts to a certain limit (say \$20,000), enter into contracts to a certain amount (say \$5000), sign tenancy agreements under specified conditions, and to obtain all necessary information relating to these sorts of transactions’. It considered that this could require a form of registration with a bank or even the issuing of a registration certificate by the Tribunal to confirm the person’s authority. Alternatively, it suggested that the Tribunal could be given the power to make an enduring power of attorney on behalf of an adult with impaired capacity (similar to the Supreme Court’s jurisdiction to make a statutory will for an adult with impaired capacity).<sup>1121</sup>

18.70 The family of an adult with impaired capacity was of the view that parents should not be able to appoint a guardian or an administrator for their children. They suggested that a formal appointment should be made by the Tribunal if required.<sup>1122</sup>

18.71 Another family of an adult with impaired capacity commented:<sup>1123</sup>

We feel that it is undesirable for guardians and administrators to be appointed other than by the Tribunal. However, we also feel that parents of children with impaired capacity often worry about who will ‘take care’ of their children in the event of their incapacity or death. In order to reduce this concern, we suggest that the Act be amended so that, when appointing parents to guardianship or administration, the Tribunal be advised:

- to investigate the parents’ views in this area, and
- to advise them that successive appointments are within the Tribunal’s powers, and

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1120 Submission 170.

1121 Submission 135.

1122 Submission 54A.

1123 Submission 177.

- to ask if there are persons whom the parents would like to see in the role of guardian or administrator in the event of their incapacity or death.

This would better safeguard such adults and at the same time reduce their parents' concern.

18.72 The Department of Communities commented that ageing parents of adult children are in a vulnerable situation. It suggested, however, that family members or friends who are considered as potential appointees may not be appropriate. It also suggested that some family members or friends might be unwilling, but not prepared to say so out of a concern not to disappoint or distress the parents by declining the appointment.<sup>1124</sup> The Department suggested, as an alternative to a binding direction, that the *Guardianship and Administration Act 2000* (Qld) might be amended:

to allow a parent who currently has guardianship to make a recommendation to the tribunal about future appointments regarding their child.

18.73 The NSW Guardianship Tribunal also expressed its concern about allowing parents to appoint a guardian or an administrator for their adult children, commenting that such a power would be 'at odds with several established and well-regarded principles in the guardianship and disability field, namely self-determination of adults, protection through independent scrutiny and monitoring and guardianship as "a last resort"'.<sup>1125</sup> The Tribunal commented:

Adults with cognitive disabilities have long struggled to be recognised and respected as autonomous adults rather than children. Any person who reaches adulthood should have the rights and freedoms of adulthood regardless of their disability. The proposed amendment would in effect allow parents to extend their parental rights over a child into the person's adulthood in a way that does not apply to adult children without a disability.

The UN Convention on the Rights of People with Disabilities enshrines the principles of autonomy, respect and other key rights of people with disabilities, particularly the right to 'normalisation' within the community and substitute decision-making being a last resort.

The Tribunal would be concerned that the amendment could be seen as a retrograde step for people with cognitive disabilities where their right to make their own decisions is delegated to a substitute decision maker appointed by their parents. If such an appointment is to be made, it should be made by an independent, objective legal tribunal, with access to all the legal safeguards this entails.

### *Mechanisms for review*

18.74 Several respondents referred to the need to review any appointment that could be made by a parent.

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1124 Submission 169.

1125 Submission 147.

18.75 Although the former Acting Public Advocate did not support the concept of a binding direction, he suggested that any appointment should be subject to timely review when it first takes effect:<sup>1126</sup>

Timely review of the appointment as soon as practicable after the death or incapacity of the parent is essential in order to determine the appropriateness/suitability of the new appointee, their willingness to act, and the adult's capacity and need for a guardian/administrator. It is also vital that the review occur expediently in order to prevent abuse, exploitation or neglect of an adult by the new appointee from occurring in the interim. Although a timely independent review by the Tribunal would better safeguard the adult's interests, it is recognised that this approach does not overcome the issue of restrictiveness and interference with the adult's rights, particularly if, on review, it is determined that the adult's level of capacity has changed and that the guardian or administrator is only required for complex matters, or is no longer required.

18.76 A respondent who supported the concept of a binding direction suggested that there should be periodic review of the appointment to ensure that it remains in the interests of the adult.<sup>1127</sup>

18.77 Carers Queensland was of the view that, at the end of the initial appointment of five years:<sup>1128</sup>

a review could be undertaken to ensure that the arrangement is still needed and functioning well for all concerned. The review could identify any change to the adult's decision making capacity as well as the overall management of their affairs.

18.78 The Public Trustee suggested that the person nominated by a parent should be subject to the same regime that applies under the *Guardianship and Administration Act 2000* (Qld):<sup>1129</sup>

In this way any concerns that might be had about the appropriateness of the appointee or their prudential supervision would be the same as for other administrators and guardians.

#### *Submissions in favour of automatic guardianship of parents*

18.79 Although the Commission sought submissions on the issue of binding directions, it is noted that a number of respondents, as well as people at the Commission's community forums, also expressed a strong view that parents should automatically continue to have guardianship of their children after they turn 18.<sup>1130</sup>

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1126 Submission 160.

1127 Submission 165.

1128 Submission 146.

1129 Submission 156A.

1130 Submissions C31A, 116, 134; Forum 9.

18.80 One respondent commented:<sup>1131</sup>

It is the unquestionable natural right of natural parents of a child of any age to oversee and care for the health, well-being and welfare of that child during their joint lifetime and that natural right should be protected and suffer no interference from any agency except where it has been proved, in a Court of proper jurisdiction (but not (repeat not) the Tribunal) on a balance of probabilities (*Briginshaw -v- Briginshaw* (1938) 60 C.L.R. 336) that the natural parents have failed to care properly for their child and continue so to fail and that it is imperative that, in the interests of the child, their right to direct the care and welfare of the child be rescinded.

18.81 Another respondent suggested that:<sup>1132</sup>

Active parents doing the care should be recognised as the legal guardian, be able to make decisions and be recognised.

### **Whether appointment as a guardian or an administrator should be a requirement for making a binding direction**

18.82 If the *Guardianship and Administration Act 2000* (Qld) were amended to enable a parent to appoint a guardian or an administrator for his or her adult child, a threshold issue that would need to be resolved is whether a parent should be able to exercise that power only if he or she has already been appointed as the guardian or administrator of his or her adult child.

### ***Discussion Paper***

18.83 In the Discussion Paper, the Commission suggested that such a limitation would have the advantage of preventing an appointment from being made where the adult does not have impaired capacity or does not have an unmet decision-making need. It would also limit the operation of the provision to those situations where the Tribunal had already found that the parent was appropriate to be appointed.<sup>1133</sup>

18.84 The Commission acknowledged, however, that the imposition of such a limitation could also operate to defeat the utility of the mechanism of direct appointment by a parent. It noted that a parent might not have sought to be appointed as the guardian or administrator for his or her adult child for the reason that the support that the parent provided on an informal basis had the effect that the adult's decision-making needs were being met. As a result, the parent might not be able to satisfy the grounds for appointment under section 12(1)(b) and (c) of the *Guardianship and Administration Act 2000* (Qld).<sup>1134</sup> Under section 12(1), for the

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1131 Submission C31A.

1132 Submission 116.

1133 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.46].

1134 Ibid [8.47].

Tribunal to appoint a guardian or an administrator, it must be satisfied not only that the adult has impaired capacity, but also that:

- (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- (c) without an appointment—
  - (i) the adult's needs will not be adequately met; or
  - (ii) the adult's interests will not be adequately protected.

18.85 The Commission suggested that, once the adult's parent was no longer capable of providing that support, or died, it might be that the grounds mentioned in section 12(1) could be satisfied, but by that time the opportunity for the parent to have input into the appointment would have been lost.<sup>1135</sup>

18.86 The Commission sought submissions on the following question:<sup>1136</sup>

If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, should the Act limit the exercise of that power to a parent who has been appointed by the Tribunal as the guardian or administrator for his or her adult child?

### **Submissions**

18.87 The overwhelming view expressed at the Commission's community forums was that the power of a parent to appoint a guardian or an administrator by a binding direction should not be restricted to a parent who was an existing guardian or administrator.<sup>1137</sup> Two respondents also expressed that view.<sup>1138</sup>

18.88 Some respondents, however, were of the view that the power to appoint a guardian or an administrator should be limited to a parent who has been appointed by the Tribunal as the guardian or administrator of his or her child.<sup>1139</sup>

18.89 The former Acting Public Advocate expressed the view that this latter approach arguably provides better protection for the adult as the threshold matters in section 12 of the Act will have been satisfied.<sup>1140</sup> He commented:

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1135 Ibid [8.48].

1136 Ibid 149.

1137 Forums 9, 12.

1138 Submissions 27A, 163.

1139 Submissions 160, 165, 177.

1140 Submission 160.

Although the Public Advocate recognises the fundamental importance and role of informal decision-makers, in the absence of appropriate safeguards to protect vulnerable adults, the Public Advocate does not consider it appropriate for power to make a binding direction to be available to informal decision-makers. As part of succession planning however informal decision-makers for an adult with [impaired decision-making capacity] should be encouraged to express in their wills their views and wishes as to the adult's guardianship and/or administration, to enable the Tribunal to consider their views where an application for a formal appointment is made following the parent's death or incapacitation.

18.90 Although not expressing a view about whether a parent should be able to make a binding direction, the Public Trustee suggested that limiting the power to appoint to a parent who was an existing guardian or administrator would be a 'convenient mechanism to ensure that it is the parent or parents who provides the support to their adult child' who has the power to make the appointment.<sup>1141</sup> The Public Trustee also suggested that the power to make a binding direction could be conferred on a parent by a Tribunal order:

In this way and in a practical context the issues of capacity and need ... might be determined by the Tribunal in order to extend the power to the parent administrator or guardian to make a future, binding direction.

18.91 The former Acting Public Advocate made a similar suggestion.<sup>1142</sup>

18.92 However, the Adult Guardian did not consider that limiting the power to make a binding direction to a parent who has been appointed was an appropriate way to safeguard the interests of adults. She suggested that a limitation of this kind would simply 'force parents to bring applications for appointments, when they may not otherwise require them'.<sup>1143</sup>

### The scope of the powers that may be conferred by a binding direction

18.93 The *Guardianship and Administration Act 2000* (Qld) provides that the appointment of a guardian or an administrator may be on terms considered appropriate by the Tribunal.<sup>1144</sup> Further, the General Principles provide that:<sup>1145</sup>

a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

18.94 Accordingly, when the Tribunal appoints a guardian or an administrator for a matter, it will not necessarily appoint a guardian for all personal matters or an administrator for all financial matters. If an appointment for only some matters will

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1141 Submission 156A.

1142 See [18.99] below.

1143 Submission 164.

1144 *Guardianship and Administration Act 2000* (Qld) s 12(2).

1145 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). See now new General Principle 7(b) recommended in Chapter 4 of this Report.

be sufficient to meet the adult's decision-making needs — for example, the appointment of an administrator for complex financial matters — the Tribunal will make the appointment on those terms, rather than appoint an administrator for *all* financial matters (what is often referred to as a 'plenary appointment').

### **Discussion Paper**

18.95 In the Discussion Paper, the Commission suggested that allowing a parent to appoint another person as guardian or administrator only in relation to the matters for which the parent has been appointed would be likely to prevent an appointment from being made that was unnecessarily restrictive of the adult's rights. On the other hand, the Commission suggested that, if the power to appoint a guardian or an administrator could be exercised by a parent who had not already been appointed, it would be necessary to ensure by some other mechanism that a guardian or an administrator was not appointed with greater powers than were necessary.<sup>1146</sup>

18.96 The Commission sought submissions on the following question:<sup>1147</sup>

If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, how should the Act ensure that the powers conferred on the guardian or administrator do not unnecessarily restrict the adult's rights?

### **Submissions**

18.97 The former Acting Public Advocate commented that any amendments to the *Guardianship and Administration Act 2000* (Qld) should provide expressly that only the powers conferred on the original guardian or administrator may be exercised by the binding appointee. He suggested that this would significantly reduce the new appointee's potential to exceed or abuse his or her decision-making authority.<sup>1148</sup>

18.98 The Public Trustee similarly suggested that the powers that may be conferred by a parent should be no greater than those conferred on the existing guardian or administrator.<sup>1149</sup> The Public Trustee suggested that, if the power to make a binding direction were limited to a parent who was an existing guardian or administrator, one option would be for the Tribunal, on a case-by-case basis, to confer on a parent the power to make an appointment.

18.99 The former Acting Public Advocate made a similar suggestion about allowing the Tribunal to give a parent the power to make a binding direction:

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<sup>1146</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.52].

<sup>1147</sup> Ibid 150.

<sup>1148</sup> Submission 160.

<sup>1149</sup> Submission 156A.



Another alternative to the approach proposed above may be for the power for a parent to make a binding appointment to be granted by the Tribunal at the time of appointing the parent as guardian/administrator. For example, the definitions of 'personal matter' and 'financial matter' could be amended to insert 'succession planning, including the making of a binding direction for the appointment of a guardian or administrator'. Accordingly, upon the appointment of a parent as a guardian or administrator, the parent could seek for the Tribunal to consider their choice of successor, and, following consideration, the Tribunal could appoint the parent as a guardian/administrator for personal/financial matters, including for 'succession planning, including the making of a binding direction for the appointment of a guardian or administrator'. In this way the Tribunal would exercise some discretion and control over the appropriateness of a binding appointment being made.

### Disagreement between parents

18.100 In the Discussion Paper, the Commission referred to the possibility that, if the *Guardianship and Administration Act 2000* (Qld) were amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her child, the parents might appoint different people to be the guardian or administrator.<sup>1150</sup>

18.101 The Commission suggested that it might be possible to avoid that situation by providing that, if an adult has more than one parent who has capacity, an appointment is effective only if both parents make the appointment or, where the appointment is made by one parent, if the other parent consents. However, it considered that, if there were doubts about the effectiveness of the appointment, third parties might be reluctant to deal with a guardian or an administrator who had been appointed by this mechanism.<sup>1151</sup>

18.102 The Commission sought submissions the following question:<sup>1152</sup>

If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, how should the Act ensure that, where an adult has two parents with capacity, the parents do not make conflicting appointments?

### Submissions

18.103 The Public Trustee did not express a view about whether parents should be able to make a binding appointment, but suggested that, if such a mechanism were to be created, the person 'who has the active (or practical) care and assistance for their child would be the appropriate person to have power to appoint'.<sup>1153</sup> The Public Trustee elaborated:

1150 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.53].

1151 Ibid [8.54].

1152 Ibid 150.

1153 Submission 156A.

Not uncommonly the Public Trustee's experience is that one parent is not involved in the support of their child (and accordingly that 'absent' parent may not be well positioned to make a thoughtful decision in respect of a future administrator or guardian).

18.104 The Public Trustee also suggested that either the *Guardianship and Administration Act 2000* (Qld) or the Tribunal order conferring the power to make a binding direction<sup>1154</sup> could provide that the parents must agree as to the person or persons nominated.

18.105 The former Acting Public Advocate suggested that, if the power to make a binding appointment were conferred only on parents with a formal appointment, the *Guardianship and Administration Act 2000* (Qld) could be amended to provide that, where parents are joint guardians or joint administrators, their power to appoint a guardian or an administrator must be exercised jointly.<sup>1155</sup>

18.106 One respondent suggested that the appointment should be consented to by both parents.<sup>1156</sup>

18.107 Another respondent commented that the persons appointed by the parents should be required to act jointly. If a conflict between the appointed persons was unresolved, it would be necessary for other arrangements to be made for decision-making.<sup>1157</sup>

### **The power to make a binding direction during the minority of a person with impaired capacity**

18.108 The terms of reference for this review require the Commission, in undertaking the review, to have regard to:<sup>1158</sup>

the fact that some parents of a person with impaired capacity (whether or not an adult), may wish to make a binding direction, appointing a guardian or administrator for a matter for the adult, that applies if the parents are no longer alive or are no longer capable of exercising a power for a relevant matter for the adult. (emphasis added)

18.109 This raises the issue of whether the parent of a child with impaired capacity should be able to make a binding direction, before his or her child turns

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1154 See [18.98] above.

1155 Submission 160.

1156 Submission 27A.

1157 Submission 165.

1158 The terms of reference are set out in Appendix 1.

18, for the appointment of a guardian or an administrator for the child. Obviously, such an appointment could not take effect before the child turned 18.<sup>1159</sup>

18.110 A parent might wish to make a binding direction while his or her child is still a minor because of the risk that, by the time the child turns 18, the parent may not have the capacity to make an appointment or may have died. In either situation, the opportunity for the parent to have input into the future decision-making for his or her child would have been lost.

### **Discussion Paper**

18.111 In the Discussion Paper, the Commission stated that an issue that was of particular significance in this context was whether, if the *Guardianship and Administration Act 2000* (Qld) were amended to provide for a binding appointment by a parent, the provisions should apply only to a parent who has been appointed by the Tribunal as a guardian or an administrator for his or her child. It observed that, because the earliest age at which the Tribunal may make an appointment is 17½,<sup>1160</sup> such a requirement would generally prevent a parent from making a binding appointment for his or her child before the child turned 18.<sup>1161</sup>

18.112 Accordingly, the Commission considered that the desirability of extending the mechanism for making a binding direction to the parents of minor children would be a factor to be taken into account in deciding whether any legislative recognition of binding directions should be limited to parents who have themselves been appointed by the Tribunal as a guardian or an administrator of their child.<sup>1162</sup>

18.113 In the Discussion Paper, the Commission sought submissions on the following question:<sup>1163</sup>

Should the *Guardianship and Administration Act 2000* (Qld) be amended to enable the parent of a child with impaired capacity to appoint a guardian or an administrator for his or her child while the child is under 18 years of age, such appointment not to take effect before the child turns 18?

### **Submissions**

18.114 The submissions were divided on this issue. Some respondents supported the ability of parents to make a direction before their child turned 18,<sup>1164</sup>

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1159 The *Guardianship and Administration Act 2000* (Qld) provides for advance appointments in ss 13 and 13A. The earliest age at which the Tribunal may appoint a guardian or an administrator for an individual is 17½ years: s 13(1). The appointment takes effect when the individual turns 18: s 13(3). Section 13A includes similar provisions in relation to the appointment of a guardian for a restrictive practice matter.

1160 See *Guardianship and Administration Act 2000* (Qld) ss 13, 13A.

1161 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [8.57].

1162 Ibid [8.58].

1163 Ibid 151.

1164 Submissions 163, 165.

while two other respondents were opposed to that approach.<sup>1165</sup>

18.115 The former Acting Public Advocate and the Adult Guardian were of the view that, if legislative change were proposed, it should be in line with the other provisions of the *Guardianship and Administration Act 2000* (Qld) that provide for appointments when a child is 17½, with implementation effective from 18 years of age.<sup>1166</sup>

## THE COMMISSION'S VIEW

18.116 The approach of the *Guardianship and Administration Act 2000* (Qld) in relation to the appointment of guardians and administrators is directed to ensuring that:<sup>1167</sup>

- an appointment can be made only where an adult has impaired capacity, which requires the Tribunal to be satisfied that the presumption of capacity has been rebutted;
- there is a need for a decision to be made in relation to a matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property;
- the appointment is necessary to meet the adult's needs or to protect the adult's interests; and
- the appointment is made in a way that is least restrictive of the adult's rights, both in terms of the powers conferred by the appointment and the duration of the appointment.

18.117 The provisions that reflect this approach are consistent with the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>1168</sup>

18.118 The Commission notes that many parents were of the view that the *Guardianship and Administration Act 2000* (Qld) should enable parents to appoint a guardian or an administrator for their adult child, while such a change was opposed by the Adult Guardian, the former Acting Public Advocate, Pave the Way, and the advocacy organisations, Queensland Advocacy Incorporated and Speaking Up For You.

18.119 The Commission is sympathetic to the position of parents who are concerned to have greater control in relation to decision-making for their children after they are no longer in a position to fulfil that role either formally or informally. However, in deciding whether the *Guardianship and Administration Act 2000* (Qld)

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<sup>1165</sup> Submissions 156A, 177.

<sup>1166</sup> Submissions 160, 164.

<sup>1167</sup> *Guardianship and Administration Act 2000* (Qld) ss 12(1), 28, 29, 31, sch 1 ss 1, 7(3)(c).

<sup>1168</sup> See [18.38]–[18.40] above and, generally, Chapter 3 of this Report.

should be amended to enable parents to appoint guardians and administrators for their adult children, the Commission's focus must necessarily be on the rights and interests of the adults concerned. This approach requires that the Act should not confer such a power on parents unless it can ensure that the power would be exercised in a way that guarantees to adults with impaired capacity the same safeguards that apply to appointments made by the Tribunal.

18.120 A fundamental requirement of which the Tribunal must be satisfied in appointing a guardian or an administrator for a matter is that the adult has impaired capacity for that matter. The *Guardianship and Administration Act 2000* (Qld) acknowledges that the capacity of an adult with impaired capacity to make decisions may differ according to the nature and extent of the impairment; the type of decision to be made, including, for example, the complexity of the decision; and the support available to the adult.<sup>1169</sup> If parents were able to appoint guardians and administrators, it would be difficult to ensure as rigorous an approach to the assessment of capacity and to the rebuttal of the presumption of capacity. Further, because the appointment process would be a private matter for a parent (even if appointments were subsequently reviewable by the Tribunal), it would be difficult to ensure that guardians and administrators were appointed as a last resort, and that their appointments were the least restrictive of the adult's rights.

18.121 The only way to minimise these risks would be to recommend that a parent's power to appoint a guardian or an administrator be restricted to a parent who has a current appointment as his or her child's guardian or administrator, and that the parent may confer only the power that he or she may presently exercise. However, as mentioned earlier, there is a significant practical limitation that would affect the utility of such a proposal. In the majority of cases, parents of adult children with impaired capacity do not hold appointments as their guardians or administrators. In many cases, the Tribunal would not have the power to make an appointment for the reason that, in particular, the requirement in section 12(1)(c) is not met.<sup>1170</sup> Yet, as explained in Chapter 14, it is important for section 12 to set a high bar for the appointment of guardians and administrators to ensure that the rights of adults are not unnecessarily restricted.

18.122 Moreover, even if the power to appoint a guardian or an administrator were restricted to a parent who was already the adult's guardian or administrator and to a conferral of the same power that the parent may presently exercise, there would still be the potential difficulty that the parents might not agree on the appointee or that, at the time the appointment is to take effect, the appointee is not willing or appropriate to act as the adult's guardian or administrator.<sup>1171</sup> This

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1169 *Guardianship and Administration Act 2000* (Qld) s 5(c).

1170 *Guardianship and Administration Act 2000* (Qld) s 12(1)(c) requires the Tribunal to be satisfied that, without an appointment, the adult's needs will not be adequately met or the adult's interests will not be adequately protected. Where the requirements of s 12(1) of the *Guardianship and Administration Act 2000* (Qld) are satisfied and a parent is appointed as guardian or administrator, the Tribunal would, in any event, have the power to make a successive appointment that would take effect on the death or incapacity of the parent: see [18.19]–[18.20] above.

1171 When a successive appointment takes effect under the *Guardianship and Administration Act 2000* (Qld), the next appointee must advise the Tribunal in writing of the change as soon as practicable: s 57(2)(b). This gives the Tribunal an opportunity to initiate a review of the appointment.

situation differs from that of testamentary guardians, where the appointment is always for a limited period of time (that is, until the child turns 18).<sup>1172</sup> In the Commission's view, these are very real difficulties that could have an adverse effect on the adult's interests.

18.123 The Commission considers that the interests of adults with impaired capacity require that appointments continue to be made only by the Tribunal and, where section 245 applies, by the Supreme and District Courts.<sup>1173</sup> This is necessary to ensure that appointments are made with all the legislative safeguards provided by the *Guardianship and Administration Act 2000* (Qld) — in particular, that appropriate consideration is given to the presumption of capacity, the need for the appointment, the appropriateness of the appointee, and the terms and duration of the appointment.

18.124 Accordingly, the Commission is of the view that the *Guardianship and Administration Act 2000* (Qld) should not be amended to enable parents to make binding directions appointing guardians or administrators for their adult children. It follows that the Act should not be amended to enable parents to make such directions for their minor children on conditions that would take effect on or during their adulthood.

18.125 The Commission notes, however, that the Tribunal has the power under section 14(4)(e) of the *Guardianship and Administration Act 2000* (Qld) to appoint 'successive appointees for a matter'. As mentioned earlier in this chapter, that power is wide enough to enable the Tribunal, when appointing a parent as the guardian or administrator for his or her adult child, to appoint a person to be the adult's guardian or administrator when the parent's appointment ends, whether through death or a loss of capacity.<sup>1174</sup> It is important that parents who are applying to be appointed as a guardian or an administrator are aware of this power so that consideration can be given to whether application should also be made for a successive appointment. Accordingly, if a parent applies for appointment as the guardian or administrator for his or her adult child, the Tribunal should inform the parent of the Tribunal's power under section 14(4)(e) to appoint successive appointees for a matter. This could be done by way of a letter from the registry explaining the scope of the Tribunal's power under section 14(4)(e).

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1172 See [18.5]–[18.9] above.

1173 *Guardianship and Administration Act 2000* (Qld) s 245 is considered in Chapter 28 of this Report.

1174 See [18.20] above. The successive appointee would, of course, need to consent to the appointment: *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 110(1)(a). Note also that the Commission has recommended that the general requirement that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment is a substantive one, and should be contained in the *Guardianship and Administration Act 2000* (Qld) rather than in the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld): see Recommendation 14-5 above.

## RECOMMENDATIONS

- 18-1** The *Guardianship and Administration Act 2000* (Qld) should not be amended to enable parents to appoint guardians or administrators for their adult or minor children.
- 18-2** If a parent applies for appointment as the guardian or administrator for his or her adult child, the Tribunal should inform the parent of the Tribunal's power under section 14(4)(e) of the *Guardianship and Administration Act 2000* (Qld) to appoint successive appointees for a matter.





# Chapter 19

## Restrictive practices

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### INTRODUCTION

#### The Carter Report

19.1 In 2006, a panel comprised of the Honourable WJ Carter QC, the Director-General of Communities and Disability Services Queensland, and the Director-General of the Department of Housing undertook a review of the existing provisions for the care, support and accommodation of people with an intellectual or cognitive disability who represent a significant risk of harm to themselves or the

community.<sup>1175</sup> Their terms of reference required them, among other matters, to 'identify where restrictive practices are currently used and the problems that these may pose'.<sup>1176</sup> The restrictive practices under review included containment and seclusion, for example, by locking 'bedrooms, front doors or yard gates', and other restrictive practices, such as 'physical restraint techniques, restraint devices, or daily medication to alter behaviour'.<sup>1177</sup>

19.2 The review panel's final report (the 'Carter Report') recommended a legislative scheme to regulate the use of restrictive practices in relation to adults with an intellectual or cognitive disability.<sup>1178</sup> A key feature of the recommended scheme was that the *Disability Services Act 2006* (Qld) (the 'DSA') be amended to provide legislative support for the use of any restrictive practice identified as part of the Positive Behaviour Support Plan for the individual in accordance with the following principles:<sup>1179</sup>

1. The human rights and service delivery principles set out in part 2 Divisions 1 and 2 of the *Disability Services Act 2006* are to be applied expressly to the extent that the same are relevant to this issue.
2. Since the legislative focus is on the development of the individual person, and the services to be delivered have to be designed and implemented for the purpose of developing the individual and enhancing that person's opportunity for a quality life, restrictive practices can only be justified as part of a specific individualised positive behaviour and support plan which will be of benefit to the individual and which will assist in the achievement of that objective.
3. Any such plan for the care and support of the individual person must be developed by the appropriate specialists in association with the individual and where necessary his/her parent or guardian.
4. Approval for such a plan, if it contains provisions for the use of restrictive practices must be given by an independent body consisting of persons with the requisite skill, knowledge and/or experience and such approval shall operate only for a limited time, at which time it shall be reviewed and the continuance or otherwise of the restrictive practice considered anew in the light of the material to be provided to the independent body. That independent body should be the Guardianship and Administration Tribunal (GAAT).

1175 The Hon WJ Carter QC, *Challenging Behaviour and Disability: A Targeted Response — Report to Honourable Warren Pitt MP Minister for Communities Disability Services and Seniors* (2006) 4 <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf>> at 13 August 2010. Disability Services Queensland (now Disability and Community Care Services) and the Department of Housing (now Housing and Homelessness Services) have since been subsumed within the Department of Communities.

1176 Ibid.

1177 Ibid 36.

1178 Ibid 14.

1179 Ibid 19–20.

5. Whilst the approval remains in operation, the use of the approved restrictive practice(s) shall be monitored by an independent person(s) who shall report to the independent body upon each review. This should be done as part of the Community Visitor Program.
6. That the use of restrictive practices be prohibited except as approved by GAAT in accordance with the above principles.

### The enactment of the restrictive practices legislation

19.3 The recommendations made in the Carter Report were implemented by the *Disability Services and Other Legislation Amendment Act 2008* (Qld). That Act inserted Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) (collectively referred to in this Chapter as the 'restrictive practices legislation'), which both commenced on 1 July 2008.

19.4 The overall aim of the restrictive practices legislation is:<sup>1180</sup>

to drive service improvements to reduce or eliminate the use of restrictive practices; promote positive behavioural support; reduce the incidence of 'challenging behaviour'; and improve the quality of life for adults with an intellectual or cognitive disability.

19.5 The use of restrictive practices is primarily regulated by Part 10A of the DSA. Part 10A:

- imposes a requirement for a relevant service provider to keep and implement a policy about the use of restrictive practices;<sup>1181</sup>
- requires an adult to be assessed before a restrictive practice can be used, and sets out the requirement for an assessment;<sup>1182</sup>
- sets out the matters that must be addressed in a positive behaviour support plan for an adult, as well as imposing various requirements in relation to the development of a positive behaviour support plan;<sup>1183</sup>
- sets out the matters that must be addressed in a respite/community access plan;<sup>1184</sup>
- prescribes the circumstances in which a relevant service provider is authorised to use a restrictive practice, including the requirements for a positive behaviour support plan or a respite/community access plan and the

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1180 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 1.

1181 *Disability Services Act 2006* (Qld) ss 123I, 123ZT–123ZU.

1182 *Disability Services Act 2006* (Qld) s 123J.

1183 *Disability Services Act 2006* (Qld) ss 123L, 123S–123Y, 123ZE–123ZH.

1184 *Disability Services Act 2006* (Qld) ss 123ZO–123ZR.

requirements for approval or consent;<sup>1185</sup> and

- grants an immunity from criminal and civil liability to a relevant service provider who uses a restrictive practice, honestly and without negligence, in accordance with the requirements of Part 10A.<sup>1186</sup>

19.6 These provisions are complemented by Chapter 5B of the *Guardianship and Administration Act 2000* (Qld), which prescribes the approval and consent mechanisms that apply in respect of the various restrictive practices that are regulated by the DSA.<sup>1187</sup>

19.7 As explained in more detail below, the restrictive practices legislation does not regulate the use of restrictive practices in relation to all adults with an intellectual or cognitive disability. Rather, it applies in relation to adults with an intellectual or cognitive disability who receive disability services from a ‘funded service provider’ within the meaning of the DSA.<sup>1188</sup>

### Review mechanism

19.8 Section 233 of the DSA requires the Minister for Disability Services and Multicultural Affairs, who administers the DSA, to review the efficacy and efficiency of that Act as soon as practicable after 1 July 2011.

19.9 Section 233A provides that, when conducting the review required by section 233, the Minister for Disability Services and Multicultural Affairs and the Minister who administers the *Guardianship and Administration Act 2000* (Qld),<sup>1189</sup> acting jointly, must review the efficacy and efficiency of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).

### THE COMMISSION’S APPROACH TO RESTRICTIVE PRACTICES

19.10 As explained above, the restrictive practices legislation was enacted following an independent review, and has been in force for only a relatively short period of time. Both Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) are also subject to a legislative requirement for review as soon as practicable after 1 July 2011. Moreover, while Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) regulates the approval and consent mechanisms for the use of restrictive practices, it is the DSA that primarily regulates the use of restrictive practices. In view of these factors, the Commission is not generally reviewing the restrictive practices legislation as part of this review.

<sup>1185</sup> *Disability Services Act 2006* (Qld) ss 123M–123O, 123ZA–123ZD.

<sup>1186</sup> *Disability Services Act 2006* (Qld) s 123ZZB.

<sup>1187</sup> See Table 19.1 at [19.41] below for a broad overview of who may approve, or consent to, the use of restrictive practices.

<sup>1188</sup> See [19.19]–[19.23] below.

<sup>1189</sup> The *Guardianship and Administration Act 2000* (Qld) is administered by the Attorney-General and Minister for Industrial Relations.

19.11 The Commission's consideration of restrictive practices is confined to two issues:

- the use of restrictive practices in relation to adults to whom the restrictive practices legislation does not apply for the reason that they do not receive disability services that are provided or funded by the Department of Communities;<sup>1190</sup> and
- the scope of the definition of 'chemical restraint' that applies for the purposes of the restrictive practices legislation and, in light of that definition, the application of the restrictive practices legislation to antilibidinal drugs.<sup>1191</sup>

19.12 As background to these issues, this chapter gives an overview of the scheme for the use of restrictive practices, with particular emphasis on the provisions in Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) that deal with the approval of, and consent to, the use of restrictive practices.

## OVERVIEW OF THE LEGISLATIVE SCHEME FOR RESTRICTIVE PRACTICES

### The restrictive practices that are regulated

19.13 The restrictive practices legislation deals with three categories of restrictive practices:<sup>1192</sup>

- containing or secluding an adult with an intellectual or cognitive disability;
- using chemical, mechanical or physical restraint on an adult with an intellectual or cognitive disability; and
- restricting the access of an adult with an intellectual or cognitive disability to certain objects.

19.14 Containment and seclusion have some similarities in that the adult who is contained or secluded is confined to particular premises.<sup>1193</sup> However, the additional element of isolation that is involved in seclusion distinguishes it from containment.<sup>1194</sup>

19.15 Chemical restraint, which is of particular relevance in this chapter,<sup>1195</sup> is defined in section 123F of the DSA:

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1190 See [19.68]–[19.143] below.

1191 See [19.144]–[19.199] below.

1192 *Disability Services Act 2006* (Qld) s 123E.

1193 *Disability Services Act 2006* (Qld) ss 123E (definition of 'seclude'), 123G.

1194 Explanatory Notes, *Disability Services and Other Legislation Amendment Bill 2008* (Qld) 37.

1195 See [19.145]–[19.152] below.

**123F Meaning of chemical restraint**

- (1) Chemical restraint, of an adult with an intellectual or cognitive disability, means the use of medication for the primary purpose of controlling the adult's behaviour.
- (2) However, using medication for the proper treatment of a diagnosed mental illness or physical condition is not chemical restraint.
- (3) To remove any doubt, it is declared that an intellectual or cognitive disability is not a physical condition.
- (4) In this section—

**diagnosed**, for a mental illness or physical condition, means a doctor confirms the adult has the illness or condition.

**mental illness** see the *Mental Health Act 2000*, section 12.

19.16 The legislation also provides for the use of 'chemical restraint (fixed dose)', which is defined as follows:<sup>1196</sup>

**chemical restraint (fixed dose)** means chemical restraint using medication that is administered at fixed intervals and times.

19.17 Mechanical restraint means 'the use, for the primary purpose of controlling the adult's behaviour, of a device to restrict the free movement of the adult or prevent or reduce self-injurious behaviour'.<sup>1197</sup> Physical restraint means 'the use, for the primary purpose of controlling the adult's behaviour, of any part of another person's body to restrict the free movement of the adult'.<sup>1198</sup>

19.18 Restricting access means 'restricting the adult's access, at a place where the adult receives disability services, to an object to prevent the adult using the object to cause harm to the adult or others',<sup>1199</sup> for example, locking a drawer in which knives are kept to prevent an adult using the knives to cause harm or restricting an adult's access to a particular cupboard or fridge to prevent the adult from eating in a way that is likely to harm the adult.

**The adults to whom the restrictive practices legislation applies**

19.19 The restrictive practices legislation applies to adults with an intellectual or cognitive disability who receive services from a funded service provider within the meaning of the DSA.<sup>1200</sup> The DSA includes the following definition of 'funded service provider':

<sup>1196</sup> *Disability Services Act 2006* (Qld) s 123E; *Guardianship and Administration Act 2000* (Qld) s 80U.

<sup>1197</sup> *Disability Services Act 2006* (Qld) s 123H(1); *Guardianship and Administration Act 2000* (Qld) s 80U.

<sup>1198</sup> *Disability Services Act 2006* (Qld) s 123E; *Guardianship and Administration Act 2000* (Qld) s 80U.

<sup>1199</sup> *Disability Services Act 2006* (Qld) s 123E (definition of 'restricting access').

<sup>1200</sup> *Disability Services Act 2006* (Qld) s 123B; *Guardianship and Administration Act 2000* (Qld) s 80R.

#### 14 Meaning of funded service provider

- (1) A funded service provider is a service provider that receives funds from the department to provide disability services.
- (2) A funded service provider includes the department to the extent it provides disability services.
- (3) However, a funded service provider does not include another department receiving funds from the department.

19.20 Accordingly, the restrictive practices legislation does not apply to an adult with an intellectual or cognitive disability who does not receive disability services or to an adult who receives disability services from a service provider that is not a funded service provider. The Explanatory Notes for the Disability Services and Other Legislation Amendment Bill 2008 (Qld) gave the following examples of adults who are outside the scope of the legislation:<sup>1201</sup>

- Adult with an intellectual or cognitive disability living at home being cared for by a family member (and not receiving a disability service from DSQ or a funded non-government service provider);
- Adult with an intellectual or cognitive disability residing in a boarding house or hostel (and not receiving a disability service from DSQ or a funded non-government service provider);
- Adult with an intellectual or cognitive disability when receiving a service from Queensland Health (For example, a patient in a Queensland Health residential care facility); ...

19.21 The Department of Communities (which incorporates Disability and Community Care Services) noted in its submission to this Commission that the issue of 'extending the restrictive practices scheme to the non-funded sector was considered as part of the development of the restrictive practices scheme'.<sup>1202</sup> However, 'government made a decision at that stage not to regulate the non-funded sector, and to look at this issue as part of a broader issue which examined the role of regulation in respect of unfunded disability services'.

19.22 The Department explained that, at the time, the costs that would be imposed on the 'unfunded sector' if it was subject to the restrictive practices legislation were not considered to be justified:

The broader review, through a public benefit test, examined ways of improving the safety and quality of disability services, whether delivered or funded by government or in the private sector.

The review concluded that there was no evident service failure in the unfunded sector and that the size and extent of that market was not likely to be significant compared to the government funded sector. It was considered that a further

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1201 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 31.

1202 Submission 169.

regulatory burden on a small market could result in increased costs to service providers.

19.23 The Department observed, however, that when the reviews required by sections 233 and 233A of the DSA are undertaken,<sup>1203</sup> ‘the opportunity exists for the Department to consider whether some or all of the regulatory framework in the DSA should be extended to regulate a non-funded disability service provider’.

### Immunity from civil and criminal liability

19.24 The DSA provides that a relevant service provider is not criminally or civilly liable if, acting honestly and without negligence, it uses a restrictive practice under Part 10A of the DSA.<sup>1204</sup> Protection from civil and criminal liability is also given to an individual, acting for a relevant service provider, who uses a restrictive practice in accordance with the requirements of the Act or who reasonably believes that he or she is acting in compliance with those requirements.<sup>1205</sup>

### Requirements for the use of restrictive practices

19.25 The DSA sets out the circumstances in which a relevant service provider<sup>1206</sup> is authorised to use a restrictive practice in relation to an adult.

### Assessment of the adult

19.26 Generally, before a restrictive practice can be used in relation to an adult, the adult must be assessed for the purposes of:<sup>1207</sup>

- making findings about the nature, intensity, frequency and duration of the behaviour of the adult that causes harm to the adult or others;
- developing theories about the factors that contribute to the adult’s behaviour — for example, biological factors; psychological or cognitive factors, such as low communication skills; social factors, such as the adult’s surroundings; or medical conditions; and
- making recommendations about appropriate strategies for:
  - meeting the adult’s needs and improving the adult’s capabilities and quality of life;

1203 See [19.8]–[19.9] above.

1204 *Disability Services Act 2006* (Qld) s 123ZZB.

1205 *Disability Services Act 2006* (Qld) s 123ZZC.

1206 A ‘relevant service provider’ is a funded service provider who provides disability services to an adult with an intellectual or cognitive disability: *Disability Services Act 2006* (Qld) s 123B.

1207 *Disability Services Act 2006* (Qld) s 123J(1), (3). An assessment is not required if the restrictive practice is used under a short term approval or in the course of providing respite or community access services to the adult (s 123J(2)), although the relevant service provider must comply with the requirements of div 5 of the Act.



- reducing the intensity, frequency and duration of the adult’s behaviour that causes harm to the adult or others; and
- managing the adult’s behaviour that causes harm to the adult or others in order to minimise the risk of harm.

19.27 The DSA imposes different assessment requirements depending on the nature of the restrictive practice. For containment or seclusion under section 123M, the adult must undergo a multidisciplinary assessment — that is, an assessment by two or more appropriately qualified persons who have qualifications or experience in different disciplines.<sup>1208</sup> For chemical, mechanical or physical restraint under section 123ZA, an adult must be assessed by at least one appropriately qualified person.<sup>1209</sup> For restriction of access, an adult must be assessed by the relevant service provider that is proposing to restrict the adult’s access.

### **Positive behaviour support plans**

19.28 An important requirement for using a restrictive practice in relation to an adult is that it complies with the positive behaviour support plan that has been developed for the adult.<sup>1210</sup>

19.29 A positive behaviour support plan must include the following information:<sup>1211</sup>

- (a) the adult’s name, age and gender;
- (b) the name of any guardian or informal decision maker for the adult;
- (c) a description of the adult’s intellectual or cognitive disability;
- (d) the name of each relevant service provider providing disability services to the adult and a description of the disability services provided;
- (e) in relation to previous behaviour of the adult that has caused harm to the adult or others, a description of—
  - (i) the intensity, frequency and duration of the behaviour; and
  - (ii) the consequences of the behaviour;

*Examples—*

- harm is caused to the adult or someone else

1208 *Disability Services Act 2006* (Qld) s 123J(4). See s 123K (Who is appropriately qualified to assess an adult).

1209 *Disability Services Act 2006* (Qld) s 123J(5).

1210 *Disability Services Act 2006* (Qld) ss 123M(1)(c)(ii) (Containing or secluding an adult under containment or seclusion approval), 123ZA(1)(c)(ii) (Using chemical, mechanical or physical restraint, or restricting access, with consent of guardian etc). Some exceptions are considered at [19.34]–[19.37] below.

1211 *Disability Services Act 2006* (Qld) s 123L.

- the adult is charged with, or was convicted of, an offence involving the behaviour
- (f) any available information about strategies previously used to manage the behaviour mentioned in paragraph (e) and the effectiveness of those strategies;
- (g) for the assessment of the adult, each of the following—
- (i) the name of each person who assessed the adult;
  - (ii) a description of the assessment conducted;
  - (iii) the findings, theories and recommendations of each person about the matters mentioned in section 123J(3);
  - (iv) if the assessment was a multidisciplinary assessment and there was a difference of opinion between any of the appropriately qualified persons who assessed the adult—how the difference was taken into account in developing the plan;
- (h) for each restrictive practice proposed to be used in relation to the adult, the details stated in subsection (2);
- (i) a description of the positive strategies, including the community access arrangements in place for the adult, that will be used to—
- (i) meet the adult’s needs and improve the adult’s capabilities and quality of life; and
  - (ii) reduce the intensity, frequency and duration of the adult’s behaviour that causes harm to the adult or others;

*Examples—*

- skills development, such as communication skills, motor skills or life skills
  - strategies that encourage the use of appropriate behaviour
- (j) for each relevant service provider who will use a restrictive practice in relation to the adult—a description of how the provider will support and supervise staff involved in implementing the plan;
- (k) if the person developing the plan is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—the requirements of the order;
- (l) the name, and relationship to the adult, of each person consulted during the development of the plan, and the person’s views about the use of each restrictive practice proposed to be used in relation to the adult.

19.30 The positive behaviour support plan must include the following information about each restrictive practice that is proposed to be used in relation to the adult:<sup>1212</sup>

- (a) the name of the relevant service provider who will use the restrictive practice;
- (b) any strategies that must be attempted before using the restrictive practice;
- (c) the procedure for using the restrictive practice, including observations and monitoring, and any other measures necessary to ensure the adult's proper care and treatment, that must happen while the restrictive practice is being used;
- (d) a description of the anticipated positive and negative effects on the adult of using the restrictive practice;
- (e) a demonstration of why use of the restrictive practice is the least restrictive way of ensuring the safety of the adult or others;
- (f) the strategy for reducing or eliminating the use of the restrictive practice;
- (g) the intervals at which use of the restrictive practice will be reviewed by the relevant service provider using the restrictive practice in compliance with the provider's policy about use of the restrictive practice;

*Note—*

See also section 123ZV.

- (h) for containment—a description of the adult's accommodation and its suitability for implementing the plan;
- (i) for seclusion—
  - (i) a description of the place where the adult will be secluded and its suitability for secluding the adult; and
  - (ii) the maximum period for which seclusion may be used at any 1 time and the maximum frequency of the seclusion;
- (j) for chemical restraint—
  - (i) the name of the medication to be used and any available information about the medication, including, for example, information about possible side effects; and
  - (ii) the dose, route and frequency of administration, including, for medication to be administered as and when needed, the circumstances in which the medication may be administered, as prescribed by the adult's treating doctor; and

<sup>1212</sup>

*Disability Services Act 2006* (Qld) s 123J(1)(h), (2).

- (iii) if the adult's medication has previously been reviewed by the adult's treating doctor—the date of the most recent medication review; and
- (iv) the name of the adult's treating doctor;
- (k) for mechanical or physical restraint—the maximum period for which the restraint may be used at any 1 time.

19.31 The DSA deals specifically with the situation of an adult who is subject to a forensic order or under an involuntary treatment order. If the Director-General of the Department of Communities is aware that the adult is subject to one of these orders and develops a positive behaviour support plan under Part 10A, Division 3 of the DSA (Containment and seclusion), the Director-General must ensure that the authorised psychiatrist responsible for treatment of the adult under the *Mental Health Act 2000* (Qld) is given the opportunity to participate in the development of the positive behaviour support plan.<sup>1213</sup>

19.32 The responsibility for developing a positive behaviour support plan for an adult depends on the nature of the restrictive practice in question. For containment or seclusion, the positive behaviour support plan must be developed by the Director-General of the Department of Communities;<sup>1214</sup> for chemical, mechanical or physical restraint, or restricting access to objects, carried out with the consent of a relevant decision-maker, the positive behaviour support plan must be developed by the relevant service provider.<sup>1215</sup>

19.33 The DSA also includes provisions about changing positive behaviour support plans.<sup>1216</sup>

#### *Exceptions*

19.34 The DSA includes some exceptions under which a restrictive practice may be used without the development of a positive behaviour support plan for the adult.

19.35 A relevant service provider may contain or seclude an adult without a positive behaviour support plan if containment or seclusion:

- is approved under an interim order of the Tribunal made under section 80ZA of the *Guardianship and Administration Act 2000* (Qld);<sup>1217</sup>
- is used in the course of providing respite services or community access services to the adult;<sup>1218</sup> or

<sup>1213</sup> *Disability Services Act 2006* (Qld) s 123T.

<sup>1214</sup> *Disability Services Act 2006* (Qld) s 123M(1)(c)(ii).

<sup>1215</sup> *Disability Services Act 2006* (Qld) s 123ZA(1)(c)(ii). This subparagraph applies if the adult is not also the subject of a containment or seclusion approval.

<sup>1216</sup> *Disability Services Act 2006* (Qld) ss 123U–123Y, 123ZG.

<sup>1217</sup> *Disability Services Act 2006* (Qld) s 123M(1)(c)(ii).

- has short term approval and, if a short term plan for the adult has been approved under the *Guardianship and Administration Act 2000* (Qld), the containment or seclusion complies with the short term plan.<sup>1219</sup>

19.36 A relevant service provider may also use chemical, mechanical or physical restraint on an adult, or restrict an adult's access, if the restrictive practice is used in the course of providing respite services or community access services to the adult and, in addition to satisfying certain specified requirements, the use of the restrictive practice complies with a respite/community access plan for the adult.<sup>1220</sup> Such restrictive practices may also be used without a positive behaviour support plan where their use complies with short term approval.<sup>1221</sup>

19.37 Finally, a relevant service provider may use chemical restraint (fixed dose) on an adult in the course of providing respite services to the adult if its use complies with the consent of the 'relevant decision maker (respite)',<sup>1222</sup> for the adult and the relevant service provider keeps and implements a policy about the use of chemical restraint as required by Division 6 of Part 10A of the Act.<sup>1223</sup>

### **Approval and consent requirements**

19.38 The DSA requires that, before a relevant service provider uses a restrictive practice, an approval for, or consent to, the use of the restrictive practice be obtained in accordance with the requirements of that Act. The Act provides for different levels of approval or consent, depending on the nature of the restrictive practice and the circumstances in which the restrictive practice is to be used, namely:

- generally;
- in the course of providing respite or community access services to an adult; or
- on a short-term basis.

1218 *Disability Services Act 2006* (Qld) s 123N. However, the containment or seclusion must comply with a respite/community access plan for the adult: s 123N(1)(d)(ii).

1219 See [19.58]–[19.59] below in relation to the circumstances in which the Adult Guardian and the chief executive of the Department of Communities may approve the short term use of restrictive practices.

1220 *Disability Services Act 2006* (Qld) s 123ZB(1)(d)(ii).

1221 *Disability Services Act 2006* (Qld) s 123D.

1222 *Disability Services Act 2006* (Qld) s 123E defines 'relevant decision maker (respite)':

**relevant decision maker (respite)**, for an adult with an intellectual or cognitive disability, means—

- a guardian for a restrictive practice (respite) matter for the adult; or
- for a restrictive practice other than chemical restraint used under section 123ZB, if there is no guardian for a restrictive practice (respite) matter for the adult—an informal decision maker for the adult.

1223 *Disability Services Act 2006* (Qld) s 123ZC.

19.39 Approval for the use of a restrictive practice may be given, depending on the circumstances, by the Tribunal, the Adult Guardian or the chief executive of the Department of Communities (which incorporates Disability and Community Care Services).

19.40 Consent may be given by a guardian for a restrictive practice matter appointed by the Tribunal or, in certain circumstances, by an informal decision-maker for the adult. The legislation provides for two types of guardian for a restrictive practice matter: a guardian for a restrictive practice (general) matter<sup>1224</sup> and a guardian for a restrictive practice (respite) matter.<sup>1225</sup>

19.41 The following table gives a broad overview of who may approve, or consent to, the use of particular restrictive practices.

Restrictive practice	Requirement for approval or consent		
	General use	Use during respite or community access services	Short term use
<b>Containment or seclusion</b>	Tribunal approval <sup>1226</sup>	Consent of a guardian for a restrictive practice (respite) matter <sup>1227</sup>	Adult Guardian approval <sup>1228</sup>
<b>Chemical, mechanical or physical restraint</b>	Consent of a guardian for a restrictive practice (general) matter <sup>1229</sup>	Consent of: <ul style="list-style-type: none"> <li>• a guardian for a restrictive practice (respite) matter;<sup>1230</sup> or</li> <li>• for mechanical or physical restraint (but not chemical restraint), if there is no guardian for a restrictive practice (respite) matter—an informal decision-maker<sup>1231</sup></li> </ul>	Approval by: <ul style="list-style-type: none"> <li>• the Adult Guardian;<sup>1232</sup> or</li> <li>• the chief executive of the Department of Communities<sup>1233</sup></li> </ul>

1224 *Disability Services Act 2006* (Qld) s 123E provides that '**guardian for a restrictive practice (general) matter**, for an adult with an intellectual or cognitive disability, means a guardian for a restrictive practice (general) matter appointed for the adult under the GAA, chapter 5B'.

1225 *Disability Services Act 2006* (Qld) s 123E provides that '**guardian for a restrictive practice (respite) matter**, for an adult with an intellectual or cognitive disability, means a guardian for a restrictive practice (respite) matter appointed for the adult under the GAA, chapter 5B'.

1226 *Disability Services Act 2006* (Qld) s 123M; *Guardianship and Administration Act 2000* (Qld) s 80V.

1227 *Disability Services Act 2006* (Qld) s 123N; *Guardianship and Administration Act 2000* (Qld) s 80ZF.

1228 *Disability Services Act 2006* (Qld) s 123O; *Guardianship and Administration Act 2000* (Qld) s 80ZH.

1229 *Disability Services Act 2006* (Qld) s 123ZA(1)–(4)(a); *Guardianship and Administration Act 2000* (Qld) s 80ZE.

1230 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZB; *Guardianship and Administration Act 2000* (Qld) s 80ZF(1)–(4).

1231 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZB; *Guardianship and Administration Act 2000* (Qld) s 80ZS.

<b>Chemical restraint (fixed dose)</b>	—	Consent of: <ul style="list-style-type: none"> <li>• a guardian for a restrictive practice (respite) matter;<sup>1234</sup> or</li> <li>• if there is no guardian for a restrictive practice (respite) matter—an informal decision-maker<sup>1235</sup></li> </ul>	—
<b>Restricted access to objects</b>	Consent of: <ul style="list-style-type: none"> <li>• a guardian for a restrictive practice (general) matter;<sup>1236</sup> or</li> <li>• if there is no guardian for a restrictive practice (general) matter—an informal decision-maker<sup>1237</sup></li> </ul>	Consent of: <ul style="list-style-type: none"> <li>• a guardian for a restrictive practice (respite) matter;<sup>1238</sup> or</li> <li>• if there is no guardian for a restrictive practice (respite) matter—an informal decision-maker<sup>1239</sup></li> </ul>	Approval by: <ul style="list-style-type: none"> <li>• the Adult Guardian;<sup>1240</sup> or</li> <li>• the chief executive of the Department of Communities<sup>1241</sup></li> </ul>

Table 19.1

19.42 The general approach of the scheme is that containment and seclusion are regarded as the most serious forms of restrictive practice and therefore have the strictest requirements for their use (including a general requirement for Tribunal approval), while restricted access is regarded as the least serious form of restrictive practice and provides for the greatest flexibility for approval or consent.

19.43 Further, the requirements for the use of restrictive practices during respite services or community access services are less onerous than for their use generally. The Explanatory Notes for the Disability Services and Other Legislation Amendment Bill 2008 (Qld) explain the rationale for this approach:<sup>1242</sup>

1232 *Disability Services Act 2006* (Qld) ss 123E (definition of 'short term approval'), 123ZD; *Guardianship and Administration Act 2000* (Qld) s 80ZK.

1233 *Disability Services Act 2006* (Qld) ss 123E (definition of 'short term approval'), 123ZD, 123ZK.

1234 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZC; *Guardianship and Administration Act 2000* (Qld) s 80ZF.

1235 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZC; *Guardianship and Administration Act 2000* (Qld) s 80ZS.

1236 *Disability Services Act 2006* (Qld) s 123ZA; *Guardianship and Administration Act 2000* (Qld) s 80ZE.

1237 *Disability Services Act 2006* (Qld) s 123ZA; *Guardianship and Administration Act 2000* (Qld) s 80ZS.

1238 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZB; *Guardianship and Administration Act 2000* (Qld) s 80ZF.

1239 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZB; *Guardianship and Administration Act 2000* (Qld) s 80ZS.

1240 *Disability Services Act 2006* (Qld) ss 123E (definition of 'short term approval'), 123ZD; *Guardianship and Administration Act 2000* (Qld) s 80ZK.

1241 *Disability Services Act 2006* (Qld) ss 123E (definition of 'short term approval'), 123ZD, 123ZK.

1242 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 10.

This situation refers to those adults within the target group who only receive a respite service and/or community access from DSQ or a DSQ funded non-government service. These clients live with their families and enter the DSQ system for short periods in order to receive respite and/or community access services. They do not receive any other disability service.

Consultation indicated that the requirements under the main scheme would prove too onerous for these services and the likely unintended outcome is that respite and community access service providers may consider it unviable to provide respite or community access to adults who exhibit challenging behaviour and their families, who are in most need of these services.

The proposed amendments aim to maintain adequate safeguards for the adult while providing flexibility for respite or community access services.

#### *Tribunal approval of containment and seclusion*

19.44 Section 80V(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may, by order, give approval for a relevant service provider to contain or seclude an adult, subject to the conditions stated in the order. However, the Tribunal may give the approval only if it is satisfied that:<sup>1243</sup>

- (a) the adult has impaired capacity for making decisions about the use of restrictive practices in relation to the adult; and
- (b) there is a need for the relevant service provider to contain or seclude the adult because—
  - (i) the adult's behaviour has previously resulted in harm to the adult or others; and
  - (ii) there is a reasonable likelihood that, if the approval is not given, the adult's behaviour will cause harm to the adult or others; and
- (c) a positive behaviour support plan has been developed for the adult that provides for the containment or seclusion; and
- (d) containing or secluding the adult in compliance with the approval is the least restrictive way of ensuring the safety of the adult or others; and
- (e) the adult has been adequately assessed by appropriately qualified persons, within the meaning of the DSA, section 123E, in the development of the positive behaviour support plan for the adult; and
- (f) if the positive behaviour support plan for the adult is implemented—
  - (i) the risk of the adult's behaviour causing harm will be reduced or eliminated; and
  - (ii) the adult's quality of life will be improved in the long-term; and

<sup>1243</sup>

*Guardianship and Administration Act 2000* (Qld) s 80V(2).



- (g) the observations and monitoring provided for under the positive behaviour support plan for the adult are appropriate.

19.45 Section 80W of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal, in deciding whether to give a containment or seclusion approval, to consider the following:

- (a) the suitability of the environment in which the adult will be contained or secluded;
- (b) if the tribunal is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—
  - (i) the terms of the order; and
  - (ii) the views of the authorised psychiatrist responsible for treatment of the adult under that Act about the containment or seclusion of the adult;
- (c) any strategies, including restrictive practices, previously used to manage or reduce the behaviour of the adult that causes harm to the adult or others, and the effectiveness of those strategies;
- (d) the type of disability services provided to the adult.

19.46 A containment or seclusion approval has effect for the period stated in the order, which cannot exceed 12 months.<sup>1244</sup> The Tribunal may review a containment or seclusion approval at any time on its own initiative or on the application of certain specified persons.<sup>1245</sup>

*Appointment of a guardian for a restrictive practice matter*

19.47 Section 80ZD of the *Guardianship and Administration Act 2000* (Qld) deals generally with the appointment by the Tribunal of a guardian for a restrictive practice matter. The Tribunal may, by order, appoint a guardian for a restrictive practice matter<sup>1246</sup> if it is satisfied that:<sup>1247</sup>

- (a) the adult has impaired capacity for the matter; and
- (b) the adult's behaviour has previously resulted in harm to the adult or others; and
- (c) there is a need for a decision about the matter; and

<sup>1244</sup> *Guardianship and Administration Act 2000* (Qld) s 80Y.

<sup>1245</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZA.

<sup>1246</sup> *Guardianship and Administration Act 2000* (Qld) s 80U includes the following definition:

**restrictive practice matter** means—

- (a) a restrictive practice (general) matter; or
- (b) a restrictive practice (respite) matter.

<sup>1247</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZD(1).

- (d) without the appointment—
  - (i) the adult's behaviour is likely to cause harm to the adult or others; and
  - (ii) the adult's interests will not be adequately protected.

19.48 The appointment of a guardian for a restrictive practice matter cannot exceed 12 months.<sup>1248</sup> The Tribunal may review the appointment of a guardian for a restrictive practice matter at any time on its own initiative or on the application of certain specified persons.<sup>1249</sup>

*Consent by a guardian for a restrictive practice (general) matter*

19.49 Section 80ZE of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian for a restrictive practice (general) matter<sup>1250</sup> may consent to the use of a restrictive practice by a relevant service provider in compliance with a positive behaviour support plan for the adult.<sup>1251</sup> However, section 80ZE(4) provides that the guardian may give consent only if:

- (a) the adult's behaviour has previously resulted in harm to the adult or others; and
- (b) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and
- (c) using the restrictive practice in compliance with the positive behaviour support plan mentioned in subsection (2) is the least restrictive way of ensuring the safety of the adult or others; and
- (d) the adult has been adequately assessed for developing or changing the positive behaviour support plan; and
- (e) use of the restrictive practice is supported by the recommendations of the person who assessed the adult; and
- (f) if the restrictive practice is chemical restraint—in developing the positive behaviour support plan, the relevant service provider consulted the adult's treating doctor; and
- (g) if the positive behaviour support plan is implemented—

1248 *Guardianship and Administration Act 2000* (Qld) s 80ZD(4).

1249 *Guardianship and Administration Act 2000* (Qld) s 29(1)(a), (c). The appointment of a guardian for a restrictive practice matter must be reviewed at least once before the term of the appointment ends: s 29(2).

1250 *Guardianship and Administration Act 2000* (Qld) s 80U provides:

**restrictive practice (general) matter**, for an adult, means a matter relating to the use of a restrictive practice in relation to the adult by a relevant service provider, other than—

- (a) containment or seclusion; or
- (b) any restrictive practice used in the course of providing respite services or community access services to the adult.

1251 *Guardianship and Administration Act 2000* (Qld) s 80ZE(1)–(2).

- (i) the risk of the adult's behaviour causing harm will be reduced or eliminated; and
- (ii) the adult's quality of life will be improved in the long-term; and
- (h) the observations and monitoring provided for under the positive behaviour support plan are appropriate.

19.50 Section 80ZE(5) further provides that, in deciding whether to consent, the guardian must consider the following:

- (a) if the guardian is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—
  - (i) the terms of the order; and
  - (ii) the views of the authorised psychiatrist responsible for treatment of the adult under that Act about the use of the restrictive practice;
- (b) any information available to the guardian about strategies, including restrictive practices, previously used to manage the behaviour of the adult that causes harm to the adult or others, and the effectiveness of those strategies;
- (c) the type of disability services provided to the adult;
- (d) the suitability of the environment in which the restrictive practice is to be used;
- (e) if the restrictive practice is chemical restraint—the views of the adult's treating doctor about the use of the chemical restraint.

*Consent by a guardian for a restrictive practice (respite) matter*

19.51 Section 80ZF of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian for a restrictive practice (respite) matter<sup>1252</sup> may consent to the use of a restrictive practice by a relevant service provider in compliance with a respite/community access plan for the adult.<sup>1253</sup> However, section 80ZF(4) provides that the guardian may give consent only if he or she is satisfied that:

- (a) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and
- (b) the relevant service provider has complied with the DSA, part 10A, division 5; and
- (c) if the respite/community access plan is implemented—

<sup>1252</sup> *Guardianship and Administration Act 2000* (Qld) s 80U provides:

**restrictive practice (respite) matter.** for an adult, means a matter relating to the use of a restrictive practice in relation to the adult by a relevant service provider in the course of providing respite services or community access services to the adult.

<sup>1253</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZF(1)–(2).

- (i) the risk of the adult's behaviour causing harm will be reduced or eliminated; and
- (ii) the adult's quality of life will be improved in the long-term; and
- (d) the observations and monitoring provided for under the respite/community access plan are appropriate.

19.52 However, for giving consent to the use of chemical restraint (fixed dose),<sup>1254</sup> the use of the restrictive practice is not required to be in compliance with a respite/community access plan and the guardian is not required to be satisfied of the matters mentioned in section 80ZF(4). Instead, the guardian may give consent only if he or she is satisfied that there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others.<sup>1255</sup>

*Consent by an informal decision-maker*

19.53 In certain circumstances, an informal decision-maker for an adult may consent to a relevant service provider using a restrictive practice in relation to the adult.<sup>1256</sup>

19.54 If an informal decision-maker is giving consent to a relevant service provider restricting an adult's access to objects, other than in the course of providing respite services or community access services, the informal decision-maker must:<sup>1257</sup>

- (a) apply the general principles; and
- (b) be satisfied—
  - (i) the adult's behaviour has previously resulted in harm to the adult or others; and
  - (ii) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and
  - (iii) using the restrictive practice in compliance with the positive behaviour support plan for the adult is the least restrictive way of ensuring the safety of the adult or others; and
  - (iv) if the positive behaviour support plan for the adult is implemented—

<sup>1254</sup> *Guardianship and Administration Act 2000* (Qld) s 80U applies the definition of 'chemical restraint (fixed dose)' in s 123E of the *Disability Services Act 2006* (Qld):

**chemical restraint (fixed dose)** means chemical restraint using medication that is administered at fixed intervals and times.

<sup>1255</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZF(5).

<sup>1256</sup> See Table 19.1 at [19.41] above.

<sup>1257</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZS(2).

- (A) the risk of the adult's behaviour causing harm will be reduced or eliminated; and
- (B) the adult's quality of life will be improved in the long-term; and
- (v) if the informal decision maker is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—the authorised psychiatrist responsible for treatment of the adult under that Act has been given an opportunity to participate in the development of the positive behaviour support plan.

19.55 If an informal decision-maker is giving consent to a relevant service provider's use of mechanical or physical restraint, or the restriction of an adult's access to objects, in the course of providing respite services or community access services to the adult, the informal decision-maker must:<sup>1258</sup>

- (a) apply the general principles; and
- (b) be satisfied—
  - (i) the adult's behaviour has previously resulted in harm to the adult or others; and
  - (ii) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and
  - (iii) using the restrictive practice in compliance with the respite/community access plan for the adult is the least restrictive way of ensuring the safety of the adult or others; and
  - (iv) if the respite/community access plan for the adult is implemented—
    - (A) the risk of the adult's behaviour causing harm will be reduced or eliminated; and
    - (B) the adult's quality of life will be improved in the long-term.

19.56 However, the requirements for an informal decision-maker's consent to a relevant service provider's use of chemical restraint (fixed dose), in the course of providing respite services or community access services to an adult, are more limited. The informal decision-maker must:<sup>1259</sup>

- (a) apply the general principles; and
- (b) be satisfied—

<sup>1258</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZS(3).

<sup>1259</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZS(3)–(4).

- (i) the adult's behaviour has previously resulted in harm to the adult or others; and
- (ii) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others.

19.57 The reason for having fewer conditions for consenting to the use of chemical restraint (fixed dose) is:<sup>1260</sup>

to allow for the continued use in respite of daily (fixed) dose medication, which has already been prescribed by a doctor; and where, often, the service provider is not in a position to know if the medication is being used primarily for behaviour control. Nor is the service provider of occasional respite care in a position to try and influence the longer term management of behaviour for that adult and to determine the least restrictive option. Adults receiving respite usually do so for short periods only, and it would be impracticable to require a service provider to assess and develop a plan for an adult who they only see occasionally and for short periods. Service providers strongly indicated during consultation that it may become unviable for them to continue to provide respite if there were no lesser requirements for daily (fixed) dose medication.

#### *Short term approval of restrictive practices*

19.58 Section 80ZH of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may give approval for a relevant service provider to contain or seclude an adult for a period up to six months.<sup>1261</sup> The Adult Guardian must be satisfied of a number of specified matters, including that 'there is an immediate and serious risk that, if the approval is not given, the adult's behaviour will cause harm to the adult or others'.<sup>1262</sup> Further, unless it is not practicable in the circumstances, the Adult Guardian must, in deciding whether to give approval, consult with and consider the views of the adult, a guardian or informal decision-maker for the adult and, if the Adult Guardian is aware that the adult is subject to a forensic order or an involuntary treatment order under the *Mental Health Act 2000* (Qld), the authorised psychiatrist responsible for the treatment of the adult under that Act.

19.59 The DSA also sets out the requirements that apply when the approval of the chief executive of the Department of Communities is sought for the short term use of a restrictive practice other than containment or seclusion.<sup>1263</sup>

#### ***The development of policies about the use of restrictive practices***

19.60 The DSA requires a relevant service provider who is authorised to use a restrictive practice to keep and implement a policy about the use of the restrictive practice.<sup>1264</sup> A relevant service provider must keep a copy of its up-to-date policy

<sup>1260</sup> Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 64–5.

<sup>1261</sup> *Disability Services Act 2006* (Qld) s 80ZH.

<sup>1262</sup> *Guardianship and Administration Act 2000* (Qld) s 80ZH(1).

<sup>1263</sup> *Disability Services Act 2006* (Qld) s 123ZK.

<sup>1264</sup> *Disability Services Act 2006* (Qld) ss 123ZT–123ZU.

at the premises where the restrictive practice is used,<sup>1265</sup> and ensure that a copy is available for inspection by:<sup>1266</sup>

- staff of the relevant service provider;
- guardians, informal decision-makers or advocates for adults in relation to whom the restrictive practices are used; and
- a community visitor under the *Guardianship and Administration Act 2000* (Qld).

19.61 The policy of a relevant service provider must be consistent with the Department of Communities' policy about the use of restrictive practices.<sup>1267</sup> In relation to the Department's policy, the DSA provides that, for each type of restrictive practice other than short term approval, the Department's policy must outline the procedures that a relevant service provider must use:<sup>1268</sup>

- where the restrictive practice does not involve containment or seclusion — to develop a positive behaviour support plan for an adult and to review the use of the restrictive practice;
- where the restrictive practice involves containment or seclusion — to review the use of the restrictive practice when required by the chief executive, but at least once during the period of approval;
- to ensure that an individual acting for the relevant service provider who uses the restrictive practice in relation to an adult has sufficient knowledge of the requirements for the lawful use of the restrictive practice, as well as the skills and knowledge required to use the restrictive practice appropriately;
- to monitor the use of the restrictive practice to safeguard against abuse, neglect and exploitation; and
- for restricting access — to minimise the impact on other persons living at the premises.

19.62 The DSA also includes similar requirements in relation to the Department's policy for the use of restrictive practices under a short term approval and in the course of providing respite services or community access services.<sup>1269</sup>

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1265 *Disability Services Act 2006* (Qld) s 123I(c).

1266 *Disability Services Act 2006* (Qld) s 123I(d).

1267 *Disability Services Act 2006* (Qld) s 123ZU.

1268 *Disability Services Act 2006* (Qld) s 123ZV(1)–(2).

1269 *Disability Services Act 2006* (Qld) s 123ZV(3)–(4).

## Monitoring

19.63 To assist with monitoring the use of restrictive practices, the DSA requires a relevant service provider who uses a restrictive practice in relation to an adult to make, and keep for the prescribed period, the records prescribed by the *Disability Services Regulation 2006* (Qld).<sup>1270</sup>

19.64 The DSA also includes notification requirements regarding approvals and consents given for the use of restrictive practices.

19.65 If a relevant service provider is given consent to use a restrictive practice at a service outlet<sup>1271</sup> by a guardian or an informal decision-maker (that is, for a restrictive practice other than containment or seclusion), the relevant service provider must, within the required period, give notice of the approval to the chief executive of the Department of Communities.<sup>1272</sup>

19.66 If a relevant service provider is given consent to use a restrictive practice at a 'visitable site' under the *Guardianship and Administration Act 2000* (Qld),<sup>1273</sup> the relevant service provider must, within the required period, give notice to the chief executive of the Department of Justice and Attorney-General.<sup>1274</sup> The notice must state the name and address of the visitable site and that a restrictive practice approval has been given in relation to the visitable site.<sup>1275</sup> The notice requirement ensures that the Community Visitor Program is aware of those visitable sites at which restrictive practices are being used.<sup>1276</sup>

## Funding

19.67 The Government has committed \$113 million over four years from 2007–08 for a staged implementation of the new service and legislative model in relation to restrictive practices.<sup>1277</sup> Funding has been directed to meet the costs of:<sup>1278</sup>

- implementation of the legislation, including informing key stakeholders;

1270 *Disability Services Act 2006* (Qld) s 123ZZE(2).

1271 *Disability Services Act 2006* (Qld) sch 7 defines 'service outlet' to mean 'a place at which disability services are provided'.

1272 *Disability Services Act 2006* (Qld) s 123ZZF(1)(a), (7). The requirement applies only if there is no other limited restrictive practice approval in effect relating to the service outlet: s 123ZZF(1)(b).

1273 The definition of 'visitable site' is set out at [26.19] below.

1274 *Disability Services Act 2006* (Qld) s 123ZZF(3)(a), (7). The requirement applies only if there is no other restrictive practice approval in effect relating to the visitable site: s 123ZZF(1)(b).

1275 *Disability Services Act 2006* (Qld) s 123ZZF(4).

1276 See Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 90. The Community Visitor Program is considered in Chapter 26 of this Report.

1277 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 13.

1278 Ibid.



- the additional workload for the Tribunal in processing applications for approval, reviewing containment or seclusion approvals, and reviewing the appointment of guardians for restrictive practice matters;
- the additional workload for both the Office of the Adult Guardian and the Community Visitor Program;
- new Specialist Response Service teams (located across regions);
- a new Mental Health Assessment and Outreach Team; and
- a new Centre for Excellence for positive behaviour support.<sup>1279</sup>

## THE USE OF RESTRICTIVE PRACTICES IN RELATION TO ADULTS OUTSIDE THE SCOPE OF THE RESTRICTIVE PRACTICES LEGISLATION

### Introduction

19.68 As explained earlier, the restrictive practices legislation applies only to adults with an intellectual or cognitive disability who receive disability services from a 'funded service provider' within the meaning of the DSA.<sup>1280</sup> For adults who do not receive such services, the issues of whether they may lawfully be subjected to a particular restrictive practice (using that term in its ordinary sense) and of who may make that decision depend to a large extent on the meaning of 'health matter' and 'personal matter' under the *Guardianship and Administration Act 2000* (Qld).

19.69 Section 80T of the *Guardianship and Administration Act 2000* (Qld) provides that Chapter 5B does not limit the extent to which a substitute decision-maker is authorised under a provision of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) to make a health care decision in relation to an adult to whom Chapter 5B does not apply.

### The Tribunal's decisions about the use of restrictive practices

#### ***Decisions made before the enactment of Chapter 5B of the Guardianship and Administration Act 2000 (Qld)***

19.70 In several decisions that pre-date the enactment of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld), the Tribunal considered the extent to which various restrictive practices were authorised under the Act.

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The establishment of the Centre was recommended in the Carter Report: The Hon WJ Carter QC, *Challenging Behaviour and Disability: A Targeted Response — Report to Honourable Warren Pitt MP Minister for Communities Disability Services and Seniors* (2006) 116–19 <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf>> at 13 August 2010.

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See [19.19]–[19.23] above.

19.71 In *Re JD*,<sup>1281</sup> the Tribunal held that ‘a guardian does have the power to make decisions which can involve restriction and in some cases containment provided the decisions are made in accordance with the General Principles and the Health Care Principle set out in Schedule 1 of the Act’.<sup>1282</sup> The Tribunal referred to the definition of ‘personal matter’ and stated that the expression ‘the adult’s care or welfare’ should be interpreted widely.<sup>1283</sup> Further, the Tribunal noted that the definition of ‘personal matter’ includes ‘legal matters not relating to finance or property’. It considered that ‘[c]onsent to being retained or contained in a particular place’ is a legal matter, to which a guardian can consent if the adult is unable to give a valid consent.<sup>1284</sup>

19.72 The Tribunal also held that a guardian has wide powers under section 33 of the *Guardianship and Administration Act 2000* (Qld), ‘which is essentially the basis for the Tribunal’s view that a guardian can consent to restriction and containment’.<sup>1285</sup> It stated that a ‘guardian can provide the consent necessary to allow restriction or containment just as an adult himself could do so if they had capacity’.<sup>1286</sup>

19.73 The Tribunal referred to ‘concern expressed by the Public Advocate in public forums that containment or restriction of adults with impaired capacity may have occurred in the past without any consent from any authorised decision maker’ and that ‘applications would be made to the Tribunal for the appointment of a guardian to provide consent to these practices’.<sup>1287</sup> The Tribunal outlined its approach for dealing with such applications:<sup>1288</sup>

For the Tribunal to ensure that appropriate decision making arrangements are put in place for an adult with impaired capacity it is important that any need for such consents should be foreshadowed in the application and specifically referred to in the supporting documentation. In accordance with best practice, appointments of a guardian for this purpose should be clearly specified. The appointment of a guardian for this purpose should also be of short duration and regularly reviewed to ensure that there are appropriate behaviour management plans in place and that restraint is not used as a management method or for the convenience of carers.

19.74 Subsequently, in *Re WCM*,<sup>1289</sup> the Tribunal held that the use of restrictive practices could amount to health care. Application was made for the appointment of a guardian for WCM so that consent could be given to the use of restrictive

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1281 [2003] QGAAT 14.

1282 Ibid [22].

1283 Ibid [27].

1284 Ibid [28].

1285 Ibid [32].

1286 Ibid.

1287 Ibid [43].

1288 Ibid.

1289 [2005] QGAAT 26.

practices in relation to WCM. It was argued that, at times, he needed to be placed in seclusion and given medication.<sup>1290</sup>

19.75 Although WCM did not have a mental illness, the Tribunal found that he had a 'mental condition' and that his destructive behaviours and aggression were a manifestation of that condition.<sup>1291</sup> The Tribunal referred to the definition in the legislation of 'health care',<sup>1292</sup> and held that:<sup>1293</sup>

any medication which is required to be given to treat Mr WCM's mental condition is health care within the definition as it is given to maintain or treat Mr WCM's mental condition and is given at the direction of his health provider.

19.76 It therefore held that the Adult Guardian as WCM's statutory health attorney could consent to the use of medication to treat WCM's mental condition.<sup>1294</sup>

19.77 The Tribunal also considered that the management of WCM's mental condition involved the need to consent to a behaviour management plan, 'which could involve the use of restrictive practices such as seclusion' to control his behaviour.<sup>1295</sup>

19.78 The Tribunal was satisfied on the evidence that:<sup>1296</sup>

seclusion and indeed some other restrictive practices can be accurately characterised as 'treatment' and therefore come within the definition of 'health care' because seclusion and indeed restraint do relieve symptoms of the mental condition and do have a therapeutic effect on aggression and disruptive behaviour, which are the manifestations of the mental condition.

19.79 Although the Tribunal held that the Adult Guardian, as WCM's statutory health attorney, could consent to the use of seclusion or restraint, it nevertheless appointed the Adult Guardian as WCM's guardian. It considered that:<sup>1297</sup>

The Tribunal is satisfied in this case that this is an appropriate case for the appointment of the [Adult Guardian] as a formal guardian for health care because if there is an appointment the appointment will be regularly reviewed by the Tribunal and the Tribunal can in fact monitor the use of seclusion if it is actually used from time to time.

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Ibid [7].

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Ibid [45].

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See *Guardianship and Administration Act 2000* (Qld) sch 2 s 5 (Health care).

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[2005] QGAAT 26, [47].

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Ibid.

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Ibid [48]. The Tribunal took a similar view in *Re MLI* [2006] QGAAT 31.

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[2005] QGAAT 26, [48].

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Ibid [55].

19.80 The Tribunal appointed the Adult Guardian as WCM's guardian for six months. This was consistent with a protocol between the Tribunal and the Office of the Adult Guardian regarding behaviour management and restrictive practices, which provided that the six months was the maximum period for which a guardian for a restrictive practice would be appointed.<sup>1298</sup>

19.81 In *Re MLI*,<sup>1299</sup> the Tribunal considered the circumstances in which seclusion can fall within the definition of 'health care'. It stated:<sup>1300</sup>

the Tribunal is satisfied that MLI has a mental condition as a result of intellectual disability and chromosomal abnormality and that his behaviours are a manifestation of these conditions which are mental conditions because they affect his mental functioning.

A guardian can therefore consent to seclusion which fits within the definition of health care i.e., that it is used to maintain or treat a mental condition and carried out under the direction and supervision of a health provider. Normally this would be fully set out in a Behaviour Management Plan which a guardian could consent to. What is of concern to the Tribunal is that seclusion which is used as a treatment under the *Mental Health Act 2000* may only be carried out in accordance with the requirements of that Act in relation to authorisation, duration and observation. Accordingly, adults with an intellectual disability receiving the same treatment as a person with a mental illness are not afforded the same protections except to the extent that they fall within the Protocol between the Office of the Adult Guardian and this Tribunal.

19.82 The Tribunal considered what practices would, or would not, constitute health care within the meaning of the legislation.<sup>1301</sup>

it must be made quite clear that any practices that go beyond health care cannot be authorised by a guardian and that restrictive practices that do not fit within the definition of health care, that is, practices that are not put in place to relieve the symptoms of the manifestations of a mental condition and which are not authorised or supervised by a health provider cannot be health care and cannot be authorised or consented to by a guardian. If restrictive practices restrict the fundamental liberties of an adult to an extent that they go beyond what can be truly characterised as health care then these practices would require specific legislative power similar to the Victorian Disability Bill.

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What can be authorised as health care however is a strategy put in place by a health professional either a psychologist or other professional trying to manage aggressive behaviours to minimise the distress to the adult. The important distinction here is that the distancing of people from the adult or the placing of the adult in a quiet room is aimed at assisting the adult to come to terms with the management of his condition. The strategy is not put in place permanently but as a situation arises and is of short duration and monitored regularly.

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1298 Ibid [13].

1299 [2006] QGAAT 31.

1300 Ibid [46]–[47].

1301 Ibid [49], [51].

Importantly the strategy is put in place to de-escalate distress and not to protect the staff.

***Decisions made after the enactment of Chapter 5B of the Guardianship and Administration Act 2000 (Qld)***

19.83 In *Re AAG*,<sup>1302</sup> the Tribunal considered a number of issues concerning the administration of the antilibidinal drug Androcur to an adult with impaired capacity. AAG had an intellectual impairment but did not have a mental illness.<sup>1303</sup>

19.84 AAG had been charged with a number of sexual offences against children. The Mental Health Court determined that AAG ‘was not of unsound mind’ when the alleged offences were committed. However, it determined that he was permanently unfit for trial.<sup>1304</sup> The Mental Health Court therefore imposed a forensic order on AAG with conditions of limited community treatment.<sup>1305</sup> One of the conditions of the forensic order was that AAG comply with the requirements of the authorised psychiatrist in relation to the taking of prescribed medication and other treatment.<sup>1306</sup>

19.85 The antilibidinal drug Androcur<sup>1307</sup> was prescribed for AAG to reduce his sexual urges.<sup>1308</sup> AAG’s mental health workers were of the view that, while AAG was taking this medication, the risk to the community was reduced and, as a result, he would be able to reside in the community and it was less likely that he would need to be detained in an authorised mental health service under secure conditions.<sup>1309</sup>

19.86 The forensic order was reviewed and confirmed by the Mental Health Review Tribunal on several occasions. When a decision of that Tribunal was taken on appeal to the Mental Health Court, one of the psychiatrists assisting the presiding judge expressed a concern about the use of Androcur in AAG’s case,

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1302 [2009] QGAAT 43.

1303 Ibid [1], [3].

1304 Ibid [2]. See *Mental Health Act 2000* (Qld) ss 267, 270.

1305 If the Mental Health Court decides that a person charged with an indictable offence is permanently unfit for trial for the alleged offences, it may make a forensic order for the person, which is an order that the person be detained in a stated authorised mental health service for involuntary treatment or care: *Mental Health Act 2000* (Qld) s 288(1)(b), (2). The Mental Health Court may, under the forensic order, decide to do any one or more of the following (*Mental Health Act 2000* (Qld) s 289(1)(a)–(b)):

- (a) order that the patient have limited community treatment subject to the reasonable conditions the court considers appropriate;
- (b) approve limited community treatment for the patient subject to the reasonable conditions the court considers appropriate; ...

1306 [2009] QGAAT 43, [2].

1307 See [19.144] below for an explanation of antilibidinal drugs.

1308 [2009] QGAAT 43, [23].

1309 Ibid [43].

stating that it was not a medication for the treatment of a mental illness and could not therefore be authorised under a forensic order.<sup>1310</sup>

19.87 On an application to the Guardianship and Administration Tribunal for the appointment of a guardian and an administrator for AAG, the Tribunal made a declaration that AAG had capacity for all financial matters and for simple personal matters.<sup>1311</sup> The Tribunal considered that that an adult who is not able to consent to medication because of an intellectual disability, but who does not have a mental illness, cannot be compelled to take medication under a forensic order that may include limited community treatment.<sup>1312</sup>

19.88 The Tribunal commented that, in the event that a guardian was appointed to make health care or accommodation decisions for AAG or to consent to restrictive practices for him while he was subject to a forensic order, it would be ‘important to clarify whether the guardian has authority to make decisions for AAG about his care and about taking medication prescribed by the authorised psychiatrist and in particular Androcur’.<sup>1313</sup>

19.89 The Tribunal referred to the evidence before it that:<sup>1314</sup>

Androcur can have significant long term side effects, has had a limited clinical evaluation about its use to reduce sexual urges in men with sexual deviations and has limited efficacy in the absence of the simultaneous use of psychotherapeutic measures.

19.90 The Tribunal considered that ‘a person making a decision to consent to the administration of Androcur would be exercising decision-making about a complex matter’,<sup>1315</sup> although it did not specify whether it was a complex health matter or a complex personal matter. It found that AAG did not have capacity to provide informed consent to the taking of Androcur and that consideration would need to be given to the appointment of a substitute decision-maker for AAG to make such a complex decision for him.<sup>1316</sup>

19.91 Although the Tribunal ultimately appointed a guardian for restrictive practice matters to make decisions about the administration of Androcur to AAG,<sup>1317</sup> it also considered two other options for appointing a substitute decision-maker for AAG:

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1310 Ibid [5].

1311 Ibid [7].

1312 Ibid [20].

1313 Ibid [24].

1314 Ibid [44].

1315 Ibid [46].

1316 Ibid.

1317 See [19.146] below.

- appointing a guardian to make health care decisions for AAG; and
- appointing a guardian to make decisions about personal matters relating to AAG's care.

*Appointment of a guardian to make health care decisions*

19.92 The appointment of a guardian to make health care decisions for AAG was necessary only if the administration of Androcur was health care. The Tribunal therefore sought submissions on that issue.<sup>1318</sup>

19.93 The Public Advocate submitted that Androcur had been prescribed to control AAG's behaviour and was not treatment that fell within the definition of health care as it was not being administered 'for the purpose of maintaining or treating a physical or mental condition experienced by AAG'.<sup>1319</sup> The Adult Guardian expressed a preliminary view that the administration of Androcur 'may not be health care as defined'. The representative of the Director of Mental Health submitted that 'the administration of Androcur was not health care as the medication was not designed to achieve a therapeutic outcome but to reduce sexual urges'. The representative of Disability Services Queensland (now Disability and Community Care Services) submitted that the administration of Androcur 'may be health care as being for the treatment of a mental condition'.<sup>1320</sup>

19.94 As explained later in this chapter, the Tribunal ultimately appointed a guardian for restrictive practice matters to make decisions about the administration of Androcur to AAG.<sup>1321</sup> However, in the course of the proceeding, the Tribunal noted that in a number of decisions made by it before the commencement of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld):<sup>1322</sup>

the Tribunal had determined that where a person had challenging behaviours that were a manifestation of a mental condition (as distinct from a mental illness), then the use of restrictive practices for the purpose of relieving the distress of challenging behaviours could in some circumstances be considered to be treatment for the mental condition provided that it was carried out for this purpose and it was carried out at the direction or under the supervision of a health provider.

19.95 The Tribunal commented that, if the appointment of a guardian for health care was considered as the appropriate means to facilitate lawful consent being given to the administration of Androcur to AAG, it should undertake 'an analysis of the current legislative consent regime post commencement of the [Chapter] 5B provisions ... to ascertain whether the rationale in the Tribunal's previous decisions

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1318 [2009] QGAAT 43, [49].

1319 Ibid [50].

1320 Ibid.

1321 See [19.146] below.

1322 [2009] QGAAT 43, [51].

is still sustainable'.<sup>1323</sup> It noted that this 'is particularly applicable to people with an intellectual or cognitive disability only who do *not* receive services or funding from Disability Services Queensland'.<sup>1324</sup>

*Appointment of a guardian to make decisions about personal matters relating to AAG's care*

19.96 The Tribunal referred to the definition of 'personal matter' in the *Guardianship and Administration Act 2000* (Qld), which is, relevantly, 'a matter ... relating to the adult's care, including the adult's health care, or welfare'.<sup>1325</sup> It also noted that the Act authorises a guardian to do anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.<sup>1326</sup>

19.97 The Adult Guardian submitted that 'a guardian appointed for personal matters could give consent for the administration of Androcur if it was determined that taking the medication was for the care or welfare of the adult'.<sup>1327</sup> The representative of Disability Services Queensland also submitted on a tentative basis that the definition of personal matter could provide the authority for a guardian to consent to Androcur.<sup>1328</sup>

19.98 However, the Public Advocate submitted to the Tribunal that:<sup>1329</sup>

it would in effect be an untenable strain on the wording of the legislation to interpret the meaning of personal matter in such a manner. It was submitted that if the interpretation of personal matter was extended in this manner, an informal decision maker could give consent to the use of Androcur outside either the health care principles or other statutory protections for the use of restrictive practices in the *Guardianship and Administration Act 2000*.

19.99 Similarly, the representative of the Director of Mental Health submitted that 'it would be difficult to make a finding that the administration of Androcur was for the care or welfare of AAG'.<sup>1330</sup>

19.100 The Tribunal noted that its decision in *Re JD*<sup>1331</sup> had considered the extent to which a guardian could make decisions for personal matters and had

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1323 Ibid [52].

1324 Ibid (emphasis added).

1325 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2.

1326 *Re AAG* [2009] QGAAT 43, [54], referring to s 33(1) of the *Guardianship and Administration Act 2000* (Qld).

1327 Ibid [54].

1328 Ibid [56].

1329 Ibid [55].

1330 Ibid [56].

1331 [2003] QGAAT 14. This decision is discussed at [19.71]–[19.73] above.



considered issues of a similar nature to those raised in the Adult Guardian's submission about the scope of personal matters.<sup>1332</sup>

19.101 The Tribunal commented that not all people who might be taking an antilibidinal medication for behaviour modification have the benefit of the safeguards provided by Chapter 5B of the *Guardianship and Administration Act 2000* (Qld). It referred in particular to the potential vulnerability of adults who do not receive disability services that are provided or funded by Disability Services Queensland.<sup>1333</sup>

There are at least three categories of persons with impaired decision-making capacity who may be taking medication such as Androcur for behaviour modification due to their behaviours being a risk to the community but not all of those categories of persons are covered by legislation which safeguards their basic human rights.

The first category is people with an intellectual or cognitive disability who receive services or funding from Disability Services Queensland. These people have safeguards provided by legislation about the use of restrictive practices in [Chapter] 5B of the *Guardianship and Administration Act 2000*.

The second category is people with a mental illness who receive treatment under the *Mental Health Act 2000* who also have safeguards to protect their human rights through the exercise of the General Principles set out in that Act.

The third category is people with an intellectual or cognitive disability only but who do not receive services or funding from Disability Services Queensland. These people, because of their lack of financial connection with Disability Services Queensland do not have the safeguards provided by [Chapter] 5B of the *Guardianship and Administration Act 2000*. While they can have a guardian appointed for health care, it was a matter in contention at this hearing whether a guardian for health care can lawfully consent to the administration of medication constituting a restrictive practice. A similar unresolved issue arises as to whether a guardian for personal matters can lawfully consent to the use of restrictive practices for this category of persons. This potentially places this category of people at a greater risk than those in the first two categories.

19.102 The Tribunal suggested that legislative reform may be necessary to provide safeguards for this third category of persons.<sup>1334</sup>

It is quite possible that the only way to provide safeguards in the use of restrictive practices for those persons with an intellectual or cognitive disability only but who do not receive services or funding from Disability Services Queensland is through legislative changes. The Tribunal notes that the Queensland Law Reform Commission is currently undertaking a reference on the guardianship regime in Queensland.

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1332 [2009] QGAAT 43, [57].

1333 Ibid [61]–[64].

1334 Ibid [66].

## Discussion Paper

19.103 In the Discussion Paper, the Commission observed that the consequence of characterising the use of restrictive practices, at least in some circumstances, as ‘health care’ is that it is possible for consent to the use of such practices to be given by a much wider group of decision-makers than is possible under the restrictive practices legislation. It noted, for example, that consent to containment or seclusion, which generally require Tribunal approval under Chapter 5B, could be given by:<sup>1335</sup>

- a guardian appointed for all personal matters or all health matters;
- an attorney appointed under an enduring power of attorney to exercise power for all personal matters or all health matters; or
- a statutory health attorney.

19.104 The Commission raised as a preliminary issue whether the approach taken by the Tribunal in its pre-Chapter 5B decisions was still appropriate. It suggested that, given the greater regulation of the use of restrictive practices under the DSA and the safeguards created by the approval and consent mechanisms in the *Guardianship and Administration Act 2000* (Qld), it is arguable that, to the greatest extent practicable, the consent mechanisms for the use of restrictive practices outside Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should broadly correspond with the approval and consent mechanisms provided by Chapter 5B. The Commission noted that this would not provide identical safeguards because the provisions in Part 10A of the DSA have no application to adults who do not receive disability services from a funded service provider. However, it was suggested that this would go some way to providing greater parity in relation to the two groups of adults.<sup>1336</sup>

19.105 The Commission suggested that, if it were considered desirable to maintain broad consistency with the use of restrictive practices under Chapter 5B:<sup>1337</sup>

- the Tribunal’s approval would be required for the use of containment or seclusion;
- the consent of a guardian would generally be required for the use of chemical, mechanical or physical restraint;<sup>1338</sup> and

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1335 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.78].

1336 Ibid [7.79].

1337 Ibid [7.80].

1338 Consent to the use of antilipidinal drugs for the purpose of behavioural modification is considered separately. See the discussion commencing at [19.153] below.

- the consent of a guardian would generally be required to restrict an adult's access to objects, although consent could be given by an informal decision-maker if there was no guardian.

19.106 The Commission suggested that it might also be desirable to include specific provisions dealing with the requirements for approval or consent by the Tribunal, a guardian or an informal decision-maker.<sup>1339</sup> In order to maintain consistency, as far as possible, with Chapter 5B of the Act, these provisions could be generally modelled on sections 80V and 80W (for the Tribunal),<sup>1340</sup> section 80ZD (for a guardian)<sup>1341</sup> and section 80ZS (for an informal decision-maker).<sup>1342</sup>

19.107 Another suggestion was that the *Guardianship and Administration Act 2000* (Qld) could also be amended to provide that a Tribunal approval of containment or seclusion does not have effect for more than 12 months<sup>1343</sup> and that the appointment of a guardian to consent to one of the types of restrictive practice mentioned above may not be made for more than 12 months.<sup>1344</sup>

19.108 The Commission also raised the issue of extending the definition of 'personal matter' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) to refer to the new restrictive practice matters that are to be specifically regulated, noting that they would need to be described in a way that distinguishes them from restrictive practice matters under Chapter 5B of the Act.<sup>1345</sup> It noted, however, that it would be necessary to provide that approval for, or consent to, the use of the new restrictive practice matters may be given only in accordance with the new provisions described at [19.105] and [19.106] above. That would ensure that, as a type of personal matter, consent could not be given by a statutory health attorney or an attorney appointed under an enduring document.<sup>1346</sup>

19.109 In the Discussion Paper, the Commission sought submissions on the following issues:<sup>1347</sup>

1339 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.81].

1340 See [19.44]–[19.45] above.

1341 See [19.47]–[19.48] above.

1342 See [19.54]–[19.56] above.

1343 See *Guardianship and Administration Act 2000* (Qld) s 80Y.

1344 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.82]. See *Guardianship and Administration Act 2000* (Qld) s 80ZD(4).

1345 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.83]. Note, the definition of 'personal matter' in the *Guardianship and Administration Act 2000* (Qld) currently refers to 'a restrictive practice matter under chapter 5B': sch 2 s 2(j).

1346 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.84].

1347 Ibid 128–30.

- 7-5 Should the *Guardianship and Administration Act 2000* (Qld) be amended to include new consent mechanisms, broadly corresponding with the approval and consent mechanisms in Chapter 5B of the Act, for the use of restrictive practices in relation to adults to whom Chapter 5B does not apply?
- 7-6 If yes to Question 7-5, for the containment or seclusion of an adult who is outside the scope of Chapter 5B, should the *Guardianship and Administration Act 2000* (Qld):
- (a) specify the circumstances in which the Tribunal may approve the containment or seclusion and, if so, should those circumstances generally be modelled on the requirements of section 80V(2) of the Act;
  - (b) specify the matters that the Tribunal must consider in deciding whether to approve the containment or seclusion and, if so, should those matters generally be modelled on the matters specified in section 80W of the Act; and
  - (c) provide that the Tribunal's approval for the containment or seclusion does not operate for more than 12 months?
- 7-7 If yes to Question 7-5, for restrictive practices (other than containment or seclusion or the administration of an antilipidinal drug) in relation to an adult who is outside the scope of Chapter 5B, should the *Guardianship and Administration Act 2000* (Qld) specify:
- (a) the circumstances in which the Tribunal may appoint a guardian to consent to the restrictive practice and, if so, should those circumstances generally be modelled on the requirements of section 80ZD of the Act (including that the appointment may not be made for more than 12 months);
  - (b) the circumstances in which the guardian may consent to the restrictive practice and, if so, should those circumstances generally be modelled on the requirements of section 80ZE(4) of the Act; and
  - (c) the matters that the guardian must consider in deciding whether to consent and, if so, should those matters generally be modelled on the matters specified in section 80ZE(5) of the Act?
- 7-8 If yes to Question 7-5, for the restriction of an adult's access to objects by an informal decision-maker outside the scope of Chapter 5B:
- (a) should the *Guardianship and Administration Act 2000* (Qld) specify the requirements for the informal decision-maker's consent; and
  - (b) should those requirements generally be modelled on the requirements of section 80ZS of the Act?

- 7-9 Alternatively, is there some other way of providing greater safeguards for the use of restrictive practices in relation to adults to whom Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) does not apply?

## Submissions

### General comments

19.110 The Adult Guardian commented generally that the regulation of the use of restrictive practices outside the restrictive practices legislation is a difficult issue. The Adult Guardian noted that, while she had originally argued that the restrictive practices legislation should apply to all adults with an intellectual or cognitive disability, those adults who are not presently covered by the legislation do not have the benefit of a positive behaviour support plan:<sup>1348</sup>

The basis of the restrictive practices amendments to the DSA 2006 and GAAA 2000 was:

1. To provide indemnity to service providers who use [restrictive practices].
2. To create a regime which through the use of positive behaviour support plans would attempt to modify an adult's behaviour so that over time the need for the use of restrictive practices would diminish.

For clients who do not qualify for Disability Services, there is no source of funding publicly available to provide for the development, implementation or consistent application of response[s] necessary to modify behaviour.<sup>1349</sup> Clients who are unable to secure funding, whether for housing, services or to meet other needs are among the most vulnerable that we see. When appointed to make decisions for clients who have dementia, we will often have few options other than to place them within an aged care high secure unit. In uncontroversial cases these decisions are made in our role as statutory health attorney as a health care decision. Part of the problem for our clients is not the system of consent and not the legal framework, but rather than the lack of any service infrastructure to meet their needs.

When the restrictive practices legislation was introduced, one of the matters that the Adult Guardian argued was that the human rights principles that apply within the DSA 2006 and GAAA 2000 should apply to everyone in Queensland. This would send a statement across the community about the use of these practices. The argument was unsuccessful because of the cost implications and the intrusion that it was felt that this would make into the homes of private citizens. (note added)

19.111 While acknowledging these difficulties, the Adult Guardian considered that, at least for older people in nursing homes, the regulation of containment or seclusion for adults outside the scope of the restrictive practices legislation would

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1348 Submission 164.

1349 The funding of the implementation of the restrictive practices legislation is considered at [19.67] above.

‘simply create a further administrative process which will add to the expense of nursing homes and is unlikely to create tangible benefit’.

19.112 The Adult Guardian considered that the best way of providing greater safeguards for the use of restrictive practices to adults who are outside the scope of the restrictive practices legislation is to provide that decisions may not be made by informal decision-makers:

As a matter of public policy, the human rights principles should apply to all Queenslanders. Decisions about restrictive practices should be made by either attorneys or guardians who are subject to advice directions or recommendations by the tribunal. Informal decision makers should be specifically unable to make any decisions about the use of restrictive practices.

19.113 However, several other respondents, including the former Acting Public Advocate and Queensland Advocacy Incorporated, were of the view that the approval and consent mechanisms for the use of restrictive practices in relation to whom Chapter 5B does not apply should be consistent with, or broadly correspond with, the mechanisms provided by Chapter 5B.<sup>1350</sup>

19.114 The former Acting Public Advocate commented:<sup>1351</sup>

The restrictive practices regime must equally protect the intrinsic human rights of all persons with impaired capacity subject to it. As restrictive practices threaten people’s fundamental rights to dignity, autonomy and freedom, and may be considered by a person as degrading and intrusive, it is essential that the safeguarding of rights be a primary consideration.

19.115 The former Acting Public Advocate also considered that, in the absence of legislative monitoring and regulation of adults receiving restrictive practices outside the restrictive practices legislation, such practices may be entirely ‘inappropriate, unwarranted or unlawful’:

In accordance with Article 14 of the United Nations *Convention on the Rights of Persons with Disabilities*, people with a disability should only be subject to detention or other restrictive practices where these practices occur within the law, and where reasonable safeguards and resources are in place prior to restricting rights.

19.116 The former Acting Public Advocate was particularly concerned about decisions in relation to the use of restrictive practices being made by informal decision-makers:

Decisions to introduce restrictive practices for an adult should be subject to appropriate scrutiny prior to being implemented and during the period of implementation. The Office has concerns that the use of some restrictive practices can be approved by informal decision-makers. Informal decision-makers are not without their own agendas and may be vulnerable to pressures from service providers and/or other family members. Whereas decisions made by the QCAT and by guardians for the restrictive practices are subject to

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1350 Submissions 160, 162, 177.

1351 Submission 160.

considerable scrutiny (although varying), the decisions of an informal decision-maker are not subject to any review processes at all. The Public Advocate considers that this situation presents an unacceptable risk to the adults, and recommends that the legislation establish appropriate degrees of scrutiny for all proposed instances of restrictive practices.

19.117 The former Acting Public Advocate acknowledged the resourcing issues that would result from applying the same requirements to all adults, regardless of whether they were receiving disability services from a funded service provider. However, he considered that the use of restrictive practices without regulation and scrutiny is inappropriate:

There are broad implications if the system is not applied across the board for families who may be caring for a person with 'challenging behaviour', or where services not funded or provided by Disability Services are used. It is acknowledged that there are policy considerations regarding the extension of the scheme, including resourcing issues. However, given that people with 'challenging behaviour' have historically experienced appalling violations of their basic rights and quality of life, and continue to experience abuse, devaluation and restriction of fundamental freedoms, the Public Advocate strongly contends that these tensions must be resolved in favour of adults with impaired decision-making capacity and 'challenging behaviour'.

In the absence of approval and consent mechanisms and regulation of restrictive practices for adults who fall outside Chapter 5B there is a very real risk that inappropriate and abusive practices may be occurring undetected. Use of restrictive practices without regulation and scrutiny is inappropriate. It is imperative that adequate protections for the rights, wellbeing and quality of life of all adults subject to restrictive practices, not merely those in receipt of Disability Services funded or provided services, are implemented. (note omitted)

19.118 Queensland Advocacy Incorporated considered generally that:<sup>1352</sup>

- the *Guardianship and Administration Act 2000* (Qld) should be amended to include new consent mechanisms, broadly corresponding with the approval and consent mechanisms in Chapter 5B of the Act, for the use of restrictive practices in relation to adults to whom Chapter 5B does not apply;
- the *Guardianship and Administration Act 2000* (Qld) should prohibit the use of restrictive practices on this group of adults except in accordance with that Act; and
- the use of restrictive practices on this group of adults, except in accordance with the *Guardianship and Administration Act 2000* (Qld), should attract a statutory penalty.

19.119 A number of respondents who were of the view that the *Guardianship and Administration Act 2000* (Qld) should be amended to include new consent mechanisms that broadly correspond to the approval and consent mechanisms in

Chapter 5B of the Act commented on the particular provisions that should be included.

### **Containment or seclusion**

19.120 The former Acting Public Advocate, Queensland Advocacy Incorporated, the Endeavour Foundation and the family of an adult with impaired capacity were of the view that, for the containment or seclusion of an adult to whom Chapter 5B does not apply, the *Guardianship and Administration Act 2000* (Qld) should:<sup>1353</sup>

- require Tribunal approval;
- specify the circumstances in which the Tribunal should be able to give its approval, which should generally be modelled on section 80V(2) of the Act;
- specify the matters that the Tribunal must consider in deciding whether to give its approval, which should generally be modelled on section 80W of the Act; and
- provide that the Tribunal's approval for containment or seclusion does not operate for more than 12 months.

19.121 Queensland Advocacy Incorporated suggested that the Tribunal should also be satisfied that the adult's basic needs will be met during the period of containment or seclusion, in accordance with the requirements of section 123A of the DSA. It further suggested that, given that Part 10A of the DSA would not apply to these adults, the new provisions should include a requirement for the adult to be assessed and for a positive behaviour support plan for the adult to be developed in line with the requirements contained in Part 10A of the DSA. Queensland Advocacy Incorporated explained the requirement for a positive behaviour support plan:<sup>1354</sup>

Before the Tribunal can approve containment or seclusion under Chapter 5B, it must be satisfied that essential requirements under Part 10A of the *Disability Services Act 2006* (Qld) (DSA) have been complied with. These include the proper assessment of, and the development of a positive behaviour support plan for, the adult. These requirements lie at the heart of W. J. Carter's recommendations for reform of restrictive practices in Queensland. Under the Carter model restrictive practices were intended only as a short-term, last resort to manage individual behavioural episodes when all other management had failed. The indispensable fulcrum for leveraging long-term positive behavioural change was the positive behavioural interventions developed during the assessment and prescribed in the positive behaviour support plan. Restrictive practices could only be justified as part of a plan whose overall aim was enhancing the individual's opportunities and improving their quality of life.<sup>1355</sup>

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1353 Submissions 160, 162, 163, 177.

1354 Submission 162.

1355 WJ Carter, *Challenging Behaviour and Disability: A targeted response*, 2006 pp 12–15.



Data collected by the [Office of the Senior Practitioner] suggests that restrictive practices do not decrease behaviours of concern. 'Other positive interventions (such as anger management skills) should be taught for long-term change in behaviours of concern'.<sup>1356</sup> In fact, the use of restrictive practices unallied with the appropriate positive supportive strategies may be so counterproductive in some cases [that] they precipitate the behaviours they are intended to manage.<sup>1357</sup> Consequently, a legislative regime to protect adults not captured by [Chapter] 5B must mandate the assessment of, and the development of a positive behaviour support plan for, those adults along similar lines to those prescribed under Part 10A of the DSA. Failure to include these requirements would continue to exclude affected adults from the attributes of the Carter model considered indispensable for improving the adult's quality of life, enhancing their opportunities and eliminating or reducing the use of restrictive practices. It would exclude them on the basis that they are not receiving support from Disability Services. (notes in original)

19.122 Queensland Advocacy Incorporated was also of the view that the *Guardianship and Administration Act 2000* (Qld) should express an appropriate statutory minimum requirement for monitoring and observing the adult during containment and seclusion.<sup>1358</sup> The observation regime should be included in the adult's positive behaviour support plan.

### **Other restrictive practices**

19.123 Queensland Advocacy Incorporated suggested that, for an adult outside the scope of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld), only a guardian for restrictive practices who has been appointed by the Tribunal should be able to approve the use of restrictive practices other than containment or seclusion.<sup>1359</sup>

19.124 The former Acting Public Advocate, Queensland Advocacy Incorporated, the Endeavour Foundation and the family of an adult with impaired capacity commented on the circumstances in which it should be possible for consent to be given by a guardian to the use of a restrictive practice other than containment or seclusion or the administration of an antilibidinal drug. In their view, the *Guardianship and Administration Act 2000* (Qld) should be amended to specify:<sup>1360</sup>

- the circumstances in which the Tribunal may appoint a guardian to consent to a restrictive practice, which should generally be modelled on section 80ZD of the Act (including that the appointment may not be made for more than 12 months and must be reviewed at least once during that period);

1356 Office of the Senior Practitioner, *Annual Report 2007–2008*, p 24.

1357 P Ramcharan, *Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers — A Final Report to the Office of the Senior Practitioner*, 2009, p 3.

1358 For example, s 123L(1)(c) of the *Disability Services Act 2006* (Qld) requires a positive behaviour support plan to include details of the procedure for using the restrictive practice, including observations and monitoring, and any other measures necessary to ensure the adult's proper care and treatment, that must happen while the restrictive practice is being used.

1359 Submission 162.

1360 Submissions 160, 162, 163, 177.

- the circumstances in which a guardian may consent to the restrictive practice, which should generally be modelled on section 80ZE(4) of the Act;<sup>1361</sup> and
- the matters that the guardian must consider in deciding whether to consent, which should generally be modelled on the matters specified in section 80ZE(5) of the Act.

19.125 Queensland Advocacy Incorporated was also of the view that the *Guardianship and Administration Act 2000* (Qld) should:

- require a positive behaviour support plan to be developed for the adult along the lines prescribed by the DSA;
- provide that the guardian may consent only if he or she is satisfied that the assessment and plan have been completed and that the proposed restrictive practice accords with the recommendation of the person who assessed the adult; and
- specify an appropriate statutory minimum for monitoring and observing the adult.

### **Restriction of access to objects**

19.126 The former Acting Public Advocate and the family of an adult with impaired capacity were of the view that, for the restriction of access to objects by an informal decision-maker outside the scope of Chapter 5B, the *Guardianship and Administration Act 2000* (Qld) should specify the requirements for the informal decision-maker's consent, which should generally be modelled on section 80ZS of the Act.<sup>1362</sup>

19.127 However, two respondents disagreed with this approach.

19.128 The Endeavour Foundation expressed the view that the *Guardianship and Administration Act 2000* (Qld) should not be amended to include a provision similar to section 80ZS to apply in relation to decisions about adults who are outside the scope of Chapter 5B.<sup>1363</sup>

19.129 Queensland Advocacy Incorporated also considered that it would not be appropriate to model those provisions on the requirements of the restrictive practices legislation, as it considered that the provisions in the restrictive practices legislation do not deal adequately with this issue. Queensland Advocacy Incorporated outlined its concerns:<sup>1364</sup>

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<sup>1361</sup> Queensland Advocacy Incorporated also considered that the circumstances should be modelled on s 80ZE(2)–(3) of the *Guardianship and Administration Act 2000* (Qld).

<sup>1362</sup> Submissions 160, 177.

<sup>1363</sup> Submission 163.

<sup>1364</sup> Submission 162.

Under Part 10A of the DSA an adult's access to objects may be restricted on the authority of an informal decision maker if no guardian for restrictive practices is appointed for the adult. The adult must be assessed before their access to objects may be restricted, but the relevant service provider conducts the assessment. There is no requirement that an appropriately qualified person conducts the assessment. A positive behaviour support plan must be developed for the adult, but there is no provision for an independent body to review that plan or the consent to restricting access if the consent is obtained from an informal decision maker. If the Tribunal appoints a guardian for restrictive practices and that guardian approves restricting access, then that approval, and, consequently, the adult's assessment and positive behaviour support plan must all be reviewed during the course of the appointment, which may last no more than twelve months. No such review occurs if there is no guardian for restrictive practices and an informal decision maker approves restricting access. With no limit upon the length of the approval an informal decision maker may give, it could conceivably continue indefinitely. The review process is the safeguard against lapse from limited and legitimate response into habitual practice, and from transparent regulated use into hidden unregulated abuse. The very idea that a person's fundamental human rights can be restricted without regular and independent review is repugnant both to the basic precepts of human dignity and the fundamental principles of natural justice. It confounds both the ideal of inclusive equity and its formal expression in the [Convention on the Rights of Persons with Disabilities]. (notes omitted)

19.130 In view of these concerns, Queensland Advocacy Incorporated suggested that restricting an adult's access to objects should be subject to the same consent and review mechanisms as mechanical, physical and chemical restraint:

The review of the shortcomings of Part 10A of the DSA and Chapter 5B of the GAA is largely beyond the scope of this review. However, that does not prevent their consideration when contemplating amendments to the GAA outside of Chapter 5B. If shortcomings are identified, it would be unjust to repeat them simply in the name of consistency. QAI believes informal decision makers should not be empowered to authorise restricting access either within or outside the bounds of Chapter 5B. Restricting access should be subject to the same consent and review mechanisms as mechanical, physical and chemical restraint.

19.131 The family of an adult with impaired capacity commented that, when Chapter 5B is reviewed as required by the DSA, the arrangements applying to adults not covered by Chapter 5B should also be reviewed to ensure a consistency of approach.<sup>1365</sup>

### **The Commission's view**

19.132 In the Commission's view, it is highly unsatisfactory that the lawfulness of using a restrictive practice in relation to an adult with an intellectual or cognitive disability, and the requirements for the lawful use of such a practice, depend on whether the restrictive practice is being used by a disability service provider who receives funding from the Department of Communities, by a disability service provider who does not receive such funding, or by an individual acting in a private, as distinct from a commercial, capacity.

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Submission 177.

19.133 Moreover, the earlier discussion in this chapter of the Tribunal decisions that have concerned the use of restrictive practices demonstrates the difficulty of regulating their use on the basis of being either a ‘health matter’ or a ‘personal matter’ under the guardianship legislation.<sup>1366</sup>

19.134 In the Discussion Paper, the Commission sought submissions on a range of issues with a view to determining whether it was possible, by including similar approval and consent provisions to those found in Chapter 5B of the *Guardianship and Administration Act 2000* (Qld), to provide an equivalent level of protection to adults who are not covered by Chapter 5B.

19.135 However, the difficulty with that approach is that, while the approval and consent requirements in Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) are an important component of the restrictive practices legislation, proper safeguards are essential if conduct that might otherwise be unlawful is to be sanctioned. Those safeguards also include the requirements for assessment, the development of positive behaviour support plans, the development of policies about the procedures to be used by service providers in relation to the use of restrictive practices, and notification by service providers to the relevant authorities when restrictive practices are being used to ensure that appropriate monitoring can take place. Under the restrictive practices legislation, these safeguards are all found in the DSA. The Commission is therefore of the view that it is not possible, by mirroring only parts of the restrictive practices scheme, to provide adequate safeguards for adults who are outside the scope of Chapter 5B.

19.136 In the Commission’s view, there can be no justification, in principle, of the current two-tiered system in relation to the use of restrictive practices, under which different groups of adults have the benefit (or disadvantage, as the case may be) of differential levels of protection. Moreover, the two-tiered system that currently applies is arguably inconsistent with the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>1367</sup> The Convention provides relevantly:

**Article 5**  
**Equality and non-discrimination**

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

...

**Article 14**  
**Liberty and security of person**

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

<sup>1366</sup> See [19.70]–[19.102] above.

<sup>1367</sup> See United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006 <<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>> at 13 August 2010.

- (a) Enjoy the right to liberty and security of person;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

**Article 16**  
**Freedom from exploitation, violence and abuse**

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

...

19.137 At the time the restrictive practices legislation was introduced, one of the reasons given for enacting the scheme was that:<sup>1368</sup>

In Queensland, there is no specific legislation which regulates the use of restrictive practices in relation to adults with an intellectual or cognitive disability. This lack of regulation leaves limited protection for the individual against potential abuse or misuse of restrictive practices.

19.138 However, the two-tiered system for regulating the use of restrictive practices means that not all adults with an intellectual or cognitive disability are equally protected from the improper use of those practices. Adults who are outside the scope of the restrictive practices legislation are arguably at greater risk of being arbitrarily deprived of their liberty and of being subjected to abuse in the form of the unlawful use of restrictive practices.

19.139 The Commission has come to the view that the only way to ensure that the rights and interests of *all* adults are adequately safeguarded is to bring all adults within the scope of the restrictive practices legislation.

19.140 The DSA and the *Guardianship and Administration Act 2000* (Qld) should therefore be amended so that the provisions that currently apply to the use of restrictive practices by a funded service provider apply to all providers of disability services, regardless of the source of their funding or whether they in fact receive funding.

19.141 Because the provisions of the restrictive practices legislation are framed in terms of the requirements for service providers, it would not be appropriate for some of these provisions — for example, provisions dealing with the requirement to have policies concerning the knowledge and skills of staff — to apply to individuals acting in a private capacity. Accordingly, the current provisions of the restrictive practices legislation, including the requirements for assessment of the adult and the development of a positive behaviour support plan, should be extended and adapted, as necessary, to regulate the use of restrictive practices by individuals

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Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 3.

acting in a private capacity, such as family members who care for an adult with an intellectual or cognitive disability. The modification of the current restrictive practices legislation should be undertaken jointly by the Department of Communities and the Department of Justice and Attorney-General.

19.142 It will be important that the regulation of the use of restrictive practices by individuals is supported by an education program to inform members of the community of these requirements.

19.143 The Commission acknowledges that these recommendations will result in the regulation of the conduct of a wider range of service providers and individuals than is presently the case, and will also have resourcing implications. However, the primary consideration in deciding the appropriate scope of the restrictive practices legislation must be the human rights of the adults concerned. For this reason, it is important that the scheme that has been specifically developed as the most appropriate way to regulate the use of restrictive practices be extended and become a scheme of general application.

## THE APPLICATION OF THE RESTRICTIVE PRACTICES LEGISLATION TO ANTILIBIDINAL DRUGS

### Introduction

19.144 An issue that has been raised with the Commission in the course of this review is the application of the restrictive practices legislation to antilibidinal drugs, such as Androcur. Androcur is an antiandrogenic hormone that inhibits the influence of male sex hormones.<sup>1369</sup> Antilibidinal medication is sometimes prescribed to reduce the sexual urges of men who have a history of sexual offending or problematic sexual behaviour.<sup>1370</sup> The administration of Androcur has been described as ‘effecting a reversible chemical castration’.<sup>1371</sup>

### The use of antilibidinal drugs under the restrictive practices legislation

#### *The scope of the definition of ‘chemical restraint’*

19.145 As noted earlier in this chapter, ‘chemical restraint’ means ‘the use of medication for the primary purpose of controlling the adult’s behaviour’.<sup>1372</sup> Where the purpose of prescribing Androcur or another antilibidinal drug to an adult with an

1369 Re AAG [2009] QGAAT 43, [16].

1370 Generally, see S Hayes, F Barbouttis and C Hayes, *Anti-libidinal medication and people with disabilities — long-term follow-up of outcomes following third party consent to medication for problematic sexual behaviour: Report to the Criminology Research Council* (2002) <<http://www.criminologyresearchcouncil.gov.au/reports/200001-38.htm>> at 13 August 2010. Androcur is also used in the treatment of inoperable prostate cancer: *MIMS Online*, Androcur (Full prescribing information) <<https://www.mimsonline.com.au>> at 30 September 2010.

1371 Re AAG [2009] QGAAT 43, [58].

1372 *Disability Services Act 2006* (Qld) s 123F(1). The full definition of ‘chemical restraint’ is set out at [19.15] above.

intellectual or cognitive disability is to control the adult's behaviour, it appears that the administration of the drug would therefore constitute a chemical restraint within the meaning of the DSA.

19.146 In *Re AAG*,<sup>1373</sup> which is discussed earlier in this chapter,<sup>1374</sup> the Tribunal commented that the evidence before it established that 'the use of Androcur in the case of AAG had as its primary purpose the control of his behaviour and was not being used for the proper treatment of a diagnosed mental illness or physical condition'.<sup>1375</sup> At a subsequent hearing, the Tribunal appointed the Adult Guardian as AAG's guardian for restrictive practice matters on the basis that Androcur constituted a 'chemical restraint' within the meaning of the DSA and that AAG was funded by and received services from the Department of Communities (Disability Services).<sup>1376</sup>

19.147 The significance of Androcur constituting a chemical restraint under the restrictive practices legislation is that:

- responsibility for developing the positive behaviour support plan for the adult lies with the relevant service provider that is proposing to use the restrictive practice, rather than with the Director-General of the Department of Communities (as is the case where the restrictive practice is containment or seclusion);<sup>1377</sup>
- consent to its general use for an adult may be given by a guardian for a restrictive practice (general) matter;<sup>1378</sup> and
- consent for its use during respite or community access services may be given by a guardian for a restrictive practice (respite) matter.<sup>1379</sup>

19.148 In addition, the administration of Androcur at fixed intervals and times would arguably constitute a 'chemical restraint (fixed dose)'.<sup>1380</sup> In that case, if there was no guardian for a restrictive practice (respite) matter, an informal decision-maker for an adult could consent to the administration of Androcur by a relevant service provider in the course of providing respite or community access services to the adult.<sup>1381</sup> As explained earlier, there are fewer requirements for an

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1373 [2009] QGAAT 43.

1374 See [19.83]–[19.102] above.

1375 [2009] QGAAT 43, [59].

1376 Guardianship and Administration Tribunal, *Annual Report 2008–09* (2009) 25. The Tribunal's decision in relation to this appointment has not been published.

1377 See [19.32] above.

1378 See n 1229 above.

1379 See n 1230 above.

1380 The definition of 'chemical restraint (fixed dose)' is set out at n 1254 above.

1381 See n 1235 above.

informal decision-maker's consent to 'chemical restraint (fixed dose)' in those circumstances than there are for other types of restrictive practices.<sup>1382</sup>

19.149 The Department of Communities has stated in its submission to this Commission that 'the administration of Androcur (or other antilibidinal drugs) was not contemplated in the development of the restrictive practices legislation'.<sup>1383</sup>

19.150 The Explanatory Notes for the Disability Services and Other Legislation Amendment Bill 2008 (Qld) referred to the meaning of 'chemical restraint' in section 123F and gave, as an example, the sedation of the adult:<sup>1384</sup>

Section 123F defines chemical restraint — it is intended to cover the use of medication to primarily control the person's behaviour, such as to sedate the person. It is not intended to cover the use of medication to properly treat a medical cause. ...

Example of 'chemical restraint'

Person C has an acquired brain injury and is receiving a DSQ funded accommodation service. C has a history of extensively damaging his home including the destruction of furniture and fittings, windows, doors, walls, and ceilings. During such an episode, C threw chairs and kitchen knives, injuring cotenants and support staff, as well as C himself. Assessment has identified a number of reliable 'early warning' signs which occur prior to an episode of property destruction. When support staff observe these specific signs, C is administered medication prescribed by a psychiatrist which, as a result of its sedative effects, reduces the escalation in his behaviour. The medication de-escalates the behaviour, resulting in fewer incidents and overall a safer and more stable living environment for all residents.

19.151 While the administration of sedatives and antilibidinal drugs both have the purpose of behavioural control, the use of sedatives differs from the use of antilibidinal drugs in that sedatives tend to be administered on an *ad hoc* basis when an adult is exhibiting particular early warning signs that his or her destructive or harmful behaviour is likely to escalate. In contrast, antilibidinal drugs tend to be administered on a long-term basis and not to deal with any particular imminent situation.

19.152 Further, the decision whether to administer Androcur to reduce a man's sexual urges involves important legal, medical and ethical considerations. Androcur has a number of serious side effects, including liver toxicity, thrombotic phenomena, breast development and osteoporosis.<sup>1385</sup> It has been suggested that there are particular risks 'associated with prescription of medication for people with intellectual disabilities who may not be able to report side effects and bodily

1382 See [19.56]–[19.57] above.

1383 Submission 169.

1384 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 38–9.

1385 See *MIMS Online*, Androcur (Full prescribing information) <<https://www.mimsonline.com.au>> at 9 October 2009.



changes, and who may be taking multiple other medications that could result in drug interactions'.<sup>1386</sup>

### **The administration of antilipidinal drugs to adults with impaired capacity who are not covered by the restrictive practices legislation**

#### ***Introduction***

19.153 If the administration of an antilipidinal drug to an adult outside the provisions of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) amounts to health care, a decision about its administration to an adult with impaired capacity will be able to be made by a very wide range of decision-makers:<sup>1387</sup>

- a guardian appointed for all personal matters or all health matters;
- an attorney appointed under an enduring document for all personal matters or all health matters; or
- a statutory health attorney.

19.154 However, if the administration of an antilipidinal drug is not health care, a decision about its administration to an adult with impaired capacity will simply be a decision about a personal matter. Such a decision may be made by a guardian or attorney appointed for personal matters and possibly informally by an informal decision-maker. The substitute decision-maker would be required to apply the General Principles but would not be required to apply the Health Care Principle.

#### ***The law in other jurisdictions***

19.155 New South Wales is the only Australian jurisdiction whose guardianship legislation deals specifically with this issue. Under the *Guardianship Act 1987* (NSW), only the NSW Guardianship Tribunal may consent to the carrying out on a relevant patient of 'special treatment'.<sup>1388</sup> 'Special treatment' includes 'any kind of treatment declared by the regulations to be special treatment for the purposes of this Part',<sup>1389</sup> which includes:<sup>1390</sup>

any treatment that involves the use of androgen reducing medication for the purpose of behavioural control.

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1386 S Hayes, F Barbouttis and C Hayes, *Anti-lipidinal medication and people with disabilities — long-term follow-up of outcomes following third party consent to medication for problematic sexual behaviour: Report to the Criminology Research Council* (2002) 14 <<http://www.criminologyresearchcouncil.gov.au/reports/200001-38.html>> at 13 August 2010.

1387 The substitute decision-maker would be required to apply the General Principles and the Health Care Principle.

1388 *Guardianship Act 1987* (NSW) ss 33(1) (definitions of 'major treatment', 'minor treatment'), 36(1).

1389 *Guardianship Act 1987* (NSW) s 33(1) (definition of 'special treatment' (para (c))).

1390 *Guardianship Regulation 2005* (NSW) cl 9(b).

19.156 Because the definition refers to the purpose for which the androgen-reducing medication is used, the definition would not include the administration of androgen reducing medication that was used in the treatment of a medical condition, for example, prostate cancer.<sup>1391</sup> Accordingly, the Tribunal's consent for that purpose is not required.

19.157 The *Guardianship Act 1987* (NSW) also provides that the NSW Guardianship Tribunal may consent to the carrying out of such treatment if it is satisfied that:<sup>1392</sup>

- (c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient, and
- (d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment—those guidelines have been or will be complied with as regards the patient.

## Discussion Paper

### ***The use of antilibidinal drugs under the restrictive practices legislation***

19.158 In the Discussion Paper, the Commission considered whether the consent requirements that apply to 'chemical restraint' and 'chemical restraint (fixed dose)' under the restrictive practices legislation are appropriate for the administration of antilibidinal drugs or whether the administration of antilibidinal drugs should require greater safeguards.<sup>1393</sup>

19.159 The Commission suggested that, if it were considered desirable to provide greater safeguards for the administration of antilibidinal drugs as a restrictive practice, an option would be to provide that such drugs may be administered only with Tribunal approval. In that regard, it noted that Tribunal approval is currently required in order to contain or seclude an adult under the restrictive practices regime. The Commission suggested that, if Tribunal approval were required for the administration of an antilibidinal drug, it would also be necessary to amend Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) to specify when the Tribunal may approve the use of an antilibidinal drug and the matters that the Tribunal must consider in deciding whether to approve its use. It suggested that one option would be to model those provisions generally on sections 80V and 80W of the Act, which regulate the Tribunal's approval of containment and seclusion. It noted that it would also be necessary to amend the DSA to provide for the specific circumstances in which an antilibidinal drug may be administered with Tribunal approval.<sup>1394</sup>

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1391 See n 1370 above.

1392 *Guardianship Act 1987* (NSW) s 45(3)(b)–(d).

1393 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.62].

1394 *Ibid* [7.63].

19.160 The Commission also noted that, for consistency with the provisions regulating the Tribunal's approval of containment and seclusion, the *Guardianship and Administration Act 2000* (Qld) could provide that the Tribunal's approval of the administration of an antilibidinal drug does not have effect for more than 12 months.<sup>1395</sup>

19.161 The Commission sought submissions on the following issues:<sup>1396</sup>

- 7-1 Is it appropriate that, on the basis that the administration of an antilibidinal drug for the purpose of behavioural control constitutes a 'chemical restraint' within the meaning of section 123F of the *Disability Services Act 2006* (Qld), a guardian for a restrictive practice (general) matter may consent to the administration of an antilibidinal drug to an adult with an intellectual or cognitive disability?
- 7-2 Is it appropriate that, on the basis that the administration of an antilibidinal drug at fixed intervals and times for the purpose of behavioural control constitutes a 'chemical restraint (fixed dose)' within the meaning of section 123E of the *Disability Services Act 2006* (Qld):
- (a) a guardian for a restrictive practice (respite) matter may consent to the administration of an antilibidinal drug at fixed intervals and times to an adult with an intellectual or cognitive disability in the course of the provision of respite or community access services to the adult; or
  - (b) if there is no guardian for a restrictive practice (respite) matter, an informal decision-maker may consent to the administration of an antilibidinal drug at fixed intervals and times to an adult with an intellectual or cognitive disability in the course of the provision of respite or community access services to the adult?
- 7-3 If no to Questions 7-1 or 7-2(a) or (b), should Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) be amended so that Tribunal approval is required for the administration to an adult with an intellectual or cognitive disability of any or all of the following for the purpose of behavioural control:
- (a) an antilibidinal drug generally;
  - (b) an antilibidinal drug in the course of providing respite services or community access services to the adult; or
  - (c) an antilibidinal drug at fixed intervals and times in the course of providing respite services or community access services to the adult?
- 7-4 If Tribunal approval is required for the administration of an antilibidinal drug to an adult with an intellectual or cognitive disability, should the *Guardianship and Administration Act 2000* (Qld):

<sup>1395</sup> See *Guardianship and Administration Act 2000* (Qld) s 80Y.

<sup>1396</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, 122–3.

- (a) specify the circumstances in which the Tribunal may approve its administration and, if so, should those circumstances be generally modelled on section 80V(2) of the Act;
- (b) specify the matters that the Tribunal must consider in deciding whether to approve its administration and, if so, should those matters be generally modelled on section 80W of the Act; and
- (c) provide that the Tribunal's approval does not have effect for more than 12 months (or some other period)?

***Use of antilibidinal drugs under the Guardianship and Administration Act 2000 (Qld) to adults not covered by Chapter 5B***

19.162 In the Discussion Paper, the Commission also considered the use of antilibidinal drugs under the *Guardianship and Administration Act 2000* (Qld) in relation to adults who are not covered by Chapter 5B. It noted that the Public Advocate had expressed concern about the possibility that a decision in relation to the administration of an antilibidinal drug could be made by a statutory health attorney or an attorney under an enduring document, as there would be no oversight of the decision-maker:<sup>1397</sup>

The efficacy of chemical castration as a treatment is questionable ... , the side effects are serious and it represents a major infringement of basic human rights. It would appear grossly inappropriate for there to be any possibility that a decision about chemical castration is a health care decision in relation to which the decision-maker is not subject to supervision. For similar reasons, arguably, it should also not be another type of personal matter which could be made by an informal personal decision-maker.

19.163 The former Public Advocate suggested that, even in relation to guardians, for whom the Tribunal 'provides some minimal supervision', 'the level of supervision available through GAAT combined with the guidance that the [General Principles] and the Health Care Principle currently provide is also inadequate in relation to chemical castration'.<sup>1398</sup>

19.164 The former Public Advocate raised the possibility that 'chemical castration should be specifically excluded from health care or other type[s] of personal matter'. However, if it remained as health care, she suggested a possible way of providing greater safeguards for its use:<sup>1399</sup>

Consideration could be given to whether it is special health care, if indeed, it can or should be characterised as health care at all ... If it was special health care, arguably specific criteria should be prescribed to guide decision-making about it (as they have been in relation to other types of special health care, including sterilisation).

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<sup>1397</sup> Ibid [7.87], referring to correspondence from the Public Advocate, 12 June 2009.

<sup>1398</sup> Ibid [7.88].

<sup>1399</sup> Ibid [7.89].

19.165 The Commission noted that it had raised the issue of whether the consent requirements that apply in relation to the use of a ‘chemical restraint’ under Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) were appropriate for the administration of antilibidinal drugs or whether the administration of antilibidinal drugs should require greater safeguards. It suggested that, if it were decided that:

- the administration of antilibidinal drugs under Part 10A of the DSA should require Tribunal approval under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld); and
- the *Guardianship and Administration Act 2000* (Qld) should, to the greatest extent practicable, include approval and consent mechanisms for the use of restrictive practices outside Chapter 5B of the Act that broadly correspond with the approval and consent mechanisms provided by Chapter 5B;

then the approval or consent requirements for the administration of antilibidinal drugs as a restrictive practice outside Chapter 5B should generally be consistent with the requirements under Chapter 5B and also require Tribunal approval.<sup>1400</sup>

19.166 In order to maintain consistency, as far as possible, with Chapter 5B of the Act, it was suggested that a new provision dealing with the Tribunal’s approval of the use of an antilibidinal drug could be generally modelled on the requirements of sections 80V and 80W, which regulate the Tribunal’s approval of containment and seclusion, but without the references in those sections to the adult’s positive behaviour support plan.<sup>1401</sup> For the same reason, it was also suggested that the legislation could be amended to provide that the Tribunal’s approval has effect for a period of not more than 12 months.<sup>1402</sup> This would ensure that the drug could not be administered indefinitely but would be reviewed regularly to determine whether it was continuing to have a positive effect on the adult.<sup>1403</sup>

19.167 The Commission sought submissions on the following issues:<sup>1404</sup>

- 7-10 Should the approval or consent requirements for the administration of an antilibidinal drug as a restrictive practice outside the scope of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) generally be consistent with the approach that is taken in relation to the approval or consent requirements for the administration of an antilibidinal drug under Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld)?

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1400 Ibid [7.90].

1401 See [19.44]–[19.45] above.

1402 See *Guardianship and Administration Act 2000* (Qld) s 80Y.

1403 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [7.91].

1404 Ibid 133.

7-11 If no to Question 7-10:

- (a) who should be able to consent to the administration of an antilibidinal drug for the purpose of behavioural control to an adult with impaired capacity; and
- (b) in what circumstances should it be possible for consent to be given?

## Submissions

### *Use of antilibidinal drugs under the restrictive practices legislation*

19.168 As mentioned earlier, the Department of Communities confirmed that the administration of Androcur and other antilibidinal drugs was not contemplated in the development of the restrictive practices legislation.<sup>1405</sup> The Department considered that a number of concerns arise if antilibidinal drugs are classified as chemical restraint under the legislation. In particular, it anticipated that it would be difficult, in developing a positive behaviour support plan for the adult, to meet the statutory requirement to detail the strategy for reducing or eliminating the use of the restrictive practice.<sup>1406</sup>

If antilibidinal drugs are classified as chemical restraint under the restrictive practices scheme, a number of concerns arise. In order for the service provider to lawfully use a restrictive practice, the legislation requires a number of things to be done (s 123ZA DSA). Under the full scheme, of particular relevance is the requirement of an assessment (s 123J DSA); and based on this assessment, a positive behaviour support plan (PBSP) must be developed for which there are a number of minimum requirements (s 123L DSA). Also, the restrictive practice must be approved by the relevant decision maker (in this case, this would usually be a guardian appointed for restrictive practice matters). This decision maker must consent to the use of the drug in the context of the PBSP.

The difficulty arises when the service provider is developing a PBSP, which incorporates the use of Androcur (and other antilibidinal drugs). In particular, the difficulty in meeting one of the minimum requirements, which is to include in the PBSP (s 123L(2)(f) DSA) a strategy for reducing or eliminating the use of the restrictive practice — which in the case of the use of an antilibidinal drug, may be unachievable.

19.169 The Department of Communities referred to the side effects of antilibidinal drugs, and suggested that the restrictive practice provisions of the *Guardianship and Administration Act 2000* (Qld) may provide a stronger set of safeguards for the adult than the general health care provisions of the Act:

Androcur has multiple unpleasant side effects. Some psychiatrists require informed consent before prescribing Androcur because they are of the view the potential side effects may far outweigh any benefits. In relation to offenders in

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1405 See [19.149] above.

1406 Submission 169.

the criminal justice system, the use of Androcur will only be ordered as part of a sentencing order with the consent of the accused.

There is a case that seeking consent under the restrictive practice provisions of the GAA Act for the administration of Androcur to an adult with an intellectual or cognitive disability with impaired decision making capacity for the matter provides a stronger set of safeguards for the adult subject to Androcur as chemical restraint.

However, there is also the case that while gaining consent to the administration of Androcur under the health care provisions of the Act — as a health care matter — (rather than the restrictive practices provisions), does provide some measure of safeguard for the adult and accountability by the service provider. Under the health care provisions, the service provider and the prescribing clinician do not face the demanding and possibly unrealistic requirement to reduce or eliminate the use of Androcur (as chemical restraint) through positive behaviour support strategies.

19.170 A number of respondents addressed the issue of whether the administration of antilibidinal drugs is appropriately regulated by the restrictive practices legislation.

19.171 The Adult Guardian and another respondent both considered it appropriate that a guardian for a restrictive practice (general) matter may consent to the administration of an antilibidinal drug to an adult with an intellectual or cognitive disability.<sup>1407</sup>

19.172 The Adult Guardian also considered it appropriate that a guardian for a restrictive practice (respite) matter may consent to the administration of an antilibidinal drug at fixed intervals and times to an adult in the course of the provision of respite or community access services to the adult. However, in her view, an informal decision-maker should not be able to give such consent as an informal decision-maker does not have the safeguard of a limited appointment and his or her decisions are not therefore overseen by the Tribunal.<sup>1408</sup>

19.173 The Adult Guardian was of the view that Tribunal approval should not be required for the administration of an antilibidinal drug to an adult with an intellectual or cognitive disability, whether generally, in the course of providing respite or community access services to the adult, or at fixed intervals and times in the course of providing respite or community access services to the adult. She considered that guardians were best placed to make these decisions and that, 'given the circumstances in which this drug is used, the formality, cost and time delays inherent in this are unwarranted'. The Adult Guardian outlined the extent to which antilibidinal drugs are, in her experience, used and described the current mechanisms for monitoring their use:

The understanding of the Adult Guardian is that antilibidinals are used in extremely rare cases. For example in our client group of approximately 1200 appointments, we hold appointments for health care for 6 male adults who have

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1407 Submissions 54A, 164.

1408 Submission 164.

been prescribed androcur. All are on forensic orders and have a history of sexual offending. All have intellectual disability. In their lives decisions about their care is scrutinised by the Mental Health Review Tribunal, the Queensland Civil and Administrative Tribunal, each has a treating psychiatrist, and each has a guardian. In one of these cases androcur was trialled unsuccessfully and discontinued because it failed to reduce the adult's testosterone level. In four cases, when combined with cognitive behaviour therapy, it has assisted to manage offending behaviour and the adult is able to live in the community with support in a relatively unrestricted environment. Regular blood testing occurs to monitor their physical reaction to the drug. In one case the Adult Guardian was dissatisfied with the supervision being provided by the treating psychiatrist and advocated for his removal. Queensland Health facilitated this. In the other matter the adult continues to live on an authorised mental health site. Unlike sterilisation, with the discontinuation of use of the drug, testosterone levels return to normal ie it is not a permanent effect and ends once the effect of the drugs are removed from the adult's system.

19.174 The Adult Guardian considered that a requirement for Tribunal approval for the use of antilibidinal drugs would result in a loss of flexibility, and that a guardian for a restrictive practice matter should continue to be able to consent to the use of antilibidinal drugs:

The proposal that the tribunal make decisions concerning the use of antilibidinal medication will introduce another formal hearing to the process, when [Mental Health Review Tribunal] hearings are already occurring every 6 months. The Adult Guardian is of the view that guardians are in a position to monitor and work with the treating team to change the use of the medication as required from time to time. This flexibility is lost with a tribunal hearing to authorise use of the drug.

The guardian's role in authorising the use of this medication is subject to supervision by the tribunal who may review their appointment or give advice, directions or recommendations as appropriate.

In addition the level of responsibility for authorising the use of this medication is no greater than the level of responsibility otherwise exercised by guardians. Guardians already make significant decisions about a whole range of drugs which do not have a sedative effect and which may be prescribed for behaviour as opposed to a medical condition including powerful antipsychotic medication such as clozapine.

There is a risk that, in setting up a dual tribunal process, the medication will simply be used without proper authorisation or supervision because the dual process, lack of flexibility and time commitment involved becomes onerous.

Perhaps the focus of any legislative change might best be directed to questions of whether a guardian for health care or personal matters could consent and whether an informal decision maker can consent.

...

There is no evidence of systemic abuse of the use of antilibidinals which would justify approval only being given to their use by a publicly constituted tribunal. Because of the nature of the drug, there are strict guidelines about its use, with testosterone levels being regularly monitored. There is no reason to suppose



that an appointed attorney or guardian cannot make a considered decision about the appropriateness of its use in the context of this framework.

19.175 However, several respondents, including the former Acting Public Advocate, Queensland Advocacy Incorporated and the Endeavour Foundation, were of the view that the restrictive practices legislation does not appropriately regulate the administration of antilibidinal drugs.<sup>1409</sup>

19.176 The former Acting Public Advocate submitted that the use of antilibidinal drugs as chemical restraint of adults with an intellectual or cognitive disability raises the following concerns:<sup>1410</sup>

- Studies indicate that chemical castration and/or restraint is, at best, of limited effectiveness. The dubious success and effectiveness of chemical castration is identified in numerous sources.<sup>1411</sup>
- Expert advice from Queensland professionals working in the field confirms that factors involved in sexual offending are complex, and that using chemical intervention as the primary source of control is unlikely to be effective.<sup>1412</sup> It has been suggested that antilibidinal medication should be used only in conjunction with psychological treatment or cognitive behaviour therapy.<sup>1413</sup>
- There is evidence to suggest that antilibidinal drugs can have multiple and serious side effects, including cognitive deficits, weight gain, depression, impotence, sleep disturbances, liver problems, breast development, thrombosis (leading to heart attack), and osteoporosis.<sup>1414</sup> Some adults with IDMC may not have the ability to communicate or convey symptoms of side effects or adverse reactions to antilibidinal medication, and are therefore vulnerable.<sup>1415</sup> 'Challenging behaviours' may also be exacerbated in these circumstances.
- Regardless of public perceptions, community safety will not necessarily be addressed by simply providing a chemical restraint. Sexual offences ought also to be seen within the social context in which they occur, as they frequently involve powerless, marginalised and

1409 Submissions 160, 162, 163, 177.

1410 Submission 160.

1411 Davies, A. & Lamont, L 'MP suggests castration for sex offenders' *The Sydney Morning Herald* (24 November 2004) <<http://www.mako.org.au/newsart19.html>> at 13 November 2007; Moore, T. O. 'Testosterone and male behaviour: Empirical research with hamsters does not support the use of castration to deter human sexual aggression' (2001) 3(3) *North American Journal of Psychology* 503–518 at 514; and Spalding, L H, *Florida's 1997 Chemical castration law: A return to the Dark Ages* (1998) <<http://www.law.fsu.edu/journals/lawreview/frames/252/spalfram.html>> 30 November 2009.

1412 The complexity of the issues associated with chemical castration is canvassed to some extent in the Queensland Government's *A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders* (June 2008).

1413 Ibid 21.

1414 MIMS Online, *ANDROCUR: Adverse Reactions* <[www.mims.com.au](http://www.mims.com.au)> at 4 December 2009; Bayer Australia Ltd, *ANDROCUR Consumer Medicine Information* (2008) <<http://www.bayer.com.au>> at 4 December 2009.

1415 Office of the Public Advocate, *In Sickness and in Health ... addressing the health care needs of adults with a decision-making disability* (March 2008) 14 <[www.publicadvocate.qld.gov.au](http://www.publicadvocate.qld.gov.au)> at 30 November 2009.

mistreated individuals. Questions arise about whether this behaviour will cease, even if chemical restraint has the intended effect, or whether it will manifest in other undesirable or dangerous ways.

- Legislation concerning decision-making for adults with impaired capacity provides for the principle of the least restrictive alternative.<sup>1416</sup> This principle requires that a particular restrictive action should only be taken after all other less controlling strategies have been considered and/or attempted. Accordingly, the administration of antilibidinal medication, particularly to vulnerable individuals who are incapable of providing informed consent, requires careful consideration to determine whether it is the least restrictive option available. (notes in original)

19.177 The former Acting Public Advocate was of the view that antilibidinal drugs should be treated in the same way as containment and seclusion, the use of which require the Tribunal's approval. He considered that this would ensure that the use of antilibidinal drugs for adults with impaired capacity was subject to greater safeguards and monitoring.

19.178 The former Acting Public Advocate was also of the view that it was not appropriate for either a guardian for a restrictive practice (respite) matter or an informal decision-maker to be able to consent to the administration of antilibidinal drugs at fixed intervals and times.<sup>1417</sup>

As noted in the Discussion Paper, adults generally receive respite/community access services for only short periods of time. Consequently, particular care needs to be paid to respite and temporary support arrangements as, given the continually changing environments (such as high levels of staff turnover resulting in minimal knowledge of service users; rotation of service users; the presence of other service users with high and complex support needs; and alterations in physical environments) incidences of challenging behaviour are arguably more likely to occur. From this perspective, mechanisms for protection of rights under short-term emergency approval and within respite facilities need to be more rigorous than those currently contained in the GAA.

A guardian for a restrictive practice (respite) matter and informal decision-makers are not subject to the same strict conditions when approving chemical restraint (fixed dose) for use in the course of provision of respite services as when approving other restrictive practices. In providing consent to the use of a chemical restraint (fixed dose) in the course of providing respite or community access services, an informal decision-maker is not required to take into account the list of considerations detailed in section 80ZS(3)(b)(iii) and (iv). Further, where a fixed dose is to be approved, neither an informal decision-maker nor a guardian for a restrictive practice (respite) matter is required to be satisfied of the even stricter considerations detailed in section 80ZF(2) and (4), or the considerations to which a guardian for a restrictive practice (general) matter must have regard under section 80ZE(4) and (5) of the GAA. As a result, there are less safeguards for the adult, and antilibidinal treatment for short term or respite use may be more readily approved.

<sup>1416</sup> *Guardianship and Administration Act 2000* (Qld) s 5(d) and General Principle 7.

<sup>1417</sup> Submission 160.

Further, given the questionable effectiveness and potential side effects arising from long term use of antilibidinal drugs... it is not known whether anti-libidinal medication is appropriate for short term use. In this regard one Canadian psychiatrist has noted:

The medication may have to be taken for years without interruption; premature discontinuance may be associated with relapse, and continuous monitoring and adjunctive counselling is essential to ensure optimal compliance, thereby reducing the likelihood of re-offending.<sup>1418</sup>

While it is acknowledged that it may be impracticable where a chemical restraint is being administered on a short term basis for a guardian, informal decision-maker or service provider to be subject to the same requirements as guardians for restrictive practice (general) matters, where use of antilibidinal drugs (which have potentially serious and dangerous adverse effects, and are generally only for long-term use) is contemplated even for a very short period only, it is not appropriate for decision-making to rest with substitute decision-makers. (note in original; some notes omitted)

19.179 The Endeavour Foundation was of the view that it is not appropriate that, under the restrictive practices legislation, a guardian for a restrictive practice (general) matter may consent to the administration of an antilibidinal drug. It commented:<sup>1419</sup>

These drugs are quite complex and are given at times to minimise the impact on the carers and/or families. Therefore there needs to be a higher bar imposed for the determination of whether the drug is required and/or appropriate. There also needs to be consideration given to the need to review and monitor the use of these drugs and their side effects.

19.180 The former Acting Public Advocate and another respondent were in favour of requiring Tribunal approval for the administration of:<sup>1420</sup>

- an antilibidinal drug generally;
- an antilibidinal drug in the course of providing respite services or community access services to the adult; and
- an antilibidinal drug at fixed intervals and times in the course of providing respite services or community access services to the adult.

19.181 Several respondents, including the former Acting Public Advocate and the Endeavour Foundation, were of the view that the *Guardianship and Administration Act 2000* (Qld) should:<sup>1421</sup>

<sup>1418</sup> AJ Cooper, 'Review of the role of two antilibidinal drugs in the treatment of sex offenders with mental retardation' (February 1995) 33 *Mental Retardation* 42, 47.

<sup>1419</sup> Submission 163.

<sup>1420</sup> Submissions 160, 177.

<sup>1421</sup> Submissions 160, 163, 177.

- specify the circumstances in which the Tribunal may approve the administration of an antilibidinal drug, which should be generally modelled on section 80V(2) of the Act;
- specify the matters that the Tribunal must consider in deciding whether to approve its administration, which should be generally modelled on section 80W of the Act; and
- provide that the Tribunal's approval does not have effect for more than 12 months.

19.182 The former Acting Public Advocate considered that, by providing that the Tribunal's approval does not have effect for more than 12 months:<sup>1422</sup>

This would enable the Tribunal to review at the end of the 12 month period whether the antilibidinal drug is having the desired outcome for the adult, the impact of the drug on the adult's general health, the appropriateness of the use of the antilibidinal medication, and whether there is an ongoing need for the restrictive practice. It is suggested that the use of antilibidinal medication should be subject to the same review process as that prescribed for containment and seclusion approvals by section 80ZB of the GAA.

19.183 Queensland Advocacy Incorporated commented that 'the administration of chemical restraint at fixed intervals and times requires more rigorous control than chemical restraint administered as an ad hoc response to individual behavioural incidents'.<sup>1423</sup> It therefore proposed that Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should be amended so that Tribunal approval is required for the general administration of an antilibidinal or other drug at fixed intervals and times to an adult with an intellectual or cognitive disability for the purpose of behavioural control. In its view, the *Guardianship and Administration Act 2000* (Qld) should also be amended:

- to specify the circumstances in which the Tribunal may approve the drug's administration, which should generally be modelled on section 80V(2) of the Act;
- to specify the matters that the Tribunal must consider in deciding whether to approve the drug's administration, which should generally be modelled on section 80W of the Act;
- to specify an appropriate statutory minimum for monitoring and observing the adult during the period for which the medication is being used; and
- to provide that the Tribunal's approval does not have effect for more than 12 months.

19.184 Queensland Advocacy Incorporated was further of the view that, if Tribunal approval were required for the administration of an antilibidinal (or other)

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1422 Submission 160.

1423 Submission 162.

drugs at fixed intervals, that approval should constitute the authority for a service provider to continue the drug's administration during respite or community access, although the service provider should be required to comply with all the terms contained in the order. However, if Tribunal approval were not required for the administration of an antilibidinal (or other) drugs at fixed intervals, then Tribunal approval should be sought for the administration of the drug at fixed intervals and times during respite or community access. This should require an assessment and the development of a positive behaviour support plan.

19.185 Pave the Way commented that guardians for a restrictive practice matter should not have the authority to consent to the administration of antilibidinal drugs under the restrictive practices legislation.<sup>1424</sup>

19.186 Another respondent commented that Tribunal monitoring and reviewing of consent for the administration of antilibidinal drugs 'may inspire public confidence and lead to better process and practice'.<sup>1425</sup>

19.187 The father of an adult son with impaired capacity commented generally that, while there is a need for legislation to deal with seclusion and containment, the restrictive practices provisions in relation to chemical restraint are excessive and paternalistic. He expressed his concern about 'legislating for such specific instances other than giving the power to make such a decision to an authority such as the Mental Health Tribunal'.<sup>1426</sup>

#### ***Use of antilibidinal drugs under the Guardianship and Administration Act 2000 (Qld) to adults not covered by Chapter 5B***

19.188 The Adult Guardian considered that the requirements for the administration of antilibidinal drugs to adults with impaired capacity who are outside the scope of the restrictive practices legislation should not be made inflexible.<sup>1427</sup>

The changes to DSA 2006 and GAAA 2000 have been criticised as being too complex and requiring too much formality. One of the unforeseen outcomes of the introduction of the changes in respect to chemical restraint in particular is that doctors are determining that patients who previously had no diagnosed mental or physical condition now have a diagnosed condition and therefore are excluded from the decision making framework provided in the legislation.

The decision making about the use of these drugs needs to be sufficiently informal, accessible and supervised so that doctors do not produce diagnoses to circumvent the consent processes. If appropriately appointed decision makers are in place, there is no reason why these decisions are any more difficult for them to make than decisions about the use of other drugs with equally significant side effects, or end of life decisions. As with other treatments they administer, if doctors or other people in a person's life believe

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1424 Submission 135. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

1425 Submission 165.

1426 Submission 27A.

1427 Submission 164.

that appropriate decisions are not being made, the matter can be referred to the tribunal or to the Adult Guardian for investigation.

19.189 However, the former Acting Public Advocate was of the view that the use of antilibidinal medication should be specifically excluded from the definitions of 'health care' and 'personal mater' so that neither a formal nor an informal decision-maker can consent to its use. He was also of the view that Tribunal consent should be required for the administration of such drugs as a restrictive practice outside Chapter 5B of the *Guardianship and Administration Act 2000* (Qld):<sup>1428</sup>

the approval and consent requirements for the administration of an antilibidinal drug as a restrictive practice outside Chapter 5B should be consistent with the amendments proposed to the requirements under Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the GAA, namely that only the Tribunal should be empowered to consent to and approve the use of an antilibidinal drug as a restrictive practice. This would ensure that the rights and interests of all vulnerable adults for whom chemical castration is proposed, whether or not they receive Disability Services funded services or support, are safeguarded to a greater extent.

19.190 Queensland Advocacy Incorporated considered that the provisions regulating the administration of antilibidinal drugs to adults outside the scope of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should broadly correspond with the requirements it had suggested for the containment or seclusion of adults outside Chapter 5B. In its view:<sup>1429</sup>

- only the Tribunal should be able to approve the administration of antilibidinal drugs;
- the circumstances in which the Tribunal may give its approval should generally be modelled on the requirements of section 80V(2) of the *Guardianship and Administration Act 2000* (Qld);
- the *Guardianship and Administration Act 2000* (Qld) should include a requirement that the adult be assessed and a positive behaviour support plan for the adult developed in line with the requirements of Part 10A of the DSA;
- the *Guardianship and Administration Act 2000* (Qld) should specify an appropriate minimum for monitoring and observation of the adult while the medication is being used;
- the *Guardianship and Administration Act 2000* (Qld) should specify the matters that the Tribunal must consider in deciding whether to approve the medication, which should generally be modelled on the matters specified in section 80W of the Act; and

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1428 Submission 160.

1429 Submission 162.

- the *Guardianship and Administration Act 2000* (Qld) should provide that the Tribunal's approval does not operate for more than 12 months.

19.191 A respondent who is a long-term Tribunal member was of the view that the best approach for dealing with this issue was to make the administration of antilibidinal drugs for the purpose of behavioural control a category of special health care.<sup>1430</sup>

19.192 Pave the Way also considered that the best way to deal with the administration of antilibidinal drugs to adults who are not covered by Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) was to make antilibidinal drugs a category of special health care under the legislation. That would have the effect that their use would then require Tribunal approval. It did not support any amendment of the legislation to include provisions mirroring the relevant provisions of the restrictive practices legislation.<sup>1431</sup>

19.193 The family of an adult with impaired capacity also considered that the Tribunal was the most appropriate body to undertake this role. There should be a requirement for overview, supervising and periodic review of consent arrangements.<sup>1432</sup>

### The Commission's view

19.194 Earlier in this chapter, the Commission has recommended that the restrictive practices legislation should be amended so that it regulates the use of restrictive practices in relation to all adults with an intellectual or cognitive disability and not simply those adults who receive disability services from a 'funded service provider'.<sup>1433</sup> The Commission's primary recommendation entails:

- the extension of the provisions of the current restrictive practices legislation to all providers of disability services, regardless of whether they receive funds from the Department of Communities to provide those services; and
- the extension and adaptation of the current restrictive practices legislation to regulate the use of restrictive practices by individuals acting in a private capacity, such as family members who care for an adult with an intellectual or cognitive disability.

19.195 The effect of the Commission's recommendation is that the use of restrictive practices will no longer be regulated by two separate schemes.

19.196 Although the Commission sought submissions in the Discussion Paper on the regulation of the use of antilibidinal drugs in relation to adults who are subject to the restrictive practices legislation and in relation to adults who are outside the

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1430 Submission 179.

1431 Submission 135.

1432 Submission 177.

1433 See [19.132]–[19.143] above.

scope of that scheme, the Commission is now of the view that there should be a single legislative approach for regulating the use of antilibidinal drugs; the manner in which their use is regulated should not depend on the source of funding for disability services that are provided to the adult. The current position is unsatisfactory in two respects:

- for adults who are subject to the restrictive practices legislation, the use of antilibidinal drugs is regulated by a scheme that was not designed for the use of these drugs;<sup>1434</sup> and
- for adults who are not subject to the restrictive practices legislation, there is considerable uncertainty about who may consent to their use, depending on whether their administration to an adult is categorised as a decision about a ‘health matter’ or, more generally, a decision about a ‘personal matter’.<sup>1435</sup>

19.197 The Commission notes that the submissions were divided about whether it is appropriate for antilibidinal drugs to constitute ‘chemical restraint’ for the purpose of the restrictive practices legislation, given the implications of that categorisation.<sup>1436</sup> Although a number of respondents were of the view that the restrictive practices legislation should be amended so that Tribunal approval is required for the administration of an antilibidinal drug, the *Adult Guardian* was concerned that such an approach could create inflexibility.<sup>1437</sup>

19.198 Another option, which would still result in a single legislative approach for dealing with the use of antilibidinal drugs, would be to exclude the administration of antilibidinal drugs from the scope of the restrictive practices legislation, and to amend the definition of ‘special health care’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld)<sup>1438</sup> by inserting, as an additional category of special health care, an antilibidinal drug when used for behavioural control. As a category of special health care, the administration of an antilibidinal drug would initially require Tribunal approval.<sup>1439</sup> However, the *Guardianship and Administration Act 2000* (Qld) provides for a degree of flexibility in relation to the continued use of special health care through the Tribunal’s power, conferred by section 74, to appoint a guardian to consent to the continuation of the special health care:

**74 Subsequent special health care for adult**

- (1) If the tribunal consents to special health care for an adult, the tribunal may appoint 1 or more persons who are eligible for appointment as a guardian or guardians for the adult and give the guardian or guardians power to consent for the adult to—

1434 See [19.149] above.

1435 See [19.83]–[19.99], [19.153]–[19.154] above.

1436 See [19.170]–[19.187] above.

1437 See [19.173]–[19.174], [19.188] above.

1438 See *Guardianship and Administration Act 2000* (Qld) sch 2 s 7; *Powers of Attorney Act 1998* (Qld) sch 2 s 7.

1439 See *Guardianship and Administration Act 2000* (Qld) s 68(1).



- (a) continuation of the special health care; or
  - (b) the carrying out on the adult of similar special health care.
- (2) The appointment order may include a declaration, order, direction, recommendation, or advice about how the power given is to be used.
- (3) The appointment order may be changed by the tribunal on its own initiative or on the application of an interested person.
- (4) In deciding whether to consent, a guardian must apply the general principles and the health care principle.

19.199 In view of the fact that the use of antilibidinal drugs as a form of behavioural control was not specifically addressed when the restrictive practices legislation was being developed, the Commission is of the view that the most appropriate course is for the reviews that are required to be undertaken by sections 233 and 233A of the DSA<sup>1440</sup> to consider:

- whether, and if so how, the restrictive practices legislation should regulate the use of antilibidinal drugs, including, in particular, whether:
  - it is appropriate for antilibidinal drugs to constitute ‘chemical restraint’ under the restrictive practices legislation or whether their use should require Tribunal approval; and
  - there should be any specific requirements for a positive behaviour support plan that is developed for an adult to whom an antilibidinal drug is to be administered; or
- whether antilibidinal drugs, when administered as a form of behavioural control, should constitute a category of ‘special health care’ under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

## ISSUES FOR FUTURE REVIEW

19.200 For the reasons explained earlier, the Commission is not generally reviewing the restrictive practices legislation.<sup>1441</sup>

19.201 Some respondents have, however, raised general concerns about the restrictive practices legislation that are wider in scope than the specific issues considered in this chapter.

19.202 The family of an adult with impaired capacity expressed their concern about the use of chemical restraint. In their view, it should have the strictest

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1440 See [19.8]–[19.9] above.

1441 See [19.8]–[19.10] above.

requirements for its use. They commented:<sup>1442</sup>

We consider it infinitely preferable that Tribunal approval should be required for consent to the administration of chemical restraint for an adult with an intellectual or cognitive disability ... We note that stakeholder feedback indicated this may make accessing respite too onerous with the 'likely' (possible?) unintended outcome that service providers may consider it unviable to provide respite care to adults who exhibit challenging behaviours. However it is our view that this risk must be balanced against the potential risk that a client with challenging behaviours poses to themselves, other adults in respite and staff, as well as the risk of mismanagement of medication and potential side effects. We acknowledge this issue is highly vexed which in our view reinforces the need for Tribunal overview. ... We think all forms of chemical restraint should be seen as a last resort and should not be something that respite facilities or NGOs can instigate without appropriate supervision and review, ever.

19.203 As noted earlier, Queensland Advocacy Incorporated has expressed a number of concerns about the provisions of the restrictive practices legislation that deal with the restriction of an adult's access to objects.<sup>1443</sup> It has also expressed the view that Queensland should have a reporting system like the Restrictive Intervention Data System in Victoria, which assists the Office of the Senior Practitioner in that State to monitor the use of restrictive practices.<sup>1444</sup>

19.204 When the reviews required by sections 233 and 233A of the DSA are undertaken, it may be appropriate for these issues to be considered as part of those reviews.

## RECOMMENDATIONS

**19-1 Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should be amended so that the provisions that currently apply to the use of restrictive practices by a funded service provider apply to all service providers of disability services, regardless of the source of their funding.**

**19-2 Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should be extended and adapted, as necessary, to regulate the use of restrictive practices by individuals acting in a private capacity, such as family members who care for an adult with an intellectual or cognitive disability. This process should be undertaken jointly by the Department of Communities and the Department of Justice and Attorney-General.**

<sup>1442</sup> Submission 177.

<sup>1443</sup> See [19.129]–[19.130] above.

<sup>1444</sup> Submission 162.

**19-3** When the reviews required by sections 233 and 233A of the *Disability Services Act 2006* (Qld) are undertaken, those reviews should consider:

- (a)** whether, and if so how, Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should regulate the use of antilibidinal drugs, including, in particular, whether:
  - (i)** it is appropriate for antilibidinal drugs to constitute 'chemical restraint' under the restrictive practices legislation or whether their use should require Tribunal approval; and
  - (ii)** there should be any specific requirements for a positive behaviour support plan that is developed for an adult to whom an antilibidinal drug is to be administered; or
- (b)** whether antilibidinal drugs, when administered as a form of behavioural control, should constitute a category of 'special health care' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).



# Chapter 20

## The Tribunal's functions and powers

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## INTRODUCTION

20.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.<sup>1445</sup>

20.2 The Queensland Civil and Administrative Tribunal is established under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act'). When the Tribunal commenced operation on 1 December 2009, it was conferred with the jurisdiction that was previously exercised by the Guardianship and Administration Tribunal.<sup>1446</sup>

20.3 When exercising its jurisdiction in guardianship proceedings, the Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults, subject to the exercise of the Tribunal's powers by the Supreme or District Courts to make, change or revoke the appointment of a guardian or administrator in particular civil proceedings. The Tribunal also has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.

20.4 This chapter gives an overview of the provisions of the *Guardianship and Administration Act 2000* (Qld), the *Powers of Attorney Act 1998* (Qld) and the QCAT Act, which deal with the functions and powers of the Tribunal when it exercises jurisdiction in guardianship proceedings and makes recommendations for

<sup>1445</sup> The terms of reference are set out in Appendix 1.

<sup>1446</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 9(1); *Guardianship and Administration Act 2000* (Qld) ss 7(e), 81.

reform both in relation to some of those provisions and for the addition of some new Tribunal functions and powers.

20.5 In this chapter, a reference to 'the Tribunal', in relation to guardianship proceedings commenced from 1 December 2009, is a reference to the Queensland Civil and Administrative Tribunal. However, a reference to 'the Tribunal', in relation to guardianship proceedings commenced before 1 December 2009, is a reference to the former Guardianship and Administration Tribunal.

## BACKGROUND

20.6 Before the commencement of the *Guardianship and Administration Act 2000* (Qld), the legal mechanisms for substitute decision-making for an adult with impaired capacity were largely reposed in the hands of a public officer.<sup>1447</sup>

20.7 In its original 1996 report, the Commission identified a number of inherent difficulties with the existing legislation that governed substitute decision-making.<sup>1448</sup> These included: a lack of legislative principles binding on every person who exercises a power or performs a function under the legislation; different requirements in different legislative regimes; a limited choice of decision-maker; inflexible decision-making powers; and inadequate procedures for making applications for an appointment. In order to overcome these difficulties, the Commission recommended the implementation of a comprehensive and coherent new guardianship system which sought not only to assist adults with impaired capacity in the least restrictive manner, but also to allow adults to make plans in the event that their decision-making capacity becomes impaired in the future.<sup>1449</sup>

20.8 Central to the Commission's recommendations was the establishment of an independent tribunal to provide:<sup>1450</sup>

an accessible, affordable and simple, but sufficiently flexible way of establishing whether a person has decision-making capacity and of determining issues surrounding the appointment and powers of decision-makers where it is necessary for another person to have legal authority to make decisions for a person whose decision-making capacity is impaired.

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1447 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 25. See Chapter 2 of that Report in relation to the law in Queensland before the commencement of the *Guardianship and Administration Act 2000* (Qld). Financial decisions were generally made by the Public Trustee and health decisions were generally made by the Legal Friend, an office established under the *Intellectually Disabled Citizens Act 1985* (Qld).

1448 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 23–7.

1449 Ibid 23.

1450 Ibid 27.

20.9 The establishment of a new specialist tribunal was also consistent with developments in other Australian jurisdictions.<sup>1451</sup>

20.10 The establishment of the Tribunal has provided additional avenues for the appointment of substitute decision-makers for adults. For example, the Tribunal has power to appoint individuals as guardians and administrators. It also has a substantial supervisory jurisdiction in relation to the range of formal decision-makers who may be appointed under the Act.

20.11 The number of applications made under the *Guardianship and Administration Act 2000* (Qld) to the Tribunal each year is substantial, and has been increasing over time.<sup>1452</sup> In the year 2007–08, 6930 applications were made to the Tribunal and 6510 applications were finalised. In all, the Tribunal received applications concerning 3878 adults.<sup>1453</sup>

## THE TRIBUNAL'S FUNCTIONS

20.12 The Tribunal's functions are set out in section 81 of the *Guardianship and Administration Act 2000* (Qld):

### **81 Tribunal's functions for this Act**

- (1) The tribunal has the functions given to it by this Act, including the following functions—
- (a) making declarations about the capacity of an adult, guardian, administrator or attorney for a matter;

1451

The majority of other Australian jurisdictions have tribunals which have a specialist guardianship jurisdiction. New South Wales, South Australia, and Tasmania have guardianship specific tribunals established under their guardianship legislation. In the ACT, Victoria and Western Australia, guardianship proceedings are brought in those jurisdictions' civil and administrative tribunal. The Northern Territory does not have a permanent guardianship decision-making body. Instead, a Local Court or a specifically convened Guardianship Panel is able to make guardianship decisions.

The New South Wales Guardianship Tribunal is established under the *Guardianship Act 1987* (NSW) pt 6. The South Australian Guardianship Board is established under the *Guardianship and Administration Act 1993* (SA) pt 2 div 1. The Tasmanian Guardianship and Administration Board is established under the *Guardianship and Administration Act 1995* (Tas) pt 2.

For guardianship proceedings in the ACT Civil and Administrative Tribunal, see references to 'ACAT' in the *Guardianship and Management of Property Act 1991* (ACT) and for the establishment of the Tribunal, see *ACT Civil and Administrative Tribunal Act 2008* (ACT). For guardianship proceedings in the Victorian Civil and Administrative Tribunal, see references to 'VCAT' in the *Guardianship and Administration Act 1986* (Vic) and for the establishment of the Tribunal, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic). For guardianship proceedings in the Western Australian State Administrative Tribunal, see references to 'State Administrative Tribunal' in the *Guardianship and Administration Act 1990* (WA) and for the establishment of the Tribunal, see *State Administrative Tribunal Act 2004* (WA).

1452

Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 5. The Tribunal noted that the statistics for the year 2008–2009 represent an increase of 18 percent in applications received on the previous reporting year and an 8.9 percent increase in the number of adults concerned in those applications. The Tribunal also noted: 'These increases are substantial but also comparable with increases each reporting year from the Tribunal's establishment in 2000. For example, since 2003–04 there has been an increase of 30.9 percent in the number of adults assisted by the Tribunal'.

1453

Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 5.



- (b) considering applications for appointment of guardians and administrators;
- (c) appointing guardians and administrators if necessary and reviewing the appointments;
- (d) making declarations, orders or recommendations, or giving directions or advice, in relation to the following—
  - (i) guardians and administrators;
  - (ii) attorneys;
  - (iii) enduring documents;
  - (iv) related matters;
- (e) ratifying an exercise of power, or approving a proposed exercise of power, for a matter by an informal decision maker for an adult with impaired capacity for the matter;
- (f) consenting to the withholding or withdrawal of a life-sustaining measure for adults with impaired capacity for the health matter concerned;<sup>1454</sup>
- (g) subject to section 68, consenting to special health care for adults with impaired capacity for the special health matter concerned;
- (h) consenting to the sterilisation of a child with an impairment;
- (i) giving approvals under chapter 5B for the use by a relevant service provider of a restrictive practice in relation to an adult to whom the chapter applies, and reviewing the approvals;
- (j) registering an order made in another jurisdiction under a provision, Act or law prescribed under a regulation for section 167;
- (k) reviewing a matter in which a decision has been made by the registrar.<sup>1455</sup>

<sup>1454</sup> However, the Act does provide an express power to give effect to this function. This issue is considered in Chapter 11.

<sup>1455</sup> A 'registrar' or 'registrar of the tribunal' means the Principal Registrar of the Tribunal under the QCAT Act: *Guardianship and Administration Act 2000* (Qld) sch 4. The Tribunal has power under s 35(6)–(7) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to review a decision of the Principal Registrar to accept or reject an application made to the Tribunal. Prior to the commencement of QCAT, the Guardianship and Administration Tribunal had power under s 161 of the *Guardianship and Administration Act 2000* (Qld) to review a decision of the Registrar to make a decision under s 85 of the Act in relation to a prescribed non-contentious matter. Sections 85 and 161 of the *Guardianship and Administration Act 2000* (Qld) were repealed by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) ss 1445, 1465.

(2) In this section—

**attorney** means an attorney under an enduring document or a statutory health attorney. (notes added)

20.13 The primary functions of the Tribunal are determining issues of legal capacity; considering, making and reviewing guardianship and administration orders; giving directions to appointed decision-makers; and, in some circumstances, consenting to some special health matters. In addition to these functions, the Tribunal has a supervisory role over enduring powers of attorney. These and other functions are reflected in the substantive powers given to the Tribunal when exercising its jurisdiction in guardianship proceedings.

### Discussion Paper

20.14 In the Discussion Paper, the Commission noted that the functions of the Tribunal, which are generally broader than those of the equivalent Tribunals in the other Australian jurisdictions, are generally protective or supervisory in nature.<sup>1456</sup> While the Commission indicated that it was not aware of any additional functions that might be given to the Tribunal, it sought submissions on the appropriateness of the Tribunal's functions.<sup>1457</sup>

### Submissions

20.15 The Public Trustee, the Adult Guardian, Pave the Way<sup>1458</sup> and one other respondent each considered that the current functions of the Tribunal are appropriate.<sup>1459</sup> The Public Trustee also considered that the Tribunal should have a greater role in regulating both administrators and attorneys.<sup>1460</sup>

### The Commission's view

20.16 The Commission considers that the Tribunal's functions, which are set out in an inclusive list in section 81 of the *Guardianship and Administration Act 2000* (Qld), are generally appropriate to enable the Tribunal to perform its role of protecting the rights and interests of adults with impaired capacity.

<sup>1456</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.13].

<sup>1457</sup> Ibid 6.

<sup>1458</sup> Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane Area that supports families who have a family member with a disability.

<sup>1459</sup> Submissions 135, 156A, 164, 177.

<sup>1460</sup> Submission 156A. In this regard, the Public Trustee raised the potential for sanctions to be imposed upon administrators or attorneys, the extension of the Tribunal's oversight of attorneys under enduring powers of attorney in a similar way to its oversight of administrators, and fees charged by attorneys and administrators. These issues are discussed in Chapters 15, 17 and 29 respectively.

## THE TRIBUNAL'S POWERS

20.17 The Tribunal has various substantive powers to give effect to the Tribunal's general functions mentioned in section 81 of the Act.<sup>1461</sup> These substantive powers are discussed below.

20.18 The Tribunal also has various procedural powers, which enable it to make particular orders about the conduct of Tribunal proceedings. These procedural powers are discussed in chapter 21 of this Report.

### The power to appoint a guardian or an administrator and to review the appointment

20.19 The Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults,<sup>1462</sup> subject to the exercise of the Tribunal's powers by the Supreme or District Court to make, change or revoke the appointment of a guardian or administrator in particular civil proceedings.<sup>1463</sup>

20.20 Section 12 of the Act provides that the Tribunal may, by order, appoint a guardian for a personal matter or an administrator for a financial matter, on terms it considers appropriate, if:<sup>1464</sup>

- the adult has impaired capacity for the matter;
- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- without an appointment:
  - the adult's needs will not be adequately met; or
  - the adult's interests will not be adequately protected.

20.21 The Tribunal also has power under the Act to review the appointment of a guardian or an administrator.

20.22 Section 31 of the Act provides that, at the end of a review, the Tribunal must revoke its order making the appointment unless it is satisfied it would make an

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1461 *Guardianship and Administration Act 2000* (Qld) s 81 is set out at [20.12] above.

1462 *Guardianship and Administration Act 2000* (Qld) s 84(1).

1463 *Guardianship and Administration Act 2000* (Qld) s 245 provides that the Supreme Court or the District Court may exercise the Tribunal's powers in relation to the appointment of a guardian or an administrator for an adult if the Court sanctions a settlement between an adult and another person or orders payment to an adult by another person in a civil proceeding and the Court considers the adult has impaired capacity for a matter. See *Willett v Fletcher* (2005) 221 CLR 627, [28]. Section 245 is considered in Chapter 28 of this Report.

1464 The appointment of guardians and administrators is discussed in Chapter 14 of this Report. The Tribunal may make the order on its own initiative or on the application of the adult, the Adult Guardian or an interested person: *Guardianship and Administration Act 2000* (Qld) s 12(3).

appointment if a new application for an order were to be made.<sup>1465</sup> If the Tribunal is satisfied that the appointment should continue, it may continue its order making the appointment with no change or, alternatively, change the appointment order.<sup>1466</sup> However, the Tribunal may remove an appointee only if the Tribunal considers that the appointee is no longer competent or that another person is more appropriate for appointment.<sup>1467</sup>

20.23 On an application for the appointment of a guardian or an administrator for an adult for a matter, or on the review of an appointment, the Tribunal is required to apply the presumption that the adult has capacity for the matter.<sup>1468</sup>

20.24 The appointment of guardians and administrators and the review of an appointment are discussed in more detail in Chapter 14 of this Report.<sup>1469</sup>

### The power to make declarations about capacity

20.25 Section 146 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make a declaration about the capacity of an adult, guardian, administrator, attorney under a power of attorney, attorney under an advance health directive or a statutory health attorney, for a matter.<sup>1470</sup> Whether an adult does, or does not, have capacity is a threshold issue under the guardianship legislation.<sup>1471</sup> The Tribunal may appoint a guardian or an administrator for an adult only if the adult has impaired capacity for the matter, and

<sup>1465</sup> *Guardianship and Administration Act 2000* (Qld) s 31(2). The Tribunal may make an appointment order only if it is satisfied that each of the three grounds set out in s 12(1) of the *Guardianship and Administration Act 2000* (Qld) is established.

<sup>1466</sup> *Guardianship and Administration Act 2000* (Qld) s 31(3). The order may be changed, for example, by changing the terms of the appointment, making an additional appointment or replacing an existing appointee.

<sup>1467</sup> *Guardianship and Administration Act 2000* (Qld) s 31(4).

<sup>1468</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1). See *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402, [43], in which the Supreme Court of Queensland held that the Tribunal is required to apply the presumption of capacity when determining the capacity of the adult concerned on an initial application and on any subsequent application made under the *Guardianship and Administration Act 2000* (Qld). The presumption of capacity, and its application by the Tribunal, formally appointed substitute decision-makers or other persons or entities who perform a function or exercise a power under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) is discussed in Chapter 7.

<sup>1469</sup> Note that the Commission has recommended in this Report that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, when making an order to appoint a guardian or an administrator (an appointee) for an adult who has fluctuating capacity, the Tribunal may limit the exercise of the appointee's powers to periods when the adult has impaired capacity: see Recommendation 15-1 of this Report.

<sup>1470</sup> In this section, a 'power of attorney' means a general power of attorney made under the *Powers of Attorney Act 1998*, an enduring power of attorney or a power of attorney made otherwise than under the *Powers of Attorney Act 1998* (Qld), whether before or after its commencement: *Guardianship and Administration Act 2000* (Qld) s 146(4). The law in other jurisdictions in relation to the power to make declarations about capacity is discussed in the Commission's Discussion Paper: see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.25]–[15.28].

<sup>1471</sup> 'Capacity', for a person, for a matter, means the person is capable of:

- understanding the nature and effect of decisions about the matter;
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way: *Guardianship and Administration Act 2000* (Qld) sch 4.

an adult may execute an enduring power of attorney or advance health directive only if he or she has capacity. Additionally, the loss of capacity by a formally appointed substitute decision-maker for an adult may affect his or her ability to continue in the role.

20.26 A declaration about capacity may be made on the Tribunal's own initiative or on application by the individual or another interested person.<sup>1472</sup>

20.27 When the Tribunal decides a matter in a hearing, it must ensure, as far as practicable, that it has all the relevant evidence.<sup>1473</sup> In assessing the capacity of an adult, the Tribunal may receive evidence from a health provider for the adult.<sup>1474</sup> It may also receive evidence from other sources, such as the adult's carers or family. The Tribunal must weigh up all the relevant evidence and make its own determination about the adult's capacity.<sup>1475</sup>

20.28 Section 147 of the *Guardianship and Administration Act 2000* (Qld) deals with the effect, in certain legal proceedings, of a declaration made by the Tribunal about whether a person had capacity to enter into a contract. It provides that such a declaration is, in a subsequent proceeding in which the validity of a contract is in issue, evidence about the person's capacity.

20.29 Section 111 of the *Powers of Attorney Act 1998* (Qld) provides that the Supreme Court may make a declaration about a person's capacity. Section 112 of the Act specifies that a declaration about whether a person had capacity to enter a contract is binding in a subsequent proceeding in which the validity of the contract is in issue.

20.30 There is a difference between the effect of a declaration made under section 147 of the *Guardianship and Administration Act 2000* (Qld) and one made under section 112 of the *Powers of Attorney Act 1998* (Qld). A declaration made by the Tribunal under section 147 may be used as evidence in a subsequent proceeding, whereas a declaration made by the Supreme Court under section 112 is binding in a subsequent proceeding. This arguably reflects the different standards of evidence which apply in proceedings in the Tribunal (which is not

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1472 *Guardianship and Administration Act 2000* (Qld) s 146(2). Note also that, in some proceedings, the Tribunal may be required to make a finding on the evidence about an adult's decision-making capacity even though a formal declaration has not been made.

1473 *Guardianship and Administration Act 2000* (Qld) s 130(1). Note that s 146(3) specifically requires the Tribunal, when deciding whether an individual is capable of communicating decisions in some way, to investigate the use of all reasonable ways of facilitating communication including, for example, symbol boards or signing.

1474 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 110(2), 111(2), 113(2). These rules provide that certain applications must also include, for example, by attaching a report, information about the adult relevant to the application that is provided by a health provider. These applications are: an application for the appointment a guardian or an administrator; an application for a declaration of capacity; and an application for consent for special health care.

1475 See eg *XYZ v State Trustees Ltd* [2006] VSC 444.

bound by the rules of evidence)<sup>1476</sup> and the Supreme Court (which applies the rules of evidence).<sup>1477</sup>

### **The power to make a declaration, order or recommendation, or give directions or advice**

20.31 Section 138 of the *Guardianship and Administration Act 2000* (Qld) provides that, once an application about a matter has been made to the Tribunal, the Tribunal may give advice or directions about the matter it considers appropriate, or make recommendations it considers appropriate about action an active party should take.<sup>1478</sup> It provides:

#### **138 Advice, directions and recommendations**

- (1) Once an application about a matter has been made to the tribunal, the tribunal may—
  - (a) give advice or directions about the matter it considers appropriate; or
  - (b) make recommendations it considers appropriate about action an active party should take.

*Note—*

For disobeying a direction of the tribunal, see QCAT Act, section 213(1).
- (2) If the tribunal gives advice or a direction or makes a recommendation, it may also—
  - (a) continue with the application; or
  - (b) adjourn the application.
- (3) The tribunal may also give leave for an active party to apply to the tribunal for directions about implementing the recommendation.
- (4) A guardian, administrator or attorney who acts under the tribunal's advice, directions or recommendations is taken to have complied with this Act or the *Powers of Attorney Act 1998* unless the person knowingly gave the tribunal false or misleading information relevant to the tribunal's advice, directions or recommendations.

<sup>1476</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3). The Tribunal is not bound by the rules of evidence, or any practices or procedures applying to courts of record (other than to the extent the Tribunal adopts those rules, practices or procedures) and may inform itself in any way it considers appropriate.

<sup>1477</sup> *Evidence Act 1977* (Qld). However, the Court may dispense with the rules of evidence if a fact in issue is not seriously in dispute or strict proof of a fact in issue might cause unnecessary or unreasonable expense, delay or inconvenience in a proceeding: *Uniform Civil Procedure Rules 1999* (Qld) r 394.

<sup>1478</sup> The law in other jurisdictions in relation to the power to make a declaration, order or recommendation, or give directions or advice is discussed in the Commission's Discussion Paper: see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.34]–[15.36].

(5) In this section—

**attorney** means—

- (a) an attorney under a power of attorney; or
- (b) an attorney under an advance health directive; or
- (c) a statutory health attorney.

**power of attorney** means—

- (a) a general power of attorney made under the *Powers of Attorney Act 1998*; or
- (b) an enduring power of attorney; or
- (c) a power of attorney made otherwise than under the *Powers of Attorney Act 1998*, whether before or after its commencement.

20.32 Section 138(4) provides that a guardian, administrator or attorney who acts under the Tribunal's advice, directions or recommendations is taken to have complied with the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), as the case may be, unless the person knowingly gave the Tribunal false information relevant to the advice, directions or recommendations.

20.33 Section 138AA of the *Guardianship and Administration Act 2000* (Qld) also empowers the Tribunal, at any hearing of a proceeding relating to an adult, to give limited directions to an adult's former attorney. The directions must be necessary because of the ending of the person's appointment as attorney for the matter and relate only to a matter for which the person was appointed as the attorney immediately before the appointment ended.<sup>1479</sup>

20.34 The Act also provides that it is an offence for a person to disobey a lawful order or direction of the Tribunal.<sup>1480</sup>

20.35 In *Re WFM*,<sup>1481</sup> the Tribunal specifically considered the extent of its power to give directions to a guardian or an administrator. The Tribunal held that, at the time of the appointment of a guardian or an administrator, or on the review of an appointment,<sup>1482</sup> as well as on a specific application for directions,<sup>1483</sup> it may

<sup>1479</sup> Section 32B of the *Guardianship and Administration Act 2000* (Qld) also gives the Tribunal power to make similar directions to a former guardian or administrator.

<sup>1480</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1).

<sup>1481</sup> [2006] QGAAT 54.

<sup>1482</sup> Section 12(2) of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an appointment on 'terms considered appropriate by the tribunal'. Section 31(3)(b) of the Act also empowers the Tribunal, on a review of an appointment, to change the terms of an appointment or make a new appointment.

impose restrictions on, or give instructions to, a guardian or administrator which may extend to directing a substantive course of action for the decision-maker.<sup>1484</sup> The Tribunal also held that its power to give directions extends to 'how a decision maker should exercise its powers, and to how a matter for which a decision maker has been appointed should be decided'.<sup>1485</sup>

### The power to make an interim order

20.36 Section 129 of the *Guardianship and Administration Act 2000* (Qld) confers on the Tribunal a general power to make an interim order in a proceeding.<sup>1486</sup> The wording of section 129 generally refers to an interim order being made in 'the proceeding'. However, in practice, interim orders are made in relation to proceedings on applications for guardianship or administration.<sup>1487</sup>

20.37 Section 129 provides:

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1483 Section 115 of the *Guardianship and Administration Act 2000* (Qld) provides that an application may be made by the adult concerned or another interested person to the Tribunal for a declaration, order, direction, recommendation or advice in relation to an adult about something in, or related to, that Act or the *Powers of Attorney Act 1998* (Qld). See also s 41 of the Act which provides that, if the Adult Guardian has been unable to resolve a dispute between a guardian, administrator or attorney for an adult, the Adult Guardian, guardian, administrator or attorney may apply to the Tribunal for directions.

1484 *Re WFM* [2006] QGAAT 54, [33].

1485 *Ibid.*

1486 Section 129 does not apply to applications made in relation to ch 5A (Consent to the sterilisation of child with impairment): *Guardianship and Administration Act 2000* (Qld) s 80E(1)–(2). The law in other jurisdictions in relation to the power to make interim orders is discussed in the Commission's Discussion Paper: see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.46]–[15.56].

Section 80ZR of the Act empowers the Tribunal to make interim orders in relation to restrictive practices applications.

Section 243 of the Act also provides that, if there are Supreme Court proceedings about an adult's enduring document or attorneys under an enduring document, the Tribunal may appoint a guardian or an administrator for the adult, on an interim basis, until the proceeding is resolved. Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) applies to the appointment of a guardian or an administrator under s 243: s 244. There are no restrictions or time limits on an interim order made under s 243.

1487 See QCAT Practice Direction No 8 of 2010, adopting Guardianship and Administration Tribunal Presidential Direction No 3 of 2007 (Interim orders (s 129 *Guardianship and Administration Act 2000*)): Queensland Civil and Administrative Review Tribunal, *QCAT Practice Direction No 8 of 2010* <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 30 September 2010. Guardianship and Administration Tribunal Presidential Direction No 3 of 2007 specifies that a written request for an interim order will not be considered on the basis of a statutory declaration alone; it must accompany or follow submission of a full application for guardianship or administration: Guardianship and Administration Tribunal, *Presidential Direction No 3 of 2007* <[http://www.qcat.qld.gov.au/Publications/2007-3\\_Int\\_order.pdf](http://www.qcat.qld.gov.au/Publications/2007-3_Int_order.pdf)> at 30 September 2010. QCAT Practice Direction No 8 of 2010 provides that specified Presidential Directions, issued under the *Guardianship and Administration Act 2000* (Qld), including Presidential Direction No 3 of 2007, are 'adopted as practice directions under the *Queensland Civil and Administrative Tribunal Act 2009*'. It also provides that 'references to the Guardianship and Administration Tribunal are to be read as references to the Queensland Civil and Administrative Tribunal'.

In 2008–09, the Tribunal made 58 interim guardianship orders. As at 30 June 2009, those orders were current for 15 adults with hearings pending. The Tribunal also made 88 interim administration orders. As at 30 June 2009, those orders were current for seven adults with hearings pending: Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 42.



**129 Interim order**

- (1) This section applies if the tribunal is satisfied, on reasonable grounds, there is an immediate risk of harm to the health, welfare or property of the adult concerned in an application, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult.
- (2) The tribunal may make an interim order in the proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act, including section 118.<sup>1488</sup>
- (3) An interim order may not include consent to special health care.
- (4) An interim order has effect for the period specified in the order.
- (5) The maximum period that may be specified in an interim order is 3 months.
- (6) An interim order may be renewed, but only if the tribunal is satisfied there are exceptional circumstances justifying the renewal.
- (7) To exercise jurisdiction under subsection (6), the tribunal must be constituted by a legal member. (note added)

20.38 Section 129(1) of the Act provides that an interim order may be made in a Tribunal proceeding if the Tribunal is satisfied on reasonable grounds that there is an immediate risk of harm to the health, welfare or property of the adult concerned in the application including because of the risk of abuse, exploitation or neglect (including self-neglect) of the adult. This subsection was amended in 2007 to insert the wording of the current test for making an interim order.<sup>1489</sup>

20.39 Section 129(2) provides that the Tribunal may make an interim order in a proceeding without hearing and deciding the proceeding and without complying with other requirements under the Act (including the general notification requirements).<sup>1490</sup>

20.40 Section 129(3) specifies that an interim order cannot be made for consent to special health care.

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1488 *Guardianship and Administration Act 2000* (Qld) s 118 generally requires the Tribunal to notify certain persons about the hearing of an application before the Tribunal.

1489 *Justice and Other Legislation Amendment Act 2007* (Qld) s 78. The Explanatory Notes to that Act explained that this amendment was consistent with the recommendation made by the Queensland Law Reform Commission in its original 1996 report, that the power to make interim orders should be conferred on the Tribunal when an adult with impaired capacity may be vulnerable to exploitation, neglect or abuse and, as a result there may be an immediate risk to the person's health or welfare: Explanatory Notes, *Justice and Other Legislation Amendment Bill 2007* (Qld) 18–19. Section 129(1) had previously provided that, if the Tribunal is satisfied that urgent action is required, the Tribunal may make an interim order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of the *Guardianship and Administration Act 2000* (Qld) (such as giving notice of the hearing under s 118).

1490 Note also that s 131 of the *Guardianship and Administration Act 2000* (Qld) permits the Tribunal, in urgent or special circumstances, to proceed to decide a matter on the information before it without receiving further information.

20.41 Section 129(4) specifies that an interim order has effect for the period specified in the order. Section 129(5) states that the maximum period for which an interim order may be made is three months. When the Act commenced in 2000, the maximum period that could be specified in an interim order was 28 days.<sup>1491</sup> In 2003, the Act was amended to remove the 28 day cap on interim orders and to limit the combined period for which an interim order may be made to six months.<sup>1492</sup> The Explanatory Notes to the amending Bill explained that:<sup>1493</sup>

Under section 129 of the [*Guardianship and Administration Act 2000* (Qld)], if the Tribunal is satisfied that urgent action is required, it may make an interim order without a hearing. Under this section, the maximum period for the interim order is 28 days. The [*Guardianship and Administration Act 2000* (Qld)] currently does not have a combined maximum period for interim orders so that interim orders can be renewed month after month. The Bill amends section 129 to limit the combined period of interim orders in a particular matter to six months. This means that the adult and other interested parties are assured that the Tribunal will commence hearing a matter within six months of an interim order/s being made.

However, the Bill removes the requirement that each interim order be [for] a maximum 28 days. A 28 day limit makes the current renewal process cumbersome and wastes the resources of the Tribunal and the interim administrator as the matter has to be revisited on an interim basis every month. Orders have to be registered and fees paid to the Registrar of Titles every time an interim order is extended if it involves land.

20.42 The Act was amended in 2007 to shorten the maximum period for which an interim order may be made to three months and to provide a power to renew the order in exceptional circumstances.<sup>1494</sup> The Explanatory Notes to the amending Bill explained that the reduction in the period of time for which an interim order may be made was consistent with the least restrictive principle of the Act:<sup>1495</sup>

The amendment to section 129 also provides that the maximum duration that may be specified in an interim order is 3 months, this being reduced from 6 months. However, the tribunal may renew the interim order but only if exceptional circumstances exist. The QLRC Report recommended that the maximum period stated on an interim order should be 10 days with an ability to renew an interim order. The time period for interim orders should be reduced so that the management of an adult's affairs is not left uncertain for any unreasonable period of time. A reduction in the period of time for interim orders would result in less disruption to the adult's life and to the lives of members of the adult's existing support network. Currently, interim orders are made *ex parte* based on information provided by the applicant with limited inquiries made by the tribunal given the time restraints. There is a possibility that after a final hearing, the tribunal may determine that the adult has capacity and during that 6 month period the adult has been unable to make decisions for him or herself,

1491 See *Guardianship and Administration Act 2000* (Qld) s 129(4), as originally enacted.

1492 *Guardianship and Administration Act and Other Acts Amendment Act 2003* (Qld) s 27(1).

1493 Explanatory Notes, *Guardianship and Administration and Other Acts Amendment Bill 2003* (Qld) 4.

1494 *Justice and Other Legislation Amendment Act 2007* (Qld) s 78(2).

1495 Explanatory Notes, *Justice and Other Legislation Amendment Bill 2007* (Qld) 19.

unable to access his or her money to pay for legal representation or choose who he or she interacts with or where he or she may live. A reduction in the period of time for an interim order is consistent with the least restrictive principle of the Act.

20.43 Section 129(6) provides that an interim order may be renewed but only if there are exceptional circumstances justifying the renewal. As noted above, this power was conferred by the 2007 amendment of the Act. When exercising the power to renew an interim order, the Tribunal must be constituted by a legal member.<sup>1496</sup>

20.44 The relevant QCAT Practice Direction provides:<sup>1497</sup>

1. Introduction

The Guardianship & Administration Tribunal is required to follow principles of natural justice and procedural fairness in exercising its powers when making an order in a proceeding. In limited circumstances, the Tribunal may displace these principles by issuing an interim order; however these orders are only issued in accordance with stringent guidelines and a strict set of criteria.

2. Interim Order: Protecting and Maintaining the Best Interests of the Adult

Section 129 (1) of the *Guardianship and Administration Act 2000* (Act) provides [that] if the Tribunal is satisfied on reasonable grounds there is an immediate risk of harm to the health, welfare or property of the adult concerned (including because of the risk of abuse, exploitation or neglect of or self neglect by the adult), it may make an interim order. This section also allows the Tribunal to hear and decide the proceeding without otherwise complying with the requirements of the Act, including s.118 (advising persons concerned of hearing). This is a measure for the protection of adult, and the period for an interim order may initially be up to 3 months. The interim order may only be renewed if the Tribunal is satisfied that there are exceptional circumstances justifying the renewal. An interim order may not include consent to special health care.

3. Interim Order: Risk and Dispensing with the Need for Hearing in the Best Interests of the Adult

Only the President, Deputy President, legal member or the Registrar may make an interim order. Prior to making an interim order, the Tribunal has to be satisfied that on reasonable grounds, there is some evidence of incapacity and the adult appears to be at imminent risk. This notion of risk is grounded on the particular factual circumstances of a case. The risk needs to be immediate, and the Tribunal must be satisfied on the balance of probabilities that harm would result.

Examples of cases where action may be required include:

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1496 *Guardianship and Administration Act 2000* (Qld) s 129(7).

1497 See n 1487 above.

The adult has been physically injured or harmed or the likelihood of injury or harm is imminent or inevitable. Harm may include physical or emotional abuse; and/or mental harm;

- Allegations of abuse to the adult have been made;
- The adult is at risk from neglect or self neglect;
- The adult's property is at immediate risk;
- The provision of services for the adult is at immediate risk.

#### 4. The Scope of an Interim Order

In cases where there is an immediate and acute need to protect the adult, the Tribunal will make only those orders which are necessary. These orders will remain in operation until the actual hearing.

#### 5. Evidence Required in Support of an Application

- Evidence from health professionals about the adult's incapacity.
- Evidence by applicant setting out:
  - Nature of the immediate risk;
  - Whether other options/strategies have been tried;
  - Parties who have been consulted; or
  - Why parties have not been or should not be consulted.

Upon further inquiries a statutory declaration may be requested from the applicant.

### **The power to issue a warrant for the Adult Guardian to enter a place and remove an adult**

20.45 If the Adult Guardian considers that there are reasonable grounds for suspecting that there is 'an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse', to an adult with impaired capacity, the Adult Guardian may apply to the Tribunal for a warrant to enter a place and to remove the adult.<sup>1498</sup> Such an application must be sworn and state the grounds on which the warrant is sought.<sup>1499</sup> The Tribunal may refuse to consider the application until

<sup>1498</sup> *Guardianship and Administration Act 2000* (Qld) s 197. The law in other jurisdictions in relation to the power to issue a warrant for the Adult Guardian to enter a place and remove an adult is discussed in the Commission's Discussion Paper: see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.61]–[15.72].

<sup>1499</sup> *Guardianship and Administration Act 2000* (Qld) s 148(1).

the Adult Guardian gives the Tribunal all the information the Tribunal requires about the application in the way the Tribunal requires.<sup>1500</sup>

20.46 Section 149 of the *Guardianship and Administration Act 2000* (Qld) provides for the Tribunal, if it is satisfied there are reasonable grounds for suspecting there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse to an adult, to issue a warrant to authorise the Adult Guardian to enter a place and remove an adult. It provides:

**149 Issue of entry and removal warrant**

- (1) The tribunal may issue a warrant only if the tribunal is satisfied there are reasonable grounds for suspecting there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter.
- (2) The warrant must state—
  - (a) that the adult guardian may, with necessary and reasonable help and force, enter the place, and any other place necessary for entry, and remove the adult; and
  - (b) that the adult guardian may ask a police officer to help in the exercise of the adult guardian's powers under the warrant; and
  - (c) the hours of the day or night when the place may be entered; and
  - (d) the date, within 14 days after the warrant's issue, the warrant ends.

20.47 The warrant may be issued without notice of the application having been given to the adult or any other person.<sup>1501</sup> This provision recognises the need to provide for urgent action to be taken where an adult may be at immediate risk of harm.

20.48 Section 151 of the *Guardianship and Administration Act 2000* (Qld) provides that, as soon as practicable after the adult has been removed under the warrant, the Adult Guardian must apply to the Tribunal for the orders the Adult Guardian considers appropriate about the adult's personal welfare, a power of attorney or advance health directive of the adult, or a guardian, administrator or attorney of the adult.

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<sup>1500</sup> *Guardianship and Administration Act 2000* (Qld) s 148(3). For example, the Tribunal may require that additional information supporting the application be given by statutory declaration.

<sup>1501</sup> *Guardianship and Administration Act 2000* (Qld) s 118 does not apply to an application for an entry and removal warrant: *Guardianship and Administration Act 2000* (Qld) s 148(2). Section 118 generally requires the Tribunal to notify certain persons about the hearing of an application before the Tribunal.

### The power to ratify or approve an exercise of power by an informal decision-maker

20.49 Section 154(1) of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to ratify the exercise of power, or approve a proposed exercise of power, for a matter by an informal decision-maker for an adult with impaired capacity for the matter.<sup>1502</sup> In this context, an ‘informal decision-maker’ is a member of the adult’s support network who is not an attorney under an enduring document, administrator or guardian for the matter.<sup>1503</sup>

20.50 The Tribunal may ratify or approve the exercise of power for a matter only if:

- it considers the informal decision-maker proposes to act, or has acted, honestly and with reasonable diligence;<sup>1504</sup> and
- the matter is not a special personal matter, a health matter or a special health matter.<sup>1505</sup>

20.51 Accordingly, the Tribunal’s power to ratify or approve an exercise of power is limited to personal matters (other than health matters) and financial matters.

20.52 If the Tribunal ratifies or approves the exercise of power for an adult for a matter, the exercise of power is as effective as if the power was exercised by the adult and the adult had capacity for the matter when the power was or is exercised. Additionally, the informal decision-maker does not incur any liability, either to the adult or anyone else, for the exercise of power.<sup>1506</sup> In these respects, an informal decision-maker is placed on a similar footing to a formal substitute decision-maker.<sup>1507</sup>

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1502 The Tribunal may make the order on its own initiative or on the application of the adult or an informal decision-maker: *Guardianship and Administration Act 2000* (Qld) s 154(3). None of the other Australian jurisdictions provide for the ratification or approval of an exercise of power by an informal decision-maker.

1503 *Guardianship and Administration Act 2000* (Qld) s 154(5).

1504 The guardianship legislation imposes a similar standard on guardians, administrators and attorneys under enduring powers of attorney: *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66.

1505 *Guardianship and Administration Act 2000* (Qld) s 154(2). Special personal matters, health matters and special health matters are discussed in Chapter 6 of this Report.

1506 *Guardianship and Administration Act 2000* (Qld) s 154(4).

1507 See, in relation to the authority of guardians and administrators: *Guardianship and Administration Act 2000* (Qld) s 33. Note that s 77 of the *Powers of Attorney Act 1998* (Qld) provides that, to the extent that an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to the attorney by the enduring document. An enduring document includes an enduring power of attorney. See, in relation to protection from liability for guardians and administrators: *Guardianship and Administration Act 2000* (Qld) ss 56, 248. See, in relation to protection from liability for attorneys under an enduring power of attorney: *Guardianship and Administration Act 2000* (Qld) s 248; *Powers of Attorney Act 1998* (Qld) ss 97–99, 105.

### The power to consent to some types of special health care

20.53 The Tribunal has power to consent to some types of special health care for an adult with impaired capacity for the special health matter.<sup>1508</sup>

20.54 'Special health care' is defined in the *Guardianship and Administration Act 2000* (Qld) as health care of the following types:<sup>1509</sup>

- removal of tissue from the adult while alive for donation to someone else;
- sterilisation of the adult;
- termination of a pregnancy of the adult;
- participation by the adult in special medical research or experimental health care;
- electroconvulsive therapy or psychosurgery for the adult; and
- prescribed special health care of the adult.

20.55 If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive,<sup>1510</sup> the Tribunal has power to consent to special health care for an adult, other than electroconvulsive therapy or psychosurgery.<sup>1511</sup>

20.56 The Tribunal's power to give consent is limited by specific requirements for each type of special health care. The Tribunal must be satisfied, for example, that the special health care involves minimal risk to the adult and is the only reasonably available option.<sup>1512</sup> In deciding whether to give consent, the Tribunal must also apply the General Principles and the Health Care Principle contained in the legislation.<sup>1513</sup>

20.57 In addition, the Tribunal cannot give its consent for certain types of special health care, namely the removal of tissue from an adult while alive for donation to

<sup>1508</sup> *Guardianship and Administration Act 2000* (Qld) ss 68–73. A special health matter for an adult is a matter relating to special health care of the adult: *Guardianship and Administration Act 2000* (Qld) sch 2 s 6; *Powers of Attorney Act 1998* (Qld) sch 2 s 6. The law in other jurisdictions in relation to the power to consent to some types of special health care for an adult is discussed in the Commission's Discussion Paper: see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.83]–[15.84].

<sup>1509</sup> *Guardianship and Administration Act 2000* (Qld) sch 2 s 7; *Powers of Attorney Act 1998* (Qld) sch 2 s 7.

<sup>1510</sup> *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1).

<sup>1511</sup> *Guardianship and Administration Act 2000* (Qld) ss 65, 68. Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

<sup>1512</sup> Eg, *Guardianship and Administration Act 2000* (Qld) ss 69(1)(a), (d) (Donation of tissue); 70(1)(a), (3) (Sterilisation); 72(1)(b), (d), (2)(b), (d) (Special medical research or experimental health care).

<sup>1513</sup> *Guardianship and Administration Act 2000* (Qld) s 11.

another person or the participation by the adult in special medical research or experimental medical treatment, if the adult objects to that special health care.<sup>1514</sup>

### The power to register a similar order made in another jurisdiction

20.58 The Tribunal may register an order made under a law in another Australian jurisdiction or in New Zealand that is similar to an order made under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).<sup>1515</sup> In this context, an order that has been made in another jurisdiction is called a 'registrable order'.<sup>1516</sup>

20.59 Generally, applications for the registration of an order made in another jurisdiction are dealt with by a single Tribunal member on the papers without a formal hearing, unless the member recommends that it is more appropriate that the application is dealt with by way of an oral hearing.<sup>1517</sup>

20.60 As soon as reasonably practicable after registering or taking any subsequent action under the order, the Tribunal must advise the entity that made the order about the registration or the action taken.<sup>1518</sup>

### The power to review a decision of the Principal Registrar to accept or reject an application

20.61 Section 35 of the QCAT Act enables the Principal Registrar of the Tribunal to reject an application or to accept an application (with or without conditions) made to the Tribunal. The grounds on which the Principal Registrar may reject an application are that:<sup>1519</sup>

- the person making the application is not authorised to do so;
- the application is made outside the time allowed; or

<sup>1514</sup> *Guardianship and Administration Act 2000* (Qld) ss 69(2), 72(3). The effect of an adult's objection to special health care is considered in Chapter 12 of this Report.

<sup>1515</sup> *Guardianship and Administration Act 2000* (Qld) ss 167, 169. The Tribunal may register the order only if the original order or a certified copy of the order has been filed in the Tribunal registry: *Guardianship and Administration Regulation 2000* (Qld) s 7 sch 1. The law in other jurisdictions in relation to the power to register a similar order made in another jurisdiction is discussed in the Commission's Discussion Paper: Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.88]–[15.89].

<sup>1516</sup> A 'registrable order' means an order made under a recognised provision: *Guardianship and Administration Act 2000* (Qld) s 166. A 'recognised provision' means a provision, Act or law prescribed under a regulation for s 167 of the Act: s 166. Schedule 1 of the *Guardianship and Administration Regulation 2000* (Qld) specifies that the following Acts are prescribed equivalent provisions for s 167 of the Act: *Guardianship and Management of Property Act 1991* (ACT); *Guardianship Act 1987* (NSW); *Adult Guardianship Act* (NT); *Aged and Infirm Persons' Property Act* (NT); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1990* (WA); *Protection of Personal and Property Rights Act 1988* (NZ).

<sup>1517</sup> Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 8 of 2010* <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 30 September 2010.

<sup>1518</sup> *Guardianship and Administration Act 2000* (Qld) s 171.

<sup>1519</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 35(3).



- the application does not otherwise comply with the QCAT Act, the enabling Act (for example, the *Guardianship and Administration Act 2000* (Qld)) or the QCAT Rules.

20.62 If the Principal Registrar rejects an application or accepts an application on conditions, the Principal Registrar must notify the applicant that the applicant may request the Principal Registrar to refer the decision to the Tribunal for review. If the applicant makes the request, the Principal Registrar must make the referral.<sup>1520</sup>

20.63 If the question of whether or not an application should be rejected or accepted on conditions is referred to the Tribunal, the Tribunal must direct the Registrar to reject the application or to accept the application on the stated conditions, different conditions or no conditions.<sup>1521</sup>

### **The power to suspend the operation of all or some of the powers of a guardian or administrator**

20.64 Section 155 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to suspend the operation of all or some of the powers of a guardian or administrator for an adult if the Tribunal suspects, on reasonable grounds, that the appointed person is not competent.<sup>1522</sup> An appointee is not competent if, for example:<sup>1523</sup>

- a relevant interest of the adult has not been, or is not being, adequately protected; or
- the appointee has neglected the appointee's duties or abused the appointee's powers, whether generally or in relation to a specific power; or
- the appointee has otherwise contravened the Act.

20.65 During the suspension of the operation of a guardian's power, the Adult Guardian is taken to be the guardian for the adult for the exercise of the suspended power.<sup>1524</sup> Similarly, during the suspension of the operation of an administrator's power, the Public Trustee is taken to be the administrator for the adult for the exercise of the suspended power.<sup>1525</sup>

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1520 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 35(4).

1521 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 35(6)–(7). A decision of the Tribunal made under s 35(6) or s 35(7) is not subject to appeal: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 143(2)(a), 149(4).

1522 *Guardianship and Administration Act 2000* (Qld) s 155(1).

1523 *Guardianship and Administration Act 2000* (Qld) s 155(2).

1524 *Guardianship and Administration Act 2000* (Qld) s 155(5).

1525 *Guardianship and Administration Act 2000* (Qld) s 155(6).

20.66 The Tribunal may make a suspension order in a proceeding without hearing and deciding the proceeding or otherwise complying with the Act.<sup>1526</sup> Such an order may be made for up to three months.<sup>1527</sup>

### **The power to remove an attorney or to change or revoke an enduring document etc**

20.67 The Tribunal has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.<sup>1528</sup> Section 109A of the *Powers of Attorney Act 1998* (Qld) gives the Tribunal the same jurisdiction and powers for enduring documents as the Supreme Court. This includes giving the Tribunal power to decide the validity of an enduring power of attorney and an advance health directive,<sup>1529</sup> to declare that the power under an enduring document has begun,<sup>1530</sup> to remove or replace an attorney and change the terms of an enduring document<sup>1531</sup> and to give directions or advice or make a recommendation, order or declaration about a matter.<sup>1532</sup>

20.68 The power to remove an attorney or to change or revoke an enduring document is discussed in more detail in Chapters 9 and 15 of this Report.

### **The power to authorise conflict transactions and approve investments as authorised investments**

20.69 The guardianship legislation imposes on an attorney for a financial matter and an administrator a duty to avoid ‘conflict transactions’ — which are transactions in which there may be conflict, or which result in conflict, between the person’s duty towards the adult and either the interests of the person or other specified persons or another duty of the person.<sup>1533</sup> The legislation also gives the Tribunal and the Supreme Court a power to authorise conflict transactions.

20.70 Section 152 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to:

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1526 *Guardianship and Administration Act 2000* (Qld) s 155(3).

1527 *Guardianship and Administration Act 2000* (Qld) s 155(4).

1528 *Guardianship and Administration Act 2000* (Qld) s 82(2). An enduring document is an enduring power of attorney or an advance health directive.

1529 *Powers of Attorney Act 1998* (Qld) ss 109A, 113(1).

1530 *Powers of Attorney Act 1998* (Qld) s 115.

1531 *Powers of Attorney Act 1998* (Qld) ss 116–117.

1532 *Powers of Attorney Act 1998* (Qld) s 118.

1533 *Powers of Attorney Act 1998* (Qld) s 73(1); *Guardianship and Administration Act 2000* (Qld) s 37(1).

- authorise conflict transactions, a type of conflict transaction<sup>1534</sup> or conflict transactions generally;<sup>1535</sup> and
- approve an investment for an adult as an authorised investment.<sup>1536</sup>

20.71 The *Powers of Attorney Act 1998* (Qld) also provides for the Tribunal or the Supreme Court to authorise an attorney, either generally, or in a specific case, to undertake a transaction that the attorney is not, or may not be, otherwise authorised to undertake.<sup>1537</sup> Such a transaction may include a conflict transaction.

20.72 The Tribunal's power to authorise conflict transactions is discussed in chapter 17 of this Report.

### The power to order a summary of financial accounts to be filed and audited

20.73 On application of the adult or another interested person, or on its own initiative, the Tribunal may order an adult's administrator or attorney under an enduring power of attorney for a financial matter to file in the Tribunal, and serve on the applicant, a summary of receipts and expenditure for the adult or more detailed accounts of dealings and transactions for the adult.<sup>1538</sup> The Tribunal may also order that the summary or accounts filed be audited by an auditor appointed by the Tribunal and that a copy of the auditor's report be given to the Tribunal and the applicant.<sup>1539</sup>

1534 *Guardianship and Administration Act 2000* (Qld) s 37(2) defines a 'conflict transaction' as a transaction in which there may be conflict, or which results in conflict, between:

- the administrator's duty to the adult;
- and either:
  - the interests of the administrator or a person in a close personal or business relationship with the administrator; or
  - another duty of the administrator.

1535 *Guardianship and Administration Act 2000* (Qld) s 37(1) provides that an administrator for an adult may enter into a conflict transaction only if the Tribunal authorises the transaction, conflict transactions of that type or conflict transactions generally. See Chapter 17 of this Report in relation to conflict transactions by administrators.

1536 Generally, if an administrator has been given the power to invest, he or she may invest only in 'authorised investments': *Guardianship and Administration Act 2000* (Qld) s 51(1)–(2). An authorised investment is an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973* (Qld) pt 3, or an investment approved by the Tribunal: *Guardianship and Administration Act 2000* (Qld) sch 4. In relation to authorised investments by administrators, see [15-13]–[15-15] below.

1537 *Powers of Attorney Act 1998* (Qld) ss 109A, 118(2). See Chapter 17 of this Report in relation to conflict transactions by attorneys.

1538 *Guardianship and Administration Act 2000* (Qld) s 153(1), (3)–(4).

1539 *Guardianship and Administration Act 2000* (Qld) s 153(2)(a). The Tribunal may also make an order about the payment of the auditor's costs: *Guardianship and Administration Act 2000* (Qld) s 153(2)(b).

20.74 An administrator is generally required to submit accounts to the Tribunal or an examiner approved by the Tribunal at regular intervals.<sup>1540</sup> There is no fee charged for the examination of the accounts by the Tribunal. However, an approved examiner is entitled to charge a fee for this service.

### The power to stay a Tribunal decision pending an appeal

20.75 The Tribunal may, by order, stay a Tribunal decision until an appeal against the decision has been finally decided.<sup>1541</sup>

20.76 If there are Supreme Court proceedings about an adult's enduring document or attorneys under an enduring document, the Tribunal must stay the Tribunal proceeding unless the Supreme Court transfers the proceeding to the Tribunal.

### The power to make an order on the application of a substitute decision-maker regarding advice, notice or a requirement received from the Adult Guardian

20.77 Section 179(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may:<sup>1542</sup>

- give advice to an attorney, guardian or an administrator;
- by written notice, make an attorney, guardian or administrator subject to the Adult Guardian's supervision for a reasonable period if the Adult Guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney, guardian or administrator has contravened the Act or his or her duties, but has not done so wilfully; and
- require an attorney appointed in relation to financial matters, or an administrator, to present a plan of management for approval.

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See Presidential Direction No 1 of 2003 (Providing Accounts of Administration for Private Administrator/s), adopted as a practice direction under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) by QCAT Practice Direction No 8 of 2010. It provides that accounts of administration are to be provided in an approved form to the Tribunal (where the value of the adult's estate excluding the adult's principal place of residence or a nursing home bond is under \$50 000) or to one of the approved panel of examiners on an annual basis (where the value of the adult's estate excluding the adult's principal place of residence or nursing home bond is over \$50 000): Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2003* <[http://www.gaat.qld.gov.au/files/2003\\_-\\_1\\_Accounts\\_of\\_Administration\\_Private\\_Administrators.pdf](http://www.gaat.qld.gov.au/files/2003_-_1_Accounts_of_Administration_Private_Administrators.pdf)> at 30 September 2010. See also Presidential Direction No 1 of 2007 (Accounts of administration provided by The Public Trustee of Queensland and trustee companies under the *Trustee Companies Act 1968*), adopted as a practice direction under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) by QCAT Practice Direction No 10 of 2009. It requires these administrators to provide a tribunal briefing report to the Tribunal (where the value of the adult's estate excluding the adult's principal place of residence is under \$300 000) or to the Tribunal's approved examiner (where the value of the adult's estate excluding the adult's principal place of residence is over \$300 000): Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2007*, <[http://www.gaat.qld.gov.au/files/2007\\_-\\_1\\_Accounts\\_of\\_Administration\\_The\\_Public\\_Trust\\_Office.pdf](http://www.gaat.qld.gov.au/files/2007_-_1_Accounts_of_Administration_The_Public_Trust_Office.pdf)> at 30 September 2010.

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*Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 145(2).

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Under this section, an 'attorney' means an attorney under an enduring document or a statutory health attorney: *Guardianship and Administration Act 2009* (Qld) s 179(3).

20.78 Section 179(2) of the Act provides that an attorney, guardian or administrator may apply to the Tribunal about the Adult Guardian's advice, notice or requirement and the Tribunal may make such order as it considers appropriate.

### **The power to consent to the sterilisation of a child with an impairment**<sup>1543</sup>

20.79 Section 80C of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to consent to the sterilisation of a child with a cognitive, intellectual, neurological or psychiatric impairment. The Tribunal may consent to the sterilisation only if it is satisfied the sterilisation is in the best interests of the child. The effect of the Tribunal's consent is that the sterilisation will not be rendered unlawful.

### **The power to approve the use of a restrictive practice under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld)**

20.80 The Tribunal has power under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) to approve the use of certain restrictive practices — containment or seclusion — for some adults.<sup>1544</sup> Chapter 5B applies only in relation to adults with an intellectual or cognitive disability who receive disability services from funded service providers within the meaning of the *Disability Services Act 2006* (Qld).<sup>1545</sup>

20.81 The Tribunal also has power to review a containment or seclusion approval.<sup>1546</sup> At the end of the review of an approval, the Tribunal must revoke the containment or seclusion approval unless it is satisfied it would give the containment or seclusion approval if a new application for the approval were made.<sup>1547</sup>

20.82 If the Tribunal is satisfied that it would give the containment or seclusion approval if a new application for the approval were made, it may do one of the following:<sup>1548</sup>

1543 The Commission is not reviewing the sterilisation of children with an impairment.

1544 *Guardianship and Administration Act 2000* (Qld) s 80X. If the Tribunal has given a containment or seclusion approval which is in effect, or proposes to give a containment or seclusion approval, in relation to an adult, the Tribunal may also approve the use of a restrictive practice other than containment or seclusion in relation to the adult: s 80V. The total period for which a containment or seclusion approval has effect must be not more than 12 months: s 80Y. In some circumstances, the Adult Guardian may give a short term approval for containment or seclusion in relation to an adult: s 80ZH. The law in other jurisdictions in relation to the power to approve the use of certain restrictive practices for an adult is discussed in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.112]–[15.113].

1545 *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S; *Disability Services Act 2006* (Qld) s 14. Generally, a funded service provider is a service provider that receives funds from the Department of Communities to provide disability services: *Disability Services Act 2006* (Qld) s 14.

1546 *Guardianship and Administration Act 2000* (Qld) s 80ZB.

1547 *Guardianship and Administration Act 2000* (Qld) s 80ZB(2).

1548 *Guardianship and Administration Act 2000* (Qld) s 80ZB(3).

- continue its order giving the containment or seclusion approval;
- change its order giving the containment or seclusion approval;
- make an order giving a new containment or seclusion approval.

20.83 The Tribunal also has power to make an interim order in a proceeding under Chapter 5B of the Act if it is satisfied, on reasonable grounds, that:<sup>1549</sup>

- there is an immediate risk of harm to the adult concerned in the proceeding or others; and
- using a restrictive practice is the least restrictive way of ensuring the safety of the adult or others.

20.84 The maximum period for which such an interim order may be made is three months.<sup>1550</sup>

20.85 As explained earlier in Chapter 2 of this Report, the Commission is not generally reviewing Chapter 5B of the *Guardianship and Administration Act 2000* (Qld). However, Chapter 19 of this Report considers a number of specific issues that have been raised in relation to the use of restrictive practices.

## THE SCOPE OF THE TRIBUNAL'S POWERS

20.86 The Tribunal has the substantive powers given under the *Guardianship and Administration Act 2000* (Qld) and the QCAT Act.<sup>1551</sup> These powers include the following powers to give effect to the Tribunal's general functions under section 81 of the Act:

- making declarations about the capacity of an adult, guardian, administrator or attorney for a matter;<sup>1552</sup>
- appointing a guardian or an administrator, and reviewing the appointment;<sup>1553</sup>
- making a declaration, order or recommendation, or giving directions or advice, in relation to guardians, administrators, attorneys and enduring documents;<sup>1554</sup>

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1549 *Guardianship and Administration Act 2000* (Qld) s 80ZR(1).

1550 *Guardianship and Administration Act 2000* (Qld) s 80ZR(4).

1551 The Tribunal is also given power under s 109A of the *Powers of Attorney Act 1998* (Qld) and ss 123ZK(8), 123ZN(5)(b) of the *Disability Services Act 2006* (Qld).

1552 *Guardianship and Administration Act 2000* (Qld) s 146.

1553 *Guardianship and Administration Act 2000* (Qld) ss 12, 31.

- ratifying an exercise of power, or approving a proposed exercise of power, for a matter by an informal decision-maker for an adult with impaired capacity for the matter;<sup>1555</sup>
- consenting to some types of special health care;<sup>1556</sup>
- approving the use of a restrictive practice under Chapter 5B of the Act, and reviewing the approval;<sup>1557</sup>
- registering an interstate order;<sup>1558</sup> and
- reviewing a matter in which a decision has been made by the Registrar of the Tribunal.<sup>1559</sup>

20.87 The Tribunal also has power to make other orders including to:

- issue a warrant for the adult guardian to enter a place and remove an adult;<sup>1560</sup>
- authorise conflict transactions and approve investments as authorised investments;<sup>1561</sup>
- order a summary of financial accounts to be filed and audited;<sup>1562</sup>
- suspend the operation of all or some of the powers of a guardian or administrator;<sup>1563</sup>
- stay a Tribunal decision pending an appeal;<sup>1564</sup> and
- make any order on the application of a substitute decision-maker regarding advice, notice or a requirement received from the Adult Guardian.<sup>1565</sup>

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1554 *Guardianship and Administration Act 2000* (Qld) s 138. See also s 138AA, in relation to directions to a former attorney.

1555 *Guardianship and Administration Act 2000* (Qld) s 154.

1556 *Guardianship and Administration Act 2000* (Qld) ss 68–73.

1557 *Guardianship and Administration Act 2000* (Qld) ss 80X, 80ZB.

1558 *Guardianship and Administration Act 2000* (Qld) s 169.

1559 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 35(6)–(7).

1560 *Guardianship and Administration Act 2000* (Qld) s 149.

1561 *Guardianship and Administration Act 2000* (Qld) s 152.

1562 *Guardianship and Administration Act 2000* (Qld) s 153.

1563 *Guardianship and Administration Act 2000* (Qld) s 155.

1564 *Guardianship and Administration Act 2000* (Qld) s 163.

1565 *Guardianship and Administration Act 2000* (Qld) s 179(2).

## Discussion Paper

20.88 In the Discussion Paper, the Commission noted that the powers of the Tribunal are generally more extensive than those that may be exercised by equivalent bodies in other jurisdictions.<sup>1566</sup> While the Commission indicated that it was not aware of any additional powers that might be needed to support the Tribunal's protective and supervisory functions, the Commission sought submissions on the appropriateness of the Tribunal's powers.<sup>1567</sup>

## Submissions

20.89 The Adult Guardian and one other respondent considered that the powers of the Tribunal are generally appropriate.<sup>1568</sup> Nevertheless, the Adult Guardian proposed that the Tribunal should be given two additional powers; a power to authorise the Adult Guardian to enter a place for the purpose of assessing the circumstances of an adult when there is insufficient evidence to satisfy the requirements for an entry and removal warrant; and a power to make an order to give effect to a guardian's decision.<sup>1569</sup> These issues are discussed later in this Chapter.

20.90 Pave the Way considered that the substantive powers of the Tribunal are generally appropriate.<sup>1570</sup> However, it also suggested that, in relation to the Tribunal's power to direct that an adult undergo examination by a doctor or psychologist, it would be useful if the Tribunal were given an additional power to enable it to order an 'appropriate agency', such as the Department of Justice or the Department of Communities (which administers disability services), to pay for the costs of the examination and the preparation of any report made by the doctor or psychologist: It considered that such a power may be of assistance to the Tribunal where a party is unable or unwilling to pay for the costs of an examination.

20.91 The Queensland Law Society raised a concern that the provision that empowers the Tribunal to make a declaration about the capacity of an adult for a matter may prima facie authorise the Tribunal to make a declaration about the adult's capacity to make a will.<sup>1571</sup> It considered that such an exercise of power may 'usurp' the jurisdiction of the Supreme Court to determine the issue of testamentary capacity:

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1566 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.117].

1567 Ibid 36.

1568 Submissions 164, 177.

1569 Submission 164. See [20.199]–[20.200], [20.211]–[20.213], [20.164] below.

1570 Submission 135.

1571 Submission 70. This respondent specifically referred to this power in the context of the Tribunal performing the analogous function under s 81(1)(a) of the *Guardianship and Administration Act 2000* (Qld).



The issue of capacity of will making is within the jurisdiction of the Supreme Court. Therefore, the Supreme Court's jurisdiction to determine the issue of testamentary capacity on Probate application appears to be usurped. Furthermore, a declaration of 'capacity' to make a will could be sought years before the death or decline of an adult.

### The Commission's view

20.92 The Commission considers that, subject to the specific exceptions noted below, the substantive powers that are conferred on the Tribunal under the *Guardianship and Administration Act 2000* (Qld) and the QCAT Act are generally appropriate to enable the Tribunal to fulfil its various functions. Nevertheless, in order to enhance the Tribunal's protective and supervisory jurisdiction, the Commission has made a number of recommendations in this report to modify some of the existing powers of the Tribunal and to give the Tribunal some new powers.

20.93 The Commission has recommended that a number of Tribunal powers should be modified so as to enhance the effective operation of the Tribunal's protective and supervisory jurisdiction. In some cases, the Commission has recommended minor changes to clarify the operation of the provision conferring a particular power, while, in other cases, the changes that have been recommended are more substantial. Those powers include:

- the power to appoint a guardian or an administrator and to review the appointment;<sup>1572</sup>
- the power to make declarations about capacity;<sup>1573</sup>
- the power to make a declaration, order or recommendation, or give directions or advice;<sup>1574</sup>
- the power to make an interim order;<sup>1575</sup>
- the power to issue a warrant for the Adult Guardian to enter a place and remove an adult;<sup>1576</sup>
- the power to consent to some types of special health care;<sup>1577</sup>
- the power to authorise conflict transactions;<sup>1578</sup>

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1572 Recommendations 14-6, 14-7, 14-12 to 14-15.

1573 Recommendations 28-8, 28-9, 30-6, 30-7.

1574 Recommendations 11-6(g), 20-1, 20-2.

1575 Recommendation 20-3.

1576 Recommendations 20-4, 20-5.

1577 Recommendations 12-2, 12-3. See also Recommendation 12-5(a).

1578 Recommendations 17-13, 7-14.

- the power to approve, clinical research, special medical research or experimental health care;<sup>1579</sup> and
- the power to confer on an adult's substitute decision-maker the authority to override the adult's objection to health care (other than special health care).<sup>1580</sup>

20.94 The Commission has also recommended the amendment of the guardianship legislation to make provision for the following new Tribunal powers:

- the power to issue an entry and assessment warrant;<sup>1581</sup>
- the power to make an order to give effect to a guardian's decision;<sup>1582</sup> and
- the power to review decisions of the Adult Guardian (when acting as a guardian) and the Public Trustee (when acting as an administrator) for an adult as part of the Tribunal's review jurisdiction.<sup>1583</sup>

20.95 The Commission does not consider that the *Guardianship and Administration Act 2000* (Qld) should be amended to confer power on the Tribunal to order a government agency to pay for the costs of the examination and the preparation of any report made by the doctor or psychologist about an adult, as suggested in the submission of Pave the Way. The Commission considers that the current position, whereby the Tribunal may order a party to a proceeding to pay for the costs of an examination, is appropriate.

20.96 The Commission is of the view that no amendment should be made to the *Guardianship and Administration Act 2000* (Qld) in regard to the Tribunal's power to make a declaration about an adult's capacity to make a will.<sup>1584</sup> The Act specifies that only the adult can make a decision for a special personal matter, which includes a matter relating to making or revoking the adult's will.<sup>1585</sup> Although it may be argued that the Tribunal has power to make a declaration about an adult's *capacity* to make a will (because the Tribunal has power to make a declaration about the adult's capacity for a 'matter'),<sup>1586</sup> only the Supreme Court has the jurisdiction to determine the validity of a will. While a declaration made by the Tribunal about the adult's capacity to make a will may be used as evidence in

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1579 Recommendations 13-2, 13-3, 13-5, 13-6.

1580 Recommendation 12-1.

1581 Recommendations 20-7 to 20-11.

1582 Recommendation 20-13. See also Recommendation 20-15.

1583 Recommendation 23-11, 25-6.

1584 Submission 168.

1585 *Guardianship and Administration Act 2000* (Qld) sch 2 s 3(a).

1586 *Guardianship and Administration Act 2000* (Qld) s 146.

Supreme Court proceedings about the validity of the adult's will,<sup>1587</sup> it would not overtake the Supreme Court's jurisdiction to determine the will's validity.<sup>1588</sup>

## THE POWER TO MAKE A DECLARATION, ORDER OR RECOMMENDATION, OR GIVE DIRECTIONS OR ADVICE

20.97 As part of its supervisory jurisdiction, the Tribunal has specific power under section 138 of the Act to give advice or directions about a matter.<sup>1589</sup> That section provides that, once an application about a matter has been made to the Tribunal, the Tribunal may 'give advice or directions about the matter it considers appropriate'.

20.98 In *Re WFM*,<sup>1590</sup> the Tribunal specifically considered the extent of its power to give directions to a guardian or an administrator.

20.99 In that case, the Adult Guardian had been appointed as guardian for a 75 year old adult with Alzheimer's disease. For several years prior to, and in the period after, the Adult Guardian's appointment, the adult's daughter and partner had been in conflict over various issues, including the adult's care and contact arrangements. The adult's daughter applied to the Tribunal for orders to appoint her as the adult's guardian or, alternatively, for the Tribunal to give directions to the Adult Guardian about the manner in which it should make decisions about the adult's care, health matters and contact arrangements.

20.100 The applicant argued, on a number of grounds, that the overall scheme of the Act suggested that 'full effect' should be given to the Tribunal's powers to give directions in relation to guardians and administrators. Firstly, the broad and specific nature of the Tribunal's powers militates against reading down the power to give directions. Secondly, the Tribunal has an active role in 'ensuring appointees perform their roles in a way considered appropriate by the Tribunal'. Thirdly, the Tribunal, whether at the time of the original appointment or on review, has power to impose terms 'considered appropriate by the Tribunal', which suggests that the Tribunal may require a guardian or an administrator to exercise power in a certain way. Finally, the Act's objective of achieving a balance between the right of an adult to decision-making autonomy and the adult's right to adequate and appropriate support for decision-making would not be achieved if the Tribunal was left with the limited option of removing a guardian (who may be otherwise competent and appropriate) rather than giving the guardian directions about the exercise of a power (particularly if there was no other suitable appointee).<sup>1591</sup>

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<sup>1587</sup> *Guardianship and Administration Act 2000* (Qld) s 147.

<sup>1588</sup> In *Re AAB* [2009] QGAAT 21, the Tribunal, while not deciding the issue of whether the Tribunal has the jurisdiction to make a declaration about the adult's capacity to make a will, acknowledged that such a declaration does not affect the validity of the adult's will as the determination of that issue is one for the Supreme Court.

<sup>1589</sup> *Guardianship and Administration Act 2000* (Qld) s 138 is set out at [20.31] above.

<sup>1590</sup> [2006] QGAAT 54.

<sup>1591</sup> *Ibid* [19].

20.101 The Adult Guardian argued that the Tribunal's functions are primarily supervisory and, as such, are separate and distinct from those of a guardian. She further submitted that, while the Tribunal has power under various provisions of the Act to set the terms of an appointment by determining its scope and limits, these provisions 'do not suggest that the Tribunal has authority to determine the way in which decisions are made'.<sup>1592</sup>

20.102 The Tribunal considered that its power to give directions, recommendations or advice was similar to the Supreme Court's power to give advice and directions to trustees under section 96 of the *Trusts Act 1973* (Qld).<sup>1593</sup> It noted that a narrow construction of this power would deny decision-makers, who may have some doubt about the correctness of a decision, or be seeking an indemnity from liability for making a decision, the benefit of the Tribunal's guidance. The Tribunal also considered that a narrow reading of the power to give a direction, recommendations or advice, as suggested by the Adult Guardian, would 'deny decision makers under the Act the right which is available to all trustees and the associated benefits which flow from such directions'.<sup>1594</sup>

20.103 Accordingly, the Tribunal held that, at the time of the appointment of a guardian or an administrator, or on the review of an appointment, as well as on a specific application for directions, it may impose restrictions on, or give instructions to, a guardian or administrator which may extend to directing a substantive course of action for the decision-maker.<sup>1595</sup> It also held that its power to give directions extends to 'how a decision-maker should exercise its powers, and to how a matter for which a decision-maker has been appointed should be decided'.<sup>1596</sup> The Tribunal made directions in accordance with those findings.

20.104 The Tribunal also noted that 'the right of these decision makers to apply for directions in cases of doubt is regarded by the Tribunal as critical to the ongoing efficacy of the legislative scheme'.<sup>1597</sup>

<sup>1592</sup> Ibid [20]. In this regard, the Adult Guardian referred to ss 12(2), 33 and 36 of the *Guardianship and Administration Act 2000* (Qld). Section 12(2) provides for the Tribunal to make an appointment on terms it considers appropriate. Section 33 outlines the powers of an appointee, subject to the Tribunal ordering otherwise. Section 36 provides for the exercise of a power by an appointee as required by the terms of any Tribunal order.

<sup>1593</sup> *Trusts Act 1973* (Qld) s 96 provides:

**96 Right of trustee to apply to court for directions**

- (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.

<sup>1594</sup> [2006] QGAAT 54, [25].

<sup>1595</sup> Ibid [33].

<sup>1596</sup> Ibid.

<sup>1597</sup> Ibid [26].

20.105 The ACT legislation also enables the ACT Civil and Administrative Tribunal ('ACAT') to give a guardian or a manager a direction about the exercise of his or her functions and powers. Section 16 of the *Guardianship and Management of Property Act 1991* (ACT) relevantly provides:

**16 Directions by ACAT**

- (1) The ACAT may, on application, give a direction to a guardian or manager about the exercise of his or her functions or powers.
- (2) A guardian or manager must not, without reasonable excuse, contravene a direction.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

**17 Restrictions on ACAT's power to give directions**

- (1) This section applies to an order that affects a person—
  - (a) who has a guardian; or
  - (b) for whom a manager is appointed.
- (2) The ACAT must not give a direction that is inconsistent with the order.

20.106 In *Omari v Omari, Omari and Guardianship and Management of Property Tribunal*,<sup>1598</sup> the ACT Supreme Court held that ACAT's power under section 16(1) of the *Guardianship and Management of Property Act 1991* (ACT) to give directions to guardians or managers includes the power to direct the guardians on *how* they should exercise their powers.<sup>1599</sup> The Court also noted that:<sup>1600</sup>

There is no apparent limit on the subject matter of such directions, save that they are about the exercise of his or her [that is, the guardian's] functions or powers.

This is obviously an appropriate brake on the wide powers of guardians and can be used to resolve disputes between the guardians and others who may have an interest in the affairs or well-being of the protected person.

## Discussion Paper

20.107 In its Discussion Paper, the Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should expressly provide that the Tribunal's power to give advice or directions includes the power to give a direction to a decision-maker about the way in which a decision is to be made.<sup>1601</sup>

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1598 [2009] ACTSC 28.

1599 Ibid [66].

1600 Ibid [65]–[66].

1601 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 39.

## Submissions

20.108 Several respondents, including the Public Trustee and the Adult Guardian, considered that section 138 is appropriate as it currently stands.<sup>1602</sup> The Adult Guardian also commented that:<sup>1603</sup>

In the experience of the Adult Guardian advice, directions or recommendations are given on about 2 occasions a year. The tribunal has never in the experience of the Adult Guardian considered itself unable to give appropriate advice, directions or recommendations. One of the tensions of course is that if the decision maker requires such explicit directions, it may be that they are unsuitable to fulfil the role of decision maker, and the better course is to appoint another decision maker. Primarily the role of the tribunal is to determine capacity and, if appropriate, to appoint a decision maker: the tribunal has a very limited role as decision maker.

20.109 However, Pave the Way considered that section 138 should include an express power to give directions to guardians, administrators or attorneys about the exercise of their powers.<sup>1604</sup> In particular, Pave the Way considered that, in the case of statutory appointees, the Tribunal should have an express power to make directions about the frequency and circumstances surrounding contact with the adult in question.

20.110 The former Public Advocate also suggested that, because there has been no Supreme Court decision to date which confirms the Tribunal's decision in *Re WFM*, it may be useful to amend the *Guardianship and Administration Act 2000* (Qld) to formally reflect the Tribunal's decision.<sup>1605</sup> The Perpetual Group of Companies expressed a similar view.<sup>1606</sup>

## The Commission's view

20.111 In the Commission's view, it is desirable that the Tribunal's power to give directions be given a wide construction. As noted in *Re WFM*, a narrow construction of the power would deny a decision-maker the benefit of the Tribunal's guidance about how to make a particular decision. This is an important consideration, particularly where the decision-maker is the decision-maker of last resort. For the sake of clarity, the Commission considers that section 138 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide expressly that the Tribunal may give directions to a decision-maker about the exercise of his or her powers, including directions about how a matter for which a guardian, administrator or attorney is appointed should be decided.

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<sup>1602</sup> Submissions 156A, 164, 177.

<sup>1603</sup> Submission 164.

<sup>1604</sup> Submission 135.

<sup>1605</sup> Submission 160.

<sup>1606</sup> Submission 155.

20.112 For consistency with section 138, section 138AA of the Act, which empowers the Tribunal to give directions to a person who was formerly an attorney for an adult, should be amended in a similar way.

## THE POWER TO MAKE AN INTERIM ORDER

20.113 Interim guardianship or administration orders constitute an important safeguard under the *Guardianship and Administration Act 2000* (Qld) in protecting adults from abuse, exploitation or neglect. In recognition of the interim nature of such orders, the Tribunal's power to make such an order is subject to a number of limitations.

### The grounds for making an interim order

20.114 The grounds for making an interim order are set out in section 129(1). In order to make an interim order, the Tribunal must be satisfied on reasonable grounds that there is an immediate risk of harm to the health, welfare or property of the adult concerned in an application, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult.

20.115 Section 129(1) does not refer to any requirement that the adult concerned in the application has impaired capacity. However, the relevant QCAT Practice Direction, which deals with interim orders made under section 129 of the *Guardianship and Administration Act 2000* (Qld), provides, in paragraph (3), that, prior to making an interim order, the Tribunal must be satisfied, on reasonable grounds, that there is 'some evidence' of incapacity.<sup>1607</sup>

Prior to making an interim order, the Tribunal has to be satisfied that on reasonable grounds, there is some evidence of incapacity and the adult appears to be at imminent risk. This notion of risk is grounded on the particular factual circumstances of a case. The risk needs to be immediate, and the Tribunal must be satisfied on the balance of probabilities that harm would result. (emphasis added)

<sup>1607</sup>

QCAT Practice Direction No 10 of 2009 provides that specified Presidential Directions, issued under the *Guardianship and Administration Act 2000* (Qld), including Presidential Direction No 3 of 2007 (which deals with interim orders made under s 129 of the *Guardianship and Administration Act 2000* (Qld)), are 'adopted as practice directions under the *Queensland Civil and Administrative Tribunal Act 2009*'. QCAT Practice Direction No 10 of 2009 also provides that 'references to the Guardianship and Administration Tribunal are to be read as references to the Queensland Civil and Administrative Tribunal'. QCAT Practice Direction No 10 of 2009 (adopting GAAT Presidential Direction No 3 of 2007) is set out at [20.44] above. See eg *Re RAB* [2008] QGAAT 75, [5], [14]; *Re CAF* [2008] QGAAT 95, [3], [20]; *DFT* [2009] QCAT 23, in which the Tribunal has applied this approach.

Presidential Direction No 3 of 2007 is made under s 100(2)(d) of the *Guardianship and Administration Act 2000* (Qld), which empowers the President of GAAT to give directions about 'the tribunal's procedure'. However, to the extent that paragraph (3) of the Presidential Direction purports to limit the Tribunal's discretion to make an interim order under s 129, it is arguable that the Practice Direction goes beyond regulating the Tribunal's 'procedure'. See *Herald and Weekly Times Ltd v VCAT* [2005] VSC 44, where the Supreme Court of Victoria declared that certain rules of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) were *ultra vires* because they went beyond merely regulating 'practice and procedure'.

### Discussion Paper

20.116 In the Discussion Paper, the Commission noted that, arguably, there is an implied requirement under section 129(1) that the Tribunal must be satisfied to the requisite degree that the adult lacks capacity.<sup>1608</sup> Section 82(1) of the Act provides that the Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity, (subject to the exercise of the Tribunal's powers for the appointment of guardians or administrators by the Supreme or District Courts in particular civil proceedings).<sup>1609</sup> In order to make an appointment order, one of the grounds on which the Tribunal must be satisfied is that the adult has impaired capacity for the matter.<sup>1610</sup> However, section 129(2) also gives the Tribunal power to make an interim appointment order without hearing and deciding the proceeding or otherwise complying with the requirements of the Act.

20.117 The Commission sought submissions on whether section 129(1) should be amended to include an additional ground that the Tribunal must be satisfied to the requisite degree that the adult concerned has impaired capacity and on how such an additional ground should be framed.<sup>1611</sup>

### Submissions

20.118 The Public Trustee and Pave the Way both considered that, when making an interim order under section 129, the Tribunal should be satisfied that there is a prima facie case that the adult has impaired capacity.<sup>1612</sup>

20.119 The Adult Guardian considered that there should be 'some' evidence of impaired capacity:<sup>1613</sup>

The capacity test is essentially the human rights protection. If the tribunal is making appointments on the presumption that if an adult has capacity, the community must respect their dignity to make their own decisions, regardless of whether we as a community agree with those decisions, then consistency would indicate that the test should also apply to interim orders.

<sup>1608</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.132].

<sup>1609</sup> The Supreme or District Court also has jurisdiction under s 245 of the *Guardianship and Administration Act 2009* (Qld) for the appointment of guardians or administrators for adults with impaired capacity for matters: *Guardianship and Administration Act 2009* (Qld) s 82(1). See Chapter 28 of this Report.

<sup>1610</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1)(a). Section 12 of the Act is set out at [14.7] above. Note also that one of the General Principles under the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) states that an adult is presumed to have capacity for a matter: *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1. The Tribunal is required to apply the principles under the Act, including the presumption of capacity, when it exercises a power for a matter in relation to an adult: *Guardianship and Administration Act 2000* (Qld) s 11(1). See *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] 2 Qd R 402, [43].

<sup>1611</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 40.

<sup>1612</sup> Submissions 135, 156A.

<sup>1613</sup> Submission 164.



One of the Adult Guardian's concerns is that adults can be very vulnerable and in need of protection, but there is no adult protection system to provide that response short of guardianship. In our work in investigations we are often confronted by the unfortunate reality that an adult who we believe lacks capacity is unable to be protected by us because we cannot gather evidence in relation to capacity. Recently we have received a letter from a community member arguing that the capacity test should be lifted in recognition of the high level of vulnerability of those affected by elder abuse.

So although consistency would indicate some evidence of lack of capacity is necessary in respect of s 129, regard should be given to the often parlous circumstances which give rise to these applications.

20.120 Another respondent considered that the Tribunal should be satisfied that there is 'sufficient' evidence that the adult has impaired capacity.<sup>1614</sup>

### **The Commission's view**

20.121 One of the fundamental principles which underpin the operation of the *Guardianship and Administration Act 2000* (Qld) is that an adult is presumed to have capacity unless the contrary is proven. The Tribunal is required to apply this principle when exercising its powers under the Act. Consistent with this requirement, the Commission considers that the test for making an interim order under section 129(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include, as an additional ground, that the Tribunal must be satisfied to the requisite degree that the adult has impaired capacity.

20.122 In considering how such a ground should be framed, it is relevant to note that, although these orders are described as 'interim' orders under the *Guardianship and Administration Act 2000* (Qld), they effectively operate as interlocutory orders.<sup>1615</sup> For this reason, the Commission considers that the circumstances in which the Tribunal may make an interim order in a guardianship proceeding should be generally consistent with the circumstances in which interlocutory and interim injunctions are granted by superior courts.<sup>1616</sup> However, the formulation of those circumstances should also be consistent with the nature of

<sup>1614</sup> Submission 177.

<sup>1615</sup> Superior courts have the power to grant 'interlocutory injunctions' as a way of maintaining the status quo until the court makes its final determination: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [9]–[10] (Gleeson CJ); and see ICF Spry, *The Principles of Equitable Remedies* (6th ed, 2001) 453. The Supreme Court has statutory power to grant an interlocutory injunction 'in all cases in which it shall appear to the court to be just or convenient' to do so: *Supreme Court Act 1995* (Qld) s 246. Note that the general equitable principles governing the granting of interlocutory injunctions continue to operate: see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [87]–[88] (Gummow and Hayne JJ).

<sup>1616</sup> An interlocutory injunction may be granted if there is a serious question to be tried and the balance of convenience favours that it be granted: *Mincom Ltd v Oniqua Pty Ltd* [2006] QSC 155, [6] (Atkinson J); *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* [1991] 1 Qd R 301, 303 (Shepherdson J), 311 (Cooper J); *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153 (Mason ACJ). That is, it must be demonstrated first, that 'if the facts alleged are shown to be true, there will be a sufficiently plausible ground for the granting of final relief' (*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [8] (Gleeson CJ)) and second, that 'the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted' (*Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 623; (*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [65] (Gummow and Hayne JJ), [19] (Gleeson CJ and Crennan J agreeing)).

the applications and orders made in guardianship proceedings. In the Commission's view, section 129(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal must also be satisfied that there is evidence capable of showing that the adult has impaired capacity. The Commission also notes that the evidence required to satisfy the grounds for making an interim order will depend on the seriousness of the consequences of the proposed order.<sup>1617</sup>

### The maximum period of an interim order

20.123 Section 129(5) of the *Guardianship and Administration Act 2000* (Qld) provides that the maximum period that may be specified in an interim order is three months.<sup>1618</sup> There is also scope for the order to be renewed, but only if the Tribunal is satisfied that there are exceptional circumstances justifying the renewal.

20.124 There is a broad variation in the maximum periods for which interim orders may be made in other jurisdictions. For example, in South Australia, the maximum period is seven days; in Victoria, the maximum period is 21 days (with provision to renew the order for a further 21 days); and, in the Northern Territory, the maximum period is 90 days.<sup>1619</sup>

### Discussion Paper

20.125 In the Discussion Paper, the Commission referred to a submission from the Guardianship and Administration Reform Drivers ('GARD'),<sup>1620</sup> which suggested that the maximum period for which an interim order remains in effect should be reduced to 10 days.<sup>1621</sup> GARD considered that it was appropriate that interim orders be made only for a short period given the potential disruption to the adult's life pending the final hearing of an application for guardianship or administration. GARD also noted that this approach was consistent with the

<sup>1617</sup> See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362, in which Dixon J observed:

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the question has been proved to the reasonable satisfaction of the tribunal.

<sup>1618</sup> *Guardianship and Administration Act 2009* (Qld) s 129(5).

<sup>1619</sup> *Guardianship and Administration Act 1993* (SA) s 14; *Guardianship and Administration Act 1986* (Vic) ss 33(2), 60(2); *Adult Guardianship Act* (NT) s 19(5).

<sup>1620</sup> Submission C24. GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents of People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network. Note that GARD's submission was made prior to the 2007 amendment to s 129, when the combined period for which an interim order could be made was six months.

<sup>1621</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.135].

recommendation made by the Queensland Law Reform Commission in its original 1996 report.<sup>1622</sup>

20.126 The Commission noted that, in many cases, a shorter timeframe may be sufficient to safeguard an adult's interests. The Commission commented that, in these circumstances, the Tribunal may make an order for less than the maximum period. It also noted that section 129 empowers the Tribunal to renew an interim order in exceptional circumstances. If the current maximum timeframe for which an interim order may ordinarily be made were extended, it may have serious consequences for the adult, particularly if the adult is subsequently found to have capacity. If the period for which an interim order may ordinarily be made were reduced, the adult's interests may not be sufficiently protected.<sup>1623</sup>

20.127 The Commission sought submissions on whether the period of three months, which is specified in section 129(5) as the maximum period for which an interim order may ordinarily be made, is appropriate, or should be changed.<sup>1624</sup>

### **Submissions**

20.128 The Adult Guardian and one other respondent considered that the maximum period of three months for which an interim order may ordinarily be made, is appropriate.<sup>1625</sup> While the Adult Guardian commented that, in her experience, the Tribunal often makes interim orders an order for less than three months, she also commented that 'there are also many examples where it would be difficult to progress a matter in less than 3 months, particularly in an environment where it can be difficult to access resources.'<sup>1626</sup>

In shortening the timeframe, there may be insufficient time to progress the matter and provide protection to the adult before the matter returns to the tribunal. With a shortened timeframe, the practical reality may be that more time will be spent at hearings than will be spent accessing services and making decisions to protect the adult.

20.129 The Adult Guardian also commented that:

This is a very practical jurisdiction in which the fight for access to adequate funding and services is unremitting.

20.130 The Public Trustee also considered that the current maximum period of three months is appropriate, and commented that 'the question of the maximum

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1622 Ibid. See Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 270.

1623 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.137].

1624 Ibid 42.

1625 Submissions 164, 177.

1626 Submission 164.

length of the interim order is largely a function of a balance between resources and individual's rights and obligations'.<sup>1627</sup>

20.131 On the other hand, Pave the Way considered that the maximum period of an interim order should be 10 days, consistent with the recommendation in the Commission's original 1996 report.<sup>1628</sup>

### ***The Commission's view***

20.132 In the Commission's view, the current maximum period of three months for which an interim order may be made under section 129 is appropriate. Given the interlocutory nature of these orders, it is important to bear in mind that the three month period is not an automatic default period but the maximum period for which an interim order ordinarily may be made. The Commission considers that it is desirable that an interim order is made for the shortest possible time that is necessary and appropriate in the circumstances. Such an approach is also consistent with the requirement that the Tribunal exercise its powers in the way that is least restrictive for the adult.

### **Renewal of an interim order**

20.133 The making of an interim order affects the rights of the adult concerned by removing some or all of his or her decision-making autonomy. Section 129(6) stipulates that an interim order may be renewed but only if the Tribunal is satisfied that there are exceptional circumstances justifying the renewal.<sup>1629</sup> As mentioned above, the usual maximum period for which an interim order may be made is three months.

### ***Discussion Paper***

20.134 In the Discussion Paper, the Commission commented that three months is arguably a reasonable period of time for the parties involved in an application for an interim order to make a subsequent application for a final appointment order, if necessary.<sup>1630</sup> The Commission also commented that, notwithstanding this, it may be desirable to retain section 129(6) to ensure that, in exceptional circumstances, the interim order may be continued when it is in the interests of the adult to do so.<sup>1631</sup>

20.135 The Commission sought submissions on whether section 129(6) of the *Guardianship and Administration Act 2000* (Qld) should be omitted from the Act.<sup>1632</sup>

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1627 Submission 156A.

1628 Submission 135.

1629 *Guardianship and Administration Act 2000* (Qld) s 129(6).

1630 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.138].

1631 *Ibid.*

1632 *Ibid* 42.

### **Submissions**

20.136 The Adult Guardian and the Public Trustee both considered it appropriate to retain the power to extend interim orders in exceptional circumstances.<sup>1633</sup> In the Public Trustee's view, the limiting words 'exceptional circumstances' constitute an appropriate safeguard for the exercise of the power.<sup>1634</sup>

20.137 Pave the Way considered the legislation should allow the renewal of interim orders to a maximum period of three months in total. It also considered that any further order beyond that period should require a full hearing of the Tribunal.<sup>1635</sup>

20.138 Another respondent suggested that section 129(6) should be omitted from the Act.<sup>1636</sup>

### **The Commission's view**

20.139 The Commission considers that, ordinarily, the majority of interim orders should not need to be continued for longer than the maximum period of three months. However, it also considers that there may be exceptional circumstances in which it would be appropriate for the Tribunal to renew an interim order when it is in the interests of the adult concerned to do so. The Commission is therefore of the view that it is desirable that section 129(6) of the *Guardianship and Administration Act 2000* (Qld) should be retained in its present form.

## **THE POWER TO ISSUE A WARRANT FOR THE ADULT GUARDIAN TO ENTER A PLACE AND REMOVE AN ADULT**

### **The constitution of the Tribunal for hearing an application for an entry and removal warrant**

20.140 Section 149 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to issue a warrant for the Adult Guardian to enter a place and remove an adult.

20.141 There are no mandatory requirements in the *Guardianship and Administration Act 2000* (Qld) or the QCAT Rules in relation to the constitution of the Tribunal when hearing an application for the issue of an entry and removal warrant.<sup>1637</sup> Section 102 of the *Guardianship and Administration Act 2000* (Qld) generally provides that, when hearing a guardianship proceeding, the Tribunal is to

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1633 Submissions 156A, 164.

1634 Submission 156A.

1635 Submission 135.

1636 Submission 177.

1637 The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that 'the constitution of the Tribunal for particular classes of matters' may be the subject of rules made under that Act: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 224, sch 2 s 3(1).

be constituted by three members, and may, if the President considers it appropriate, be constituted by two members or a single member. Previously, when the Guardianship and Administration Tribunal heard an application for the issue of an entry and removal warrant, the Tribunal was required to be constituted by the President, a Deputy President or a legal member.<sup>1638</sup>

20.142 By way of contrast to the current position under section 149, when the Tribunal exercises jurisdiction to renew an interim order, it must be constituted by a legal member.<sup>1639</sup> A 'legal member' is defined in the *Guardianship and Administration Act 2000* (Qld) to mean a legally qualified member of the Tribunal under the QCAT Act.<sup>1640</sup>

### **Discussion Paper**

20.143 In the Discussion Paper, the Commission noted a number of matters that are relevant to a consideration of the constitution of the Tribunal when hearing an application for the issue of an entry and removal warrant.<sup>1641</sup> The removal of an adult from his or her surroundings is a serious matter, which affects the rights of the adult. Such an action may also have a significant impact on other people who are involved in the adult's life. Additionally, the evidence that is available at the hearing of an application to issue an entry and removal warrant is likely to be of a preliminary nature.

20.144 The Commission sought submissions on whether the Tribunal should be required to be constituted in a particular way when it exercises jurisdiction under section 149 of the Act. This might be done, for example, by a legal member or alternatively, by a three member panel (including a legal member).<sup>1642</sup>

### **Submissions**

20.145 The Adult Guardian considered that it would be sufficient for an ordinary member to hear and determine an application for an entry and removal warrant:<sup>1643</sup>

Given the current constitution of QCAT, it is likely that these issues will be determined by an ordinary member. Given the selection criteria for the position, any ordinary member ought to be able to determine these applications. It is inappropriate that sessional members determine these applications. It is noteworthy that given the requirements that must be satisfied to obtain a warrant that the Adult Guardian last applied for a warrant in 2006.

<sup>1638</sup> *Guardianship and Administration Act 2000* (Qld) s 101(5). Section 101 of the *Guardianship and Administration Act 2000* (Qld) was repealed by *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446, and replaced with a new s 102.

<sup>1639</sup> *Guardianship and Administration Act 2000* (Qld) s 129(7).

<sup>1640</sup> *Guardianship and Administration Act 2000* (Qld) sch 4.

<sup>1641</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.141].

<sup>1642</sup> *Ibid* 43.

<sup>1643</sup> Submission 164.

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The test for the tribunal granting a warrant is very high and unless there is some evidence that ordinary members of the tribunal are unable to exercise this power, to restrict who may sit on the panel would seem unnecessary. Applications are generally made at very short notice and often a panel has to be specifically convened to consider the application. Rather than restrict the tribunal panel, the selection criteria for membership of the tribunal should ensure that those with appropriate qualifications, experience and judgement are appointed to the tribunal.

20.146 In contrast, another respondent considered that such an application should be heard by a three member panel (including a legal member).<sup>1644</sup> Two other respondents considered that section 149 should be amended to require that, when hearing an application for the issue of a warrant, the Tribunal should be constituted by a legal member.<sup>1645</sup>

### **The Commission's view**

20.147 Given the seriousness of the consequences that may flow from removal of an adult from a place under the authority of an entry and removal warrant, the Commission considers that the Tribunal's jurisdiction to issue such a warrant should only be exercised by a legally qualified Tribunal member. Accordingly, section 149 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal, when hearing an application for a warrant to enter a place and remove an adult, must be constituted by a legal member. As the Tribunal rarely hears applications for entry and removal warrants, such an amendment is unlikely to have a significant impact on the Tribunal's resources.<sup>1646</sup> The proposed amendment is also consistent with the approach taken under section 129 of the *Guardianship and Administration Act 2000* (Qld) in relation to the renewal of an interim order.

### **The current grounds for issuing an entry and removal warrant**

20.148 The current grounds for the issue of an entry and removal warrant under section 149(1) of the *Guardianship and Administration Act 2000* (Qld) are that the Tribunal is satisfied 'there are reasonable grounds for suspecting that there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter'.<sup>1647</sup>

20.149 The Tasmanian and Victorian legislation makes provision for an order to be made enabling a person with a disability to be taken to a place specified in the order until an application for the appointment of a guardian or an administrator is

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1644 Submission 20B.

1645 Submissions 135, 177.

1646 Between 1 July 2003 and 30 June 2006, three applications for warrants to enter and remove an adult were made to the Tribunal. No applications were made to the Tribunal between 1 July 2006 and 30 June 2009: Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 28.

1647 Section 131 of the *Guardianship and Administration Act 2000* (Qld) permits the Tribunal, in urgent or special circumstances, to proceed to decide a matter on the information before it without receiving further information.

heard. The Tasmanian legislation provides that the Tribunal, after having obtained a report by the Public Guardian or the Public Advocate (as the case may be), may make such an order if it is satisfied that a person with a disability:<sup>1648</sup>

- is being unlawfully detained against his or her will; or
- is likely to suffer damage to his or her physical, emotional or mental health or well-being unless immediate action is taken.

20.150 The Victorian legislation is in similar terms except that, in relation to the latter ground, the Victorian legislation requires a likelihood of ‘serious damage’ rather than ‘damage’.<sup>1649</sup>

### **Discussion Paper**

20.151 In the Discussion Paper, the Commission referred to a submission from GARD which expressed concern about whether the standard of proof that applies in section 149 provides an adequate safeguard against the unwarranted removal of an adult from premises.<sup>1650</sup> GARD suggested that, in some instances, adults have been removed from their families without adequate evidence of there being an immediate risk of harm.<sup>1651</sup>

In particular, all too often an adult will be removed from their family on the basis of unsound evidence. In these circumstances the adults involved can be isolated for extended periods until the time of their hearing before the Tribunal. The isolation of people is an issue of basic human rights.

20.152 GARD proposed that the requirement under the current ground that the Tribunal must be satisfied that there are ‘reasonable grounds for suspecting’ that there is an immediate risk of harm to the adult should be replaced by a requirement for ‘compelling evidence’ of those things.<sup>1652</sup>

20.153 However, the Commission also noted that the standard of proof that applies in section 149(1) of the Act is similar to that which has been used in other Queensland legislation in relation to the issue of warrants for the protection of vulnerable people.<sup>1653</sup> For example, section 513 of the *Mental Health Act 2000* (Qld) empowers a magistrate to issue a warrant to authorise a police officer to detain a patient and take him or her to an authorised mental health service. That section empowers a magistrate to issue a warrant only if he or she is satisfied there

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1648 If, after receiving a report, the Board is satisfied that the information in the Report substantiates the Board may make an order enabling the person with a disability to be taken to, and cared for at, a place specified in the order until an application under s 19 of the Act is heard: *Guardianship and Administration Act 1995* (Tas) s 29(2).

1649 *Guardianship and Administration Act 1986* (Vic) s 27(1).

1650 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 270–1.

1651 Ibid.

1652 Ibid [15.145].

1653 Ibid [15.146].



are *reasonable grounds for suspecting* the patient may be found at the place and that the warrant is necessary to enable the patient to be taken to an authorised mental health service for assessment, treatment or care.<sup>1654</sup>

20.154 On the one hand, if the test for the issue of a removal warrant under section 149 is too easily satisfied, an adult may be removed — in some cases, from his or her support network — without proper justification. On the other hand, if the test is too onerous, it may prevent the timely removal of the adult from an immediate risk of harm.<sup>1655</sup>

20.155 The Commission sought submissions on whether the current ground for the issue of a removal warrant under section 149 of the *Guardianship and Administration Act 2000* (Qld) is appropriate.<sup>1656</sup>

### **Submissions**

20.156 Pave the Way considered that the current ground under section 149(1) of the *Guardianship and Administration Act 2000* (Qld) is appropriate.<sup>1657</sup>

20.157 The Adult Guardian commented that the issues raised by GARD's submission are not representative of the current practice within her Office.<sup>1658</sup>

The Adult Guardian last applied for a warrant in 2006. The then Presidential member (now Justice Ann Lyons) granted the application but directed that the warrant lie in the registry while the Adult Guardian explore whether there were other ways in which the adult could be removed without the need to execute the warrant. Ultimately this was possible.

The GARD report is now 5 years old and certainly has not represented practice within the Office of the Adult Guardian since the current Adult Guardian was appointed in 2006. The report on occasions refers anonymously to matters without providing any data. The allegations in respect of the removal of adults are very serious. Following the execution of a warrant the matter should be listed at the earliest possible opportunity before the tribunal so that any further necessary appointments can be made. I would find it quite concerning if at any point in time adults have been isolated for any significant time without the benefit of the protection of a hearing by the tribunal.

20.158 The Adult Guardian considered that the current requirement that the Tribunal must be satisfied that there are 'reasonable grounds for suspecting' that there is an immediate risk of harm to the adult is an appropriate standard of proof for that section:

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<sup>1654</sup> See also *Disability Services Act 2006* (Qld) s 137.

<sup>1655</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.147].

<sup>1656</sup> *Ibid* 45.

<sup>1657</sup> Submission 135.

<sup>1658</sup> Submission 164.

The view of the Adult Guardian is that the test in this respect should be consistent with the test for issuing a warrant that is used elsewhere ie reasonable grounds for suspecting.

20.159 However, the Adult Guardian considered that the balance of the current ground for issuing a warrant (that is, that there is an immediate risk of harm to the adult) is difficult to satisfy:

It is our submission that the test of 'immediate risk' as opposed to risk is too high.

20.160 By way of illustration, the Adult Guardian gave the following examples:

The Adult Guardian regularly makes decisions about where an adult lives or with whom they have contact that are ignored and countermanded by family members. Granny napping is an all too regular and inherently dangerous self-help tactic employed by families and often to great effect because of the inability of the Adult Guardian to secure assistance to enforce her orders. Currently within this office an adult with dementia is being held against her very clear and long expressed wishes that she live at home until she is unable support herself and that she then live in a local nursing home. Her daughter and son-in-law have removed her from her home and are holding her on an isolated property to which they have denied us and her family members access. The police have done a welfare check and advised that the adult is physically safe and seems to be well cared for. This is the second occasion on which this has occurred. The difficulty for the adult is that when she is removed from familiar surroundings she loses her ability to care for herself because it is the long-term memories of her home (in which she has lived for in excess of 35 years) that provide the structure for her to live independently. She is denied contact by or access to her other children. On the last occasion on which this occurred she believed that she had been visiting her daughter for one day only. Because we know that there is no immediate risk of harm we are unable to apply for a warrant to assist with her return.

In another matter a mother removed her disabled son from accommodation chosen by the Adult Guardian to which both she and the father could access their son and in which proper services were provided. She removed him to her home and isolated him from his father, who is elderly and unwell and with whom all evidence suggested that the son had a close and loving relationship. The Adult Guardian feared that the mother was motivated by issues other than her desire to provide accommodation which was in the best interests for the son and that she may be abusive of him. However we were unable to gather sufficient evidence to satisfy the test under the legislation. Last Friday this young man, who is only slightly verbal, presented at a support service, was withdrawn, and sat huddled in a corner saying 'Mum says'. He resisted attempts to return him to his mother and became flustered, and physically upset when attempts were tried to do this. Ultimately the father was called and collected his son. The report from the service is that he was joyfully reunited with his father and very eager to leave with him.

20.161 In light of her concern that the current ground for obtaining a warrant is 'very high to the point of being generally unachievable', the Adult Guardian proposed that section 149(1) of the Act should be broadened to include two additional grounds for the issue of a warrant, namely that 'the adult is being unlawfully detained against his or her will' (as in the Tasmanian and Victorian legislation) and that 'the adult is likely to suffer serious damage to his or her

physical, emotional or mental health or well-being unless immediate action is taken' (as in the Victorian legislation).

20.162 The Adult Guardian suggested that the addition of a ground based on the unlawful detention of the adult would be 'extremely beneficial' because 'it would improve the level of cooperation with decisions and be resolved by the tribunal making a decision about the Adult Guardian being able to exercise enforcement powers rather than the parties exercising self help, often at the expense of the adult'.

20.163 The Adult Guardian also suggested that the addition of a ground that the adult is 'likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken' may have been usefully applied in some of the examples described in her submission.

20.164 The Adult Guardian further submitted that 'the reality is that the current warrant provision is not serving its purpose of protection'. To overcome this problem, she proposed that the *Guardianship and Administration Act 2000* (Qld) should be amended to give the Tribunal some additional powers to supplement its power to issue an entry and removal warrant. These powers included a power to authorise a police officer (or ambulance officer) to enter premises with the Adult Guardian to enable her to assess the adult's circumstances and a power to make an order to give effect to the Adult Guardian's decisions:<sup>1659</sup>

Perhaps there should be two potential actions that can be authorised upon application to the tribunal, but without a requirement that the first is necessary before an application for a warrant can be made. The first could be effectively authorisation of a police officer to visit with the Adult Guardian and the second could be the warrant provision. In some cases the visit with the police officer may be sufficient and in others the warrant would be preferable. There are certainly matters within this office where I am unable to authorise a visit by a guardian because the potential risks are too high but insufficient to secure a police response.

### ***The Commission's view***

20.165 The Tribunal's power to issue a warrant to enter a place and remove an adult provides an important mechanism for protecting the rights and interests of adults with impaired capacity. Given that the issue of a warrant may have serious consequences for the adult and other people who are involved in the adult's life, it is critical to ensure that such warrants are issued only in limited circumstances.

20.166 Currently, the Tribunal may issue an entry and removal warrant under section 149 of the *Guardianship and Administration Act 2000* (Qld) if it 'is satisfied there are reasonable grounds for suspecting that there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter'. The Commission considers that this is an appropriate ground on which to base the Tribunal's exercise of jurisdiction, and should be retained as a ground on which the Tribunal may issue an entry and

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<sup>1659</sup>

The power to make an order to give effect to a guardian's decision is discussed at [20.211]–[20.223] below.

removal warrant. It is the fact that there is an immediate risk of harm to an adult with impaired capacity that justifies the removal of an adult from a place. This test is also generally consistent with the test for making an interim order under section 129 of the Act.<sup>1660</sup> It is appropriate that these tests are similar, given that, as soon as practicable after the adult has been removed under the warrant, the Adult Guardian is required to apply to the Tribunal for the orders the Adult Guardian considers appropriate about the adult's personal welfare, an enduring power of attorney or advance health directive of the adult and a guardian, administrator or attorney of the adult.<sup>1661</sup> These orders are likely to include an interim appointment order.

20.167 The Commission agrees with the Adult Guardian's proposal that the grounds on which the Tribunal may issue an entry and removal warrant under section 149 of the Act should be expanded to include the circumstance in which an adult who has impaired capacity is being unlawfully detained against his or her will. Such an amendment would enable the Tribunal to issue an entry and removal warrant in circumstances where there is no immediate risk of harm to the adult concerned but that the adult is being unlawfully detained against his or her will.

20.168 However, the Commission does not consider it necessary to amend section 149 of the Act to include the second ground proposed by the Adult Guardian (that is, the adult is likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken). This is because the second ground proposed by the Adult Guardian is already subsumed within the current ground for issuing a warrant under section 149 (that is, there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to the adult).

20.169 The Commission has also recommended in this chapter that the Tribunal should be given two new powers: the power to authorise the Adult Guardian and other authorised persons, to enter a place to assess the adult's circumstances; and the power to make an enforcement order to give effect to a guardian's decisions. The effect of the Commission's recommendations both in relation to these new powers, and in relation to the amended grounds for the issue of an entry and removal warrant, is to broaden the range of options under the legislation for the protection of adults from neglect, exploitation or abuse.

### **Material in support of application for an entry and removal warrant**

20.170 Section 197 of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Adult Guardian considers that there are reasonable grounds for suspecting that there is 'an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter',

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<sup>1660</sup> Section 129 of the *Guardianship and Administration Act 2000* (Qld) enables the Tribunal to make an interim order 'if the tribunal is satisfied, on reasonable grounds, there is an immediate risk of harm to the health, welfare or property of the adult concerned because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult'.

<sup>1661</sup> *Guardianship and Administration Act 2000* (Qld) s 151.

the Adult Guardian may apply to the Tribunal for a warrant to enter a place and to remove the adult.

20.171 In Victoria, if the Victorian Civil and Administrative Tribunal ('VCAT') has received information that a person with a disability in respect of whom a guardianship order has been sought:

- is being unlawfully detained against his or her will; or
- is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken;

VCAT may, by order, empower the Public Advocate or someone else, in the company of a police officer, to visit the person with a disability for the purpose of preparing a report for VCAT.<sup>1662</sup>

20.172 If, after receiving the report, VCAT is satisfied that the person is being unlawfully detained against his or her will or that the person is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken, it may make an order enabling the person with a disability to be taken to a place specified in the order for assessment and placement until the application for guardianship is heard.<sup>1663</sup>

20.173 The Tasmanian guardianship legislation includes a similar provision.<sup>1664</sup>

### **Discussion Paper**

20.174 In the Discussion Paper, the Commission referred to a submission from GARD which commented that the preparation of such a report 'may serve to limit the occasions on which adults are removed unnecessarily'.<sup>1665</sup> Accordingly, GARD proposed that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an application for an entry and removal warrant 'should be accompanied by a report to the Tribunal supporting the application and demonstrating that there is compelling evidence of harm to justify any action taken'.<sup>1666</sup>

20.175 The Commission noted that, while the preparation of a report for the Tribunal in support of an application for an entry and removal warrant may assist the Tribunal in its determination of an application, the requirement for a report might also have the effect of defeating the purpose of making the application.<sup>1667</sup> For example, the preparation of the report is likely to extend the application process,

<sup>1662</sup> *Guardianship and Administration Act 1986* (Vic) s 27(1).

<sup>1663</sup> *Guardianship and Administration Act 1986* (Vic) s 27(2).

<sup>1664</sup> *Guardianship and Administration Act 1995* (Tas) s 29.

<sup>1665</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.146], referring to Submission C24.

<sup>1666</sup> *Ibid.*

<sup>1667</sup> *Ibid* [15.53].

thereby delaying the adult's removal from actual or potential harm. It might also notify those who are suspected of causing harm to the adult of the pending application.

20.176 The Commission also noted that, if the Act were amended to provide that an application for an entry and removal warrant must be supported by a report by the Adult Guardian about the adult's circumstances, a related issue is whether the Adult Guardian should be required to prepare the report on the order of the Tribunal or as part of the documentation required to be filed with an application. If there were a requirement that the Tribunal must order the preparation of a report, it would introduce an additional step in the application process.<sup>1668</sup>

20.177 The Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:<sup>1669</sup>

- an application for an entry and removal warrant must be supported by a report by the Adult Guardian about the adult's circumstances; and
- if so, whether the Adult Guardian should be required to prepare the report on the order of the Tribunal or as part of the documentation required to be filed under an application.

### **Submissions**

20.178 The Adult Guardian did not support the amendment of the *Guardianship and Administration Act 2000* (Qld) to provide that an application for an entry and removal warrant must be supported by a report by the Adult Guardian about the adult's circumstances.<sup>1670</sup> The Adult Guardian considered that, if there is sufficient evidence to satisfy the condition for the Tribunal to issue a warrant, a requirement to prepare a report would defeat the purpose of the application:

The concerns raised within the discussion paper about delay and a requirement of a report from the tribunal are relevant considerations here.

20.179 Nonetheless, the Adult Guardian suggested that, if the *Guardianship and Administration Act 2000* (Qld) were amended to include a requirement for a report, it would be preferable to incorporate that requirement into the application process as having the Tribunal make an order to prepare a report 'simply introduces an additional step in the process'.

20.180 Two submissions considered that the *Guardianship and Administration Act 2000* (Qld) should not require that an application for a warrant be accompanied by a report from the Adult Guardian.<sup>1671</sup> Pave the Way considered that the

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1668 Ibid [15.54].

1669 Ibid 46.

1670 Submission 164.

1671 Submissions 135, 177.

requirement that there be 'prima facie' evidence should be sufficient.<sup>1672</sup> It also expressed concern about the Adult Guardian's ability to provide such a report in a timely way. It noted that the Tribunal will have the power to seek further evidence to satisfy the prima facie test.

### **The Commission's view**

20.181 In the Commission's view, the *Guardianship and Administration Act 2000* (Qld) should not be amended to provide that an application for an entry and removal warrant must be supported by a report by the Adult Guardian about the adult's circumstances. The Commission considers that such a legislative requirement is unnecessary. Further, as noted above, it may also have some potential disadvantages for the adult concerned.

### **The care of the adult following his or her removal**

20.182 Section 151 of the *Guardianship and Administration Act 2000* (Qld) provides that, as soon as practicable after the adult has been removed under the warrant, the Adult Guardian must apply to the Tribunal for the orders the Adult Guardian considers appropriate about the adult's personal welfare, a power of attorney or advance health directive of the adult, or a guardian, administrator or attorney of the adult.<sup>1673</sup> However, the Act does not expressly require the Adult Guardian, as soon as reasonably practicable after removing the adult, to take the adult to a safe place.

20.183 In New South Wales, the legislation provides that an adult, who has been removed from premises, is placed in the care of the Director-General of the relevant Department at a place approved by the Minister of that Department.<sup>1674</sup>

20.184 The Tasmanian legislation empowers a police officer, who reasonably suspects that an adult is or has been abused or neglected or unlawfully detained or is at immediate risk of harm, to enter premises and remove the adult.<sup>1675</sup> The police officer must be accompanied by a person nominated by the Public Guardian when the adult is removed. As soon as practicable, the Public Guardian's nominee

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1672 Submission 135.

1673 Note also that the Tribunal has power to suspend the operation of all or some of the powers of a guardian or an administrator for an adult if the Tribunal suspects, on reasonable grounds, that the appointed person is not competent because, for example, he or she has failed to adequately protect the adult's interests or has neglected his or her duties or abused his or her powers: *Guardianship and Administration Act 2000* (Qld) s 155. The Adult Guardian also has power to suspend the operation of all or some of the powers of an attorney under an enduring power of attorney on similar grounds: s 195. During the suspension of the operation of the power of a guardian or an attorney for a personal matter, the Adult Guardian is taken to be the guardian for the adult for the exercise of the suspended power: ss 155(5), 196(2). Similarly, during the suspension of the operation of the power of an administrator or an attorney for a financial matter, the Public Trustee is taken to be the administrator for the adult for the exercise of the suspended power: ss 155(6), 196(3). The Act also provides for the making of interim orders: s 129.

1674 *Guardianship Act 1987* (NSW) s 13.

1675 *Guardianship and Administration Act 1995* (Tas) s 30(1).

must take the adult to a safe place and ensure that an application for guardianship or other appropriate arrangements are made.<sup>1676</sup>

### **Discussion Paper**

20.185 In the Discussion Paper, the Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended to require that the Adult Guardian must take the adult to a safe place as soon as reasonably practicable after removing the adult from a place under an entry and removal warrant.<sup>1677</sup>

### **Submissions**

20.186 One respondent considered that the Act should be amended to require the Adult Guardian to take the adult to a safe place as soon as reasonably practicable after removing the adult from a place under an entry and removal warrant.<sup>1678</sup>

20.187 The Adult Guardian considered it unnecessary to amend section 151 in this regard as she has 'a duty of care to take an adult to a safe place if she removes them from their existing premises'.<sup>1679</sup> The Adult Guardian also noted that, in doing so, she is limited by the available funding and services.

20.188 In its submission, Pave the Way raised a concern that the Adult Guardian has sometimes taken an adult to a place that is completely inappropriate, such as taking a young person to an aged care nursing home.<sup>1680</sup> Pave the Way commented that this may have a traumatic effect on the adult:

If an individual is removed from an abusive institutional setting, taking them to any other institutional setting could be traumatising.

20.189 While it acknowledged the practical difficulties that arise when an adult is removed from a place, Pave the Way considered that the *Guardianship and Administration Act 2000* (Qld) should require the Adult Guardian to take the adult to an 'age appropriate place where all necessary expertise and support for the particular adult are provided'. It further commented that '[o]n occasions, this might mean that significant short term costs will be involved but it will encourage the Adult Guardian to look for, and plan for, more appropriate places than have been found in the past'.

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<sup>1676</sup> *Guardianship and Administration Act 1995* (Tas) s 30(2)–(3).

<sup>1677</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [15.158]

<sup>1678</sup> Submission 177.

<sup>1679</sup> Submission 164.

<sup>1680</sup> Submission 135.



### ***The Commission's view***

20.190 The Commission notes that the *Guardianship and Administration Act 2000* (Qld) does not currently require the Adult Guardian, as soon as reasonably practicable after entering a place and removing an adult under the authority of a warrant, to take the adult to a safe place. The Commission considers that, as a matter of practicality, the Act should be amended to require that the Adult Guardian is required to take such an action following the execution of a warrant. The Commission also considered that Pave the Way's proposal to amend the Act to require the Adult Guardian to take the adult to an 'age appropriate place where all necessary expertise and support for the particular adult are provided' rather than 'a safe place' (as is currently the case), while representing a best practice approach, is too prescriptive for inclusion as a legislative requirement.

### **THE POWER TO ISSUE AN ENTRY AND ASSESSMENT WARRANT**

20.191 The role of the Adult Guardian is to protect the rights and interests of adults with impaired capacity. The Adult Guardian is given various investigative and protective powers under the *Guardianship and Administration Act 2000* (Qld) on which he or she may rely to assist in fulfilling that role. The Adult Guardian has a general power to investigate any complaint or allegation that an adult with impaired capacity for a matter is or has been neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements.<sup>1681</sup> In certain circumstances, the Adult Guardian may also exercise one or more protective powers,<sup>1682</sup> for example, by making an application for an entry and removal warrant<sup>1683</sup> or by suspending an attorney's power.<sup>1684</sup>

20.192 If, however, the Adult Guardian is unable to make a direct assessment of the adult's circumstances, it may frustrate or hinder the Adult Guardian in the exercise of his or her investigative or protective powers. For example, it may affect the Adult Guardian's ability to properly investigate a complaint or an allegation. It may also affect the Adult Guardian's ability to obtain sufficient evidence to substantiate an application for an entry and removal warrant or an interim order, or upon which to suspend an attorney's power.

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1681 *Guardianship and Administration Act 2000* (Qld) s 180.

1682 Note also that the Adult Guardian may apply for an interim appointment order for an adult under s 129 of the *Guardianship and Administration Act 2000* (Qld). That section provides that the Tribunal may make an interim order in a proceeding if it is satisfied, on reasonable grounds, that there is an immediate risk of harm to the health, welfare or property of the adult concerned in an application, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult. An application for an interim order may be made by the adult concerned or by another interested person: *Guardianship and Administration Act 2000* (Qld) s 115(2).

1683 The Adult Guardian may apply to the Tribunal for a warrant to enter a place and remove an adult who has impaired capacity, if the Adult Guardian considers there are reasonable grounds for suspecting that there is an immediate risk of harm to the adult: *Guardianship and Administration Act 2000* (Qld) s 197.

1684 The Adult Guardian may suspend an attorney's power for an adult if the Adult Guardian suspects on reasonable grounds that the attorney is not competent: *Guardianship and Administration Act 2000* (Qld) s 195.

20.193 This situation might arise, for example, where the Adult Guardian believes it is necessary to enter a place (for example, the adult's residence) in order to assess the adult's circumstances, and is denied entry to the place. It might also occur where the Adult Guardian is allowed to enter a place, but is unable to assess the adult's circumstances because another person at the place obstructs the Adult Guardian from doing so.

20.194 There is currently no specific provision in the *Guardianship and Administration Act 2000* (Qld) which empowers the Tribunal to issue a warrant authorising the Adult Guardian to visit an adult for the purpose of assessing the adult's circumstances.

20.195 In various jurisdictions, the legislation empowers the Tribunal, in certain circumstances, to authorise the Adult Guardian (or the equivalent) to enter premises to visit an adult with impaired capacity for the purpose of obtaining information about the adult's circumstances.

20.196 In Victoria, the legislation adopts a two-step approach for the investigation of the adult's circumstances. Firstly, if the Tribunal has received information that a person with a disability in respect of whom a guardianship order has been sought is being unlawfully detained against his or her will, or is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken, the Tribunal may by order empower the Public Advocate or someone else, in the company of a police officer, to visit the person with a disability for the purpose of preparing a report for the Tribunal.<sup>1685</sup> Secondly, if, after receiving the report, the Tribunal is satisfied that the person is being unlawfully detained against her or his will or that the person is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken, it may make an order enabling the person to be taken to a place specified in the order for assessment and placement until the application for guardianship is heard.<sup>1686</sup> Similar provision<sup>1687</sup> is made in the Tasmanian legislation.

20.197 In Alberta and British Columbia, the legislation empowers the court to authorise a complaints officer or designated agency who is investigating the circumstances of an adult with impaired or limited capacity, to enter a premises to interview the adult.<sup>1688</sup> In Alberta, a complaints officer may also interview any person who may provide any information relevant to the investigation.<sup>1689</sup> In both jurisdictions, the legislation specifically empowers the court to direct a police officer to assist the person who is seeking to interview the adult. In Alberta, the court is

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<sup>1685</sup> *Guardianship and Administration Act 1986* (Vic) s 27(1).

<sup>1686</sup> *Guardianship and Administration Act 1986* (Vic) s 27(2).

<sup>1687</sup> *Guardianship and Administration Act 1995* (Tas) s 29.

<sup>1688</sup> *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 76(5)(c), (6), (7); *Adult Guardianship Act*, RSBC 1996, c 6, s 49.

<sup>1689</sup> *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 76(5)(a), (c), (7)(a).

also empowered to authorise a health care provider to enter the premises to examine the adult to determine whether health care should be provided.<sup>1690</sup>

20.198 The British Columbia provision relevantly provides:

**Power to enter to investigate**

- 49(1) A designated agency that is conducting an investigation described in section 47(3)(d) may apply to the court for an order under subsection (2) if someone from the designated agency:<sup>1691</sup>
- (a) believes it is necessary to enter any premises in order to interview the adult, and
  - (b) is denied entry to the premises by anyone, including the adult.
- (2) On application under subsection (1), the court may make an order authorizing either or both of the following:
- (a) someone from the designated agency to enter the premises and interview the adult;
  - (b) a health care provider, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*, to enter the premises to examine the adult to determine whether health care should be provided.
- (3) If an application for a court order will result in a delay that could result in harm to the adult, a justice of the peace may issue a warrant authorizing someone from the designated agency to enter the premises and interview the adult.
- (4) The court may only make an order under subsection (2), and a justice of the peace may only issue a warrant under subsection (3), if there is reason to believe that the adult
- (a) is abused or neglected, and
  - (b) is, for any of the reasons mentioned in section 44, unable to seek support and assistance. (note added)

<sup>1690</sup> *Adult Guardianship Act*, RSBC 1996, c 6, s 49(2)(b); *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 76(7)(c).

<sup>1691</sup> *Adult Guardianship Act*, RSBC 1996, c 6, s 47(3)(d) provides that, if the designated agency determines that the adult needs support and assistance, the designated agency may investigate to determine if the adult is abused or neglected and is unable, for any of the reasons mentioned in s 44, to seek support and assistance. *Adult Guardianship Act*, RSBC 1996, c 6, s 44 provides that the purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of physical restraint, a physical handicap that limits their ability to seek help, or an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect. *Adult Guardianship Act*, RSBC 1996, c 6, s 47(2) provides that, if the designated agency determines that the adult does not need support and assistance, the designated agency must take no further action and may advise the Public Guardian and Trustee.

## Submissions

20.199 The Adult Guardian submitted that the *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision which empowers the Tribunal to authorise the Adult Guardian to enter premises with police for the purpose of confirming the circumstances of an adult. She suggested that such a provision would be of particular assistance in the situation where there is insufficient evidence to satisfy the requirements for an entry and removal warrant. The Adult Guardian also considered that the proposed new provisions could be used separately, or in addition to, the provisions under the Act for the issue of an entry and removal warrant:

Perhaps there should be two potential actions that can be authorised upon application to the tribunal, but without a requirement that the first is necessary before an application for a warrant can be made. The first could be effectively authorisation of a police officer to visit with the Adult Guardian and the second could be the warrant provision. In some cases the visit with the police officer may be sufficient and in others the warrant would be preferable.

20.200 The Adult Guardian said that, sometimes, she is unable to properly investigate the circumstances of an adult because, for various reasons, she is prevented from visiting the adult.<sup>1692</sup> She observed, for example, that:

There are certainly matters within this office where I am unable to authorise a visit by a guardian because the potential risks are too high but insufficient to secure a police response.

## The Commission's view

20.201 The Commission is of the view that the difficulties raised by the Adult Guardian in her submission are a cause for concern. If the Adult Guardian is unable to obtain sufficient information about an adult's circumstances, she may, in turn, be unable to exercise her powers to apply for orders or take other action to protect the adult that may actually be warranted. To avoid this problem, the Commission considers it would be appropriate to enable the Adult Guardian to apply to the Tribunal for the issue of a warrant authorising her and, if necessary, other specified persons, to enter a place for the purpose of assessing the adult's circumstances; and to empower the Tribunal, in limited circumstances, to issue such a warrant (an 'entry and assessment warrant').

20.202 The Commission is mindful that the development of a legislative mechanism for the issue of entry and assessment warrants raises significant legal issues. For example, the evidential threshold for issuing such a warrant is necessarily lower than that required for other protective mechanisms under the legislation, such as an entry and removal warrant or an interim order. Due to its highly intrusive nature, an entry and assessment warrant also raises issues about the right to privacy. It is therefore important that the proposed new mechanism for entry and assessment warrants includes sufficient safeguards to ensure that such warrants are issued only when necessary and appropriate in the circumstances and

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<sup>1692</sup>

Submission 164.

to protect the rights and interests of the adult and any other person who is an owner or an occupier of the property in respect of which the warrant is issued.

20.203 The Commission therefore considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to include provisions for applying for an entry and assessment warrant (entry and assessment warrant application provisions). It also considers that the Act should be amended to include provisions for making an entry and assessment warrant (entry and assessment warrant provisions). The Commission's recommendations for these proposed new provisions are set out below.

20.204 The entry and assessment warrant application provisions should provide that the Adult Guardian may apply to the Tribunal for an entry and assessment warrant if the Adult Guardian:

- believes it is necessary to enter any place to interview the adult and any other person who may provide information relevant to an assessment of the adult's circumstances, and
- is denied entry to the place by anyone, including the adult; or
- is allowed to enter the place but is obstructed by a person from interviewing the adult or any other person who may provide information relevant to an assessment of the adult's circumstances.

20.205 The entry and assessment warrant provisions should provide that, on application by the Adult Guardian, the Tribunal may issue an entry and assessment warrant authorising:

- the Adult Guardian to enter a place to interview the adult and any other person who may provide information relevant to an assessment of the adult's circumstances; and
- either or both of the following:
  - a police officer to assist the Adult Guardian in enforcing the warrant;
  - a health provider (for example, an ambulance officer) to enter the premises to examine the adult to determine whether health care should be provided to the adult;

if the Tribunal considers it necessary and desirable in the circumstances.

20.206 The Tribunal may issue an entry and assessment warrant only if it is satisfied that:

- there is evidence capable of showing that the adult:
  - has impaired capacity; and

- is, or has been neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements; and
- the issue of the warrant is necessary for the purpose of obtaining information relevant to an assessment of the adult's circumstances.

20.207 In deciding whether to issue an entry and assessment warrant, the Tribunal must have regard to:

- the nature and gravity of any allegation, complaint or other information that the adult is or has been neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements;
- the rights and interests of the following persons, including the extent to which the privacy of the person is likely to be affected:
  - the adult;
  - an owner of the property; and
  - an occupier of the property.
- the existence of alternative ways of obtaining the information sought to be obtained.

20.208 For consistency, the same notification requirements that apply under section 148(2) of the *Guardianship and Administration Act 2000* (Qld) for an application for an entry and removal warrant should apply to the proposed new entry and assessment warrant.

20.209 Given the significant legal issues that the Tribunal must consider when determining an application for an entry and assessment warrant, the Commission considers that the proposed new entry and assessment warrant provisions should provide that the Tribunal, when hearing an application for an entry and assessment warrant, must be constituted by a legal member.<sup>1693</sup> This recommendation is also consistent with the approach taken under section 129 of the *Guardianship and Administration Act 2000* (Qld) in relation to the renewal of an interim order and the Commission's recommendation that the Tribunal's jurisdiction to issue an entry and removal warrant must only be exercised by a legally qualified Tribunal member.

20.210 Finally, the Commission considers that the proposed new entry and assessment warrant provisions should be located alongside the other provisions in chapter 7 of the *Guardianship and Administration Act 2000* (Qld) which set out the Tribunal's powers in particular Tribunal proceedings; and, because the proposed new entry and assessment warrant provisions give rise to a new and distinct power of the Tribunal, within a new division of that chapter.

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<sup>1693</sup>

See the definition of 'legal member' at [20.142] above.

## THE POWER TO MAKE AN ORDER TO GIVE EFFECT TO A GUARDIAN'S DECISION

20.211 An issue that has been raised by the Adult Guardian and a respondent who is a long-term member of the Tribunal relates to the enforceability of decisions about the care and welfare of an adult made by the adult's guardian. These respondents raised a concern that, in some circumstances, a guardian for an adult may be unable to implement his or her decision for the adult as a result of the adult's reluctance to comply with the decision, or obstructive behaviour on the part of a person associated with the adult.

20.212 By way of example, the Adult Guardian provided the following example in relation to a decision about that a particular adult should receive health care:<sup>1694</sup>

Meryl has dementia, is wheelchair bound, suffers from Cerebral Palsy, is a diabetic, and has some swallowing difficulties. Meryl is assessed as in need of high care by ACAT.

Meryl lived with her husband Paul, also a client of the Adult Guardian.

Meryl was very intimidated by Paul, there was reported to be a long history of domestic abuse.

Meryl fell from her wheelchair on 10/02/08. She was reported by the support service to be in extreme pain.

Ambulance was called repeatedly by the service, and the OAG for Meryl to be transported to hospital for assessment as she was in extreme pain subsequent to the fall.

Paul refused to allow anyone to provide Meryl pain relief of any kind. Meryl refused to accept it from anyone.

Paul refused the support staff access to the house because (among other reasons) they had been calling the ambulance and generally encouraging Meryl to go to hospital.

When the Ambulance would arrive, Paul would tell them to go away saying there was nothing wrong with Meryl and not let them in the house. They did have contact with Meryl on a few of the call outs, but when asked if she wanted to go to hospital she declined. Despite the repeated requests to QAS from the OAG where we informed them we were the decision maker, she was not transported to the hospital.

Eventually after high level intervention Meryl was transported to hospital six days after the fall.

Meryl was admitted to hospital with the following diagnosis: a 'fractured right distal femur, tibial plateau and proximal tibia and fibular' all believed to have been sustained in the fall. Meryl was having breathing difficulties, dehydrated, suffering the early stages of renal failure, and a suspected broken wrist (X-rays found it not broken).

Meryl desperately needed assistance and the requests from the appointed guardian were not acted upon because the adult did not wish to get into the ambulance to go to hospital. Neither Meryl nor her husband had capacity to provide informed instructions to the emergency service in question.

20.213 The Adult Guardian has previously explained that in relation to the exercise of her own powers, the *Guardianship and Administration Act 2000* (Qld) 'affords the Adult Guardian no powers to enforce the implementation of her decisions, even if the decision is in the best interests of an adult':<sup>1695</sup>

Although the Adult Guardian can apply to the Tribunal for a warrant, a warrant will only be issued if there are reasonable grounds to suspect abuse neglect or exploitation. Furthermore, police or ambulance cannot be called upon to give effect to a guardianship decision. So, for example, if an adult chooses not to live in the place which the guardian has chosen for them after careful consideration, they may continue to be itinerant for long periods of time, which may put their health and well being at great risk. In such cases, the Adult Guardian has no power to enforce the decision, or to remove the person back to the chosen accommodation. This may make the decision-making power of the guardian ineffectual, and in some cases can diminish the guardian's capacity to protect the well-being of the vulnerable adult over the long term. In this situation, influencing and relationship building skills are paramount.

20.214 The legislation in New South Wales, South Australia, Tasmania, Victoria and Alberta makes special provision for this type of situation.

20.215 Section 32 of the *Guardianship and Administration Act 1993* (SA) provides that the Guardianship Board, on application by an adult's guardian, may make an order, amongst other things, directing the adult to reside at a specified place, or with a person or in a place designated by the adult's guardian:

**32 Special powers to place and detain etc protected persons**

- (1) The Board, on application made by the guardian of a protected person—
- (a) may, by order, direct that the protected person reside—
    - (i) with a specified person or in a specified place; or
    - (ii) with such person or in such place as the guardian from time to time thinks fit, according to the terms of the Board's order; and
  - (b) may, by order, authorise the detention of the protected person in the place in which he or she will so reside; and
  - (c) may, by order, authorise the persons from time to time involved in the care of the protected person to use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person.

<sup>1695</sup>

Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 21–2.



- (1a) An application made by a person under this section may be heard at the same time as his or her application for appointment as guardian.
- (2) The Board cannot make an order under subsection (1) unless it is satisfied that, if such an order were not to be made and carried out, the health or safety of the protected person or the safety of others would be seriously at risk.

20.216 Section 21A of the *Guardianship Act 1987* (NSW) applies if the Guardianship Tribunal makes an order appointing a guardian for an adult. It provides that a guardianship order may specify that the guardian or some other person is empowered to take the measures or actions specified in the order to ensure that the adult's compliance with any decision of the guardian made in the exercise of the powers and duties conferred by the order:

**21A Power to enforce guardianship orders**

- (1) Without limiting section 16,<sup>1696</sup> a guardianship order may specify that:
  - (a) the person appointed as guardian, or
  - (b) another specified person or a person of a specified class of persons, or
  - (c) a person authorised by the guardian (the authorised person),
 is empowered to take such measures or actions as are specified in the order so as to ensure that the person under guardianship complies with any decision of the guardian in the exercise of the guardian's functions.
- (2) If a person referred to in subsection (1) (a), (b) or (c) takes any measure or action specified in the order in the reasonable belief that:
  - (a) he or she is empowered by the guardianship order to take the measure or action, and
  - (b) the measure or action is in the best interest of the person under guardianship, and
  - (c) it is necessary or desirable to take that measure or action in the circumstances,
 the person concerned is not liable to any action, liability, claim or demand arising out of the taking of that measure or action. (note added).

20.217 The Tasmanian legislation contains a similar provision.<sup>1697</sup>

20.218 Section 26 of the *Guardianship and Administration Act 1986* (Vic) provides for the Tribunal to make an order, either when appointing a guardian, or at any time

<sup>1696</sup> *Guardianship Act 1987* (NSW) s 16 (Guardianship orders).

<sup>1697</sup> *Guardianship and Administration Act 1995* (Tas) s 28.

while a guardianship order is in force, to give effect to the guardian's decisions for the adult. It provides:

**26 Power to enforce guardianship order**

- (1) If, having regard to the circumstances of the case, the Tribunal considers it appropriate to do so the Tribunal may—
- (a) when making a guardianship order under Division 2 or 4, specify in the order; or
  - (b) at any time while a guardianship order under Division 2 or 4 is in force, make an order specifying—

that the person named as plenary guardian or limited guardian or another specified person is empowered to take specified measures or actions to ensure that the represented person complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.

- (1A) If the Tribunal makes an order under subsection (1) empowering a guardian or a specified person to take such measures or actions as are specified in the order, the Tribunal must hold a hearing to reassess that order as soon as practicable after the making of that order but within 42 days of making that order.
- (2) Where a guardian or other person specified in the order under subsection (1) takes any measure or action specified in the order in the belief that—
- (a) the measure or action is in the best interests of the represented person; and
  - (b) it is reasonable to take that measure or action in the circumstances—

the guardian or other person is not liable to any action for false imprisonment or assault or any other action, liability, claim or demand arising out of the taking of that measure or action.

- (3) Subsection (1) does not limit section 24 or 25.

20.219 In Alberta, section 38 of the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 provides that if, on application by an adult's guardian, the Court is satisfied that a decision of an adult's guardian is not being given effect, and that there would be a serious risk to the adult's health or safety if the decision were not given effect, the Court may make any order it considers necessary and appropriate to give effect to the decision:

**38 Order to give effect to decision**

- (1) A guardian may apply to the Court, in accordance with the regulations, for an order under this section where the guardian has reason to believe that

- (a) a decision made by the guardian under the guardian's power and authority is not being given effect because
    - (i) the represented adult is failing or refusing to act in accordance with the decision, or
    - (ii) a person is obstructing the doing of anything necessary to give effect to the decision, and
  - (b) there would be a serious risk to the health or safety of the represented adult if the decision were not given effect.
- (2) Where the Court is satisfied that the circumstances referred to in subsection (1)(a) and (b) exist, the Court may make any order the Court considers necessary and appropriate to give effect to the decision of the guardian, including, without limitation, an order authorizing the police to assist the guardian or another person in doing anything necessary to give effect to the decision.

### The Commission's view

20.220 The Commission considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal, on application by an adult's guardian, may, in limited circumstances, make an order (an 'enforcement order') to give effect to a decision made by the guardian for the adult.

20.221 The proposed new enforcement order provisions should provide as follows:

- a guardian may apply for an enforcement order if he or she has reason to believe that :
  - a decision made by the guardian under the guardian's power and authority is not being given effect because:
    - the represented adult is failing or refusing to act in accordance with the decision, or
    - a person is obstructing the doing of anything necessary to give effect to the decision, and
  - there would be a serious risk to the health or safety of the represented adult if the decision were not given effect;
- if the Tribunal is satisfied that the grounds for making an application for an enforcement order exist, the Tribunal may make any order it considers necessary and appropriate to give effect to the decision of the guardian, including, where necessary, an order authorising the police [and/or ambulance officers] to assist the guardian or another person in doing anything reasonably necessary to give effect to the decision;

- an application made by a person under this section may be heard at the same time as his or her application for appointment as guardian; and
- if the Tribunal makes an enforcement order, the Tribunal must hold a hearing to reassess the order as soon as practicable after the making of the order but within 42 days of making the order.

20.222 To remove any doubt that the Tribunal has power under the proposed new enforcement order provisions to make an order relating to more than one decision of the guardian, the provisions should include a footnote reference to section 32C(1)(a) of the *Acts Interpretation Act 1954* (Qld), which provides that, in an Act, words in the singular include the plural.

20.223 The enforcement order provisions should not apply in relation to restrictive practice matters under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) as those matters are regulated under a separate scheme which will be the subject of a separate review.<sup>1698</sup>

## RECOMMENDATIONS

### ***The power to make a declaration, order or recommendation, or give directions or advice***

**20-1** Section 138 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal may give directions to a decision-maker about the exercise of his or her powers, including directions about how a matter for which a guardian, administrator or attorney is appointed should be decided.

**20-2** Section 138AA of the *Guardianship and Administration Act 2000* (Qld), which empowers the Tribunal to give directions to a person who was formerly an attorney for an adult, should be amended in a similar way to section 138 of the Act.

### ***The power to make an interim order***

**20-3** Section 129(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, in addition to the other matters listed in section 129(1), the Tribunal must be satisfied that there is evidence capable of showing that the adult has impaired capacity.

<sup>1698</sup>

Restrictive practices under ch 5B of the *Guardianship and Administration Act 2000* (Qld) are considered in Chapter 19.

***The power to issue a warrant for the Adult Guardian to enter a place and remove an adult***

**20-4** Section 149 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal, when hearing an application for a warrant to enter a place and remove an adult, must be constituted by a legal member.

**20-5** Section 149(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal may issue a warrant, in relation to an adult with impaired capacity for a matter, only if the Tribunal is satisfied there are reasonable grounds for suspecting:

- (a) there is an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse, to an adult with impaired capacity for a matter; or
- (b) the adult is being unlawfully detained against her or his will.

***The power to issue an entry and assessment warrant***

**20-6** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Adult Guardian may apply to the Tribunal for a warrant (an 'entry and assessment warrant') if the Adult Guardian:

- (a) believes it is necessary to enter any place to interview the adult and any other person who may provide information relevant to an assessment of the adult's circumstances, and
- (b) is denied entry to the place by anyone, including the adult; or
- (c) is allowed to enter the place but is obstructed by a person from interviewing the adult or any other person who may provide information relevant to an assessment of the adult's circumstances.

**20-7** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, on application by the Adult Guardian, the Tribunal may issue an entry and assessment warrant authorising:

- (a) the Adult Guardian to enter a place to interview the adult and any other person who may provide information relevant to an assessment of the adult's circumstances; and

- (b) either or both of the following:**
  - (i) a police officer to assist the Adult Guardian in enforcing the warrant;**
  - (ii) a health provider (for example, an ambulance officer) to enter the premises to examine the adult to determine whether health care should be provided to the adult;**

if the Tribunal considers it necessary and desirable in the circumstances.

**20-8** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, the Tribunal may issue an entry and assessment warrant only if it is satisfied that:

- (a) there is evidence capable of showing that the adult:**
  - (i) has impaired capacity; and**
  - (ii) is, or has been neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements; and**
- (b) the issue of the warrant is necessary for the purpose of obtaining information relevant to an assessment of the adult's circumstances.**

**20-9** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in deciding whether to issue an entry and assessment warrant, the Tribunal must have regard to:

- (a) the nature and gravity of any allegation, complaint or other information that the adult is or has been neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements;**
- (b) the rights and interests of the following persons, including the extent to which the privacy of the person is likely to be affected:**
  - (i) the adult;**
  - (ii) an owner of the property; and**
  - (ii) an occupier of the property.**

- (c) the existence of alternative ways of obtaining the information sought to be obtained.

20-10 For consistency, the same notification requirements that apply under section 148(2) of the *Guardianship and Administration Act 2000* (Qld) for an application for an entry and removal warrant should apply to an application for an entry and assessment warrant.

20-11 The proposed new entry and assessment warrant provisions should provide that the Tribunal, when hearing an application for an entry and assessment warrant, must be constituted by a legal member.

20-12 The proposed new entry and assessment warrant provisions should be located alongside the other provisions in chapter 7 of the *Guardianship and Administration Act 2000* (Qld) which set out the Tribunal's powers in particular Tribunal proceedings; and, because the proposed new entry and assessment warrant provisions give rise to a new and distinct power of the Tribunal, within a new division of that chapter.

*The power to make an order to give effect to a guardian's decision*

20-13 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal, on application by an adult's guardian, may, in limited circumstances, make an order (an 'enforcement order') to give effect to a decision made by the guardian for the adult.

20-14 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a guardian may apply for an enforcement order if:

- (a) he or she has reason to believe that a decision made by the guardian under the guardian's power and authority is not being given effect because:
  - (i) the adult is failing or refusing to act in accordance with the decision, or
  - (ii) a person is obstructing the doing of anything necessary to give effect to the decision, and
- (b) there would be a serious risk to the health or safety of the represented adult if the decision were not given effect.

**20-15** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Tribunal is satisfied that the grounds for making an application for an enforcement order exist, the Tribunal may make any order it considers necessary and appropriate to give effect to the decision of the guardian, including, where necessary, an order authorising the police to assist the guardian or another person in doing anything reasonably necessary to give effect to the decision.

**20-16** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Tribunal makes an enforcement order, the Tribunal must hold a hearing to reassess the order as soon as practicable after the making of the order but within 42 days of making the order.

**20-17** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an application for an enforcement order may be heard on an application for the appointment of a guardian.

**20-18** The proposed enforcement order provisions should not apply in relation to restrictive practice matters under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).