

**Queensland  
Law Reform Commission**

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

**Report**

Volume 1

Report No 67  
September 2010

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The short citation for this Report is QLRC R 67  
Published by the Queensland Law Reform Commission, September 2010.  
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ISBN: 978-0-9805799-4-9

To: The Honourable Cameron Dick MP  
Attorney-General and Minister for Industrial Relations

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report, *A Review of Queensland's Guardianship Laws*.

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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)

*A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (October 2009)



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# Executive Summary

## INTRODUCTION

[1] This Executive Summary gives an overview of the principal recommendations made in this Report.

[2] Each chapter of the Report sets out, at the end of the chapter, all of the recommendations made throughout the particular chapter. In addition, a complete set of the recommendations made in all four volumes of the Report is included in the Summary of Recommendations, immediately following this Executive Summary.

[3] A reference in this summary to the 'guardianship legislation' is a reference to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

## CHAPTER 4 — THE GENERAL PRINCIPLES

[4] The Commission has recommended (Rec 4-1) that the General Principles be redrafted:

- to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities* ('the Convention'); and
- to provide a more logical structure and avoid duplication within the General Principles.

[5] The Report includes redrafted General Principles (Recs 4-3 to 4-6), which:

- incorporate the principles referred to in article 3(a)–(g) of the Convention by providing (in new General Principle 2(2)) that 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, include:
  - (a) respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons;
  - (b) non-discrimination;
  - (c) full and effective participation and inclusion in society;
  - (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity;
  - (e) equality of opportunity;

- (f) accessibility; and
  - (g) equality between men and women.
- omit the current General Principle 7(5), and instead require that, among other things, a person or other entity in performing a function or exercising a power under the Act, or under an enduring document, must do so:
  - in a way that promotes and safeguards the adult’s rights, interests and opportunities; and
  - in the way least restrictive of the adult’s rights, interests and opportunities;
- provide greater guidance to substitute decision-makers by providing a more structured approach to decision-making.

[6] The second of the matters mentioned in the preceding paragraph represents a fundamental change from the current General Principle 7(5), which represents a ‘best interests’ approach to decision-making. Under the redrafted General Principles, it is the adult’s rights, interests and opportunities that are to be promoted and safeguarded. The reference to an adult’s ‘rights, interests and opportunities’ necessarily takes into account the principles set out in the new General Principle 2(2). This gives the General Principles a strong human rights focus, and breaks completely with the ‘best interests’ approach reflected in the current General Principle 7(5).

[7] The Commission has also recommended (Rec 4-2) that section 11 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that a person making a decision for an adult on an informal basis must apply the General Principles.

## CHAPTER 5 — THE HEALTH CARE PRINCIPLE

[8] The Commission has recommended that the guardianship legislation should continue to include a separate Health Care Principle. The Commission has recommended (Rec 5-1) that the Health Care Principle be redrafted:

- to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*;
- to avoid duplicating matters dealt with by the General Principles; and
- to provide guidance about the application of the General Principles in the context of health care.

[9] The Report includes a redrafted Health Care Principle (Rec 5-2), which:

- requires the General Principles to be applied;
- elaborates on the application of General Principle 2 by providing that, in applying that principle:
  - the principle of non-discrimination requires, among other things, that all adults be offered appropriate health care, including preventative health care, without regard to a particular adult’s capacity; and
  - any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity, individual autonomy (including the freedom to make one’s own choices) and independence of persons; and
- elaborates on the application of General Principles 7 and 8 by providing that, in applying those principles, a number of specified matters in relation to the health care must be taken into account; and
- elaborates on the application of the General Principle that requires the principle of substituted judgment to be used.

[10] Because section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) applies only in relation to special health care, the Commission has recommended (Rec 5-4) that it be omitted from the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) and relocated to Part 3 of Chapter 5 of that Act, which deals with consent to special health care.

## CHAPTER 6 — THE SCOPE OF MATTERS

[11] With two exceptions, the Commission has recommended (Rec 6-1) that the definitions of the different types of matters be retained without amendment.

[12] The first exception relates to the definition of ‘personal matter’. To assist in clarifying the scope of the definition of ‘personal matter’, the Commission has recommended (Rec 6-2) that the definition of ‘personal matter’ be amended to include, as additional examples of a personal matter:

- contact with, or access visits to, the adult; and
- advocacy relating to the care and welfare of the adult.

[13] The second exception relates to the definition of ‘special personal matter’. The Commission is of the view that a decision to enter a plea on a criminal charge is properly characterised as a type of special personal matter because it is so inherently personal that it would be inappropriate to appoint another person to make that decision on behalf of an adult. Accordingly, the Commission has recommended (Rec 6-3) that the definition of ‘special personal matter’ be amended to include ‘entering a plea on a criminal charge’.

## CHAPTER 7 — DECISION-MAKING CAPACITY

### The presumption of capacity

[14] The guardianship legislation provides that a person or other entity who performs a function or exercises a power under the legislation for a matter in relation to an adult with impaired capacity for the matter must apply the General Principles. One of those General Principles is that an adult is presumed to have capacity for a matter.

[15] The guardianship legislation does not provide any specific guidance about how the presumption of capacity is to be applied by a person or an entity, particularly if the Tribunal or the Supreme Court (when it exercises jurisdiction under the legislation) has previously made a formal determination that the adult has impaired capacity for a matter.

[16] To clarify how the presumption of capacity is to be applied by a person or entity under the guardianship legislation, the Commission has recommended (Recs 7-1 to 7-3) that the following approach be reflected in the legislation.

[17] First, whenever the Tribunal or the Supreme Court makes a determination about an adult's capacity for a matter, the Tribunal or the Court must apply the presumption of capacity. This approach reflects the decision in *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402. If the Tribunal or the Court has determined that an adult does not have capacity for a specific matter or type of matter, that determination will not displace the presumption that the adult has capacity in relation to other matters.

[18] Secondly, if the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to apply the presumption that the adult has capacity for that matter.

[19] Thirdly, if the Tribunal or the Supreme Court has made a declaration that the adult has impaired capacity for a matter and no further declaration about the adult's capacity for that matter has been made, another person or entity who performs a function or exercises a power under the guardianship legislation is entitled to rely on the finding that the presumption that the adult has capacity for that matter has been rebutted.

[20] Finally, the Commission has also recommended (Rec 7-4) that the guardianship legislation should continue to require that, if the Tribunal or the Supreme Court has not made a formal determination that the adult has impaired capacity for a matter, the person or entity must apply the presumption that the adult has capacity for that matter.

### **The approach to defining capacity**

[21] The Commission considered three approaches that are commonly used to define decision-making capacity — the functional, status and outcome approaches. The Commission is of the view that the current approach to defining capacity under the guardianship legislation — the functional approach — is appropriate and should be retained (Rec 7-7).

### **The definition of ‘capacity’**

[22] The guardianship legislation defines ‘capacity, for a person, for a matter’ to mean 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.

[23] The Commission is generally of the view that the current definition of ‘capacity’ is appropriate and has recommended (Rec 7-8) that the definition be retained. However, in order to provide greater clarity about the third limb of the definition — the capacity to communicate decisions in some way — the Commission has recommended (Rec 7-9) that the definition be amended to include a reference to examples of the ways in which a person may communicate his or her decisions.

### **Guidelines for assessing capacity**

[24] To ensure a consistent and best practice approach to capacity assessments, the Commission has recommended (Recs 7-11 to 7-16) that the Minister responsible for administering the guardianship legislation prepare and issue guidelines for making capacity assessments by way of subordinate legislation. The purpose of such guidelines is to provide practical guidance, in the form of information and advice about assessing capacity under the guardianship legislation, to the range of persons who may be required to assess an adult’s capacity. These guidelines should also include examples of best practice.

## **CHAPTER 8 — CAPACITY TO MAKE AN ENDURING DOCUMENT**

### **The statutory test for capacity to make an enduring document**

[25] Sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) set out the test of capacity for making an enduring document under that Act. The current test is subject to some uncertainty in relation to the level of understanding that the principal is required to have when making an enduring document. In order to clarify this issue, the Commission has recommended (Recs 8-1 to 8-4) that:

- the current list of the matters in section 41(2) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand to make an enduring power of attorney should continue to be expressed as an inclusive list;
- section 42(1) of the *Powers of Attorney Act 1998* (Qld) be amended to provide, amongst other things, that a principal has the capacity necessary to make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the nature and effect of the advance health directive; and
- section 42(1) of the *Powers of Attorney Act 1998* (Qld) be amended so that the current list of matters that a principal must understand to make an advance health directive is inclusive rather than exhaustive.

[26] The Commission has also recommended (Rec 8-7) that the *Powers of Attorney Act 1998* (Qld) be amended to provide that the general definition of ‘capacity’ in Schedule 3 of the Act does not apply to sections 41 and 42 of the Act. However, as an additional safeguard for the principal, the Commission has recommended (Recs 8-5, 8-6) that the second limb of the general definition of ‘capacity’ — the capacity to freely and voluntarily make decisions about the matter — should be incorporated into the test of capacity for making an enduring document in those sections.

### **Witnessing the principal’s capacity to make an enduring document**

[27] To address the concerns raised in the submissions about the incidence of enduring powers of attorney executed in circumstances where the principal has questionable or impaired capacity, the Commission has made a number of recommendations (Recs 8-8 to 8-11) to strengthen the requirements for witnessing an enduring document. These include amending the definition of ‘eligible witness’ in the *Powers of Attorney Act 1998* (Qld) to omit the reference to a commissioner for declarations (Rec 8-8). The effect of this proposed amendment is to ensure that enduring documents are witnessed only by a person who is a justice of the peace (magistrates court), a justice of the peace (qualified), a notary public or a lawyer.

[28] The Commission has also recommended (Rec 8-13) that the witnessing sections of the approved forms for making an enduring document should be amended to refer to the guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General, and to recommend their use in witnessing the document.

## **CHAPTER 9 — ADVANCE HEALTH DIRECTIVES**

### **Eligibility for appointment as an attorney under an advance health directive**

[29] The Commission has recommended (Rec 9-1) that section 29(2) of the *Powers of Attorney Act 1998* (Qld) be amended so that a person is not eligible for appointment as an attorney under an advance health directive if the person is a

service provider for a residential service where the principal is a resident. This will ensure consistency with the requirements in section 29(1) in relation to eligibility for appointment as an attorney under an enduring power of attorney.

[30] The Commission has also recommended (Rec 9-2) that section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) be omitted so that the Public Trustee is no longer eligible to be appointed as an attorney under an advance health directive. This recommendation is consistent with the approach taken under the *Guardianship and Administration Act 2000* (Qld), which provides that the Public Trustee is eligible for appointment as an administrator, but not as a guardian. It also reflects the Public Trustee's own practice in this regard.

### Operation of a direction in an advance health directive

[31] The Commission considers that some circumstances are so significant that they go to the heart of whether a direction in an advance health directive should be operative, and should not simply provide a ground of defence for a health provider who does not comply with the direction. The Commission has therefore recommended (Rec 9-3(b)(i)) that section 36 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a direction in an advance health directive does not operate if:

- the direction is uncertain; or
- circumstances, including advances in medical science, have changed to the extent that the adult, if he or she had known of the change in circumstances, would have considered that the terms of the direction are inappropriate.

[32] At common law, a competent adult cannot ordinarily compel the provision of health care that has not been offered: *R (Burke) v General Medical Council* [2006] QB 273. To avoid the uncertainty about the effect of sections 65(2) and 66(2) of the *Guardianship and Administration Act 2000* (Qld) on section 36(1)(b) of *Powers of Attorney Act 1998* (Qld), the Commission has recommended that:

- section 36(1)(b) of the *Powers of Attorney Act 1998* (Qld) be amended to ensure that a direction cannot be more effective than a direction made by a competent adult would be (Rec 9-3(a));
- section 65 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that section 65(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld) (Rec 9-19); and
- section 66 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that section 66(2) is subject to section 36 of the *Powers of Attorney Act 1998* (Qld) (9-20).

[33] The recommended amendment of section 36 allows the common law regarding the effect of a competent adult's demand for treatment to determine whether a direction in an advance health directive *requiring* health care will be effective.

### **The approved form for an advance health directive**

[34] The Commission has recommended (Recs 9-5, 9-6) that section 44 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that an advance health directive made after the commencement of that amendment must be made in the approved form. The Commission considers that a requirement to use the approved form is the most effective way of ensuring that the important information contained in the form is brought to the attention of a person making an advance health directive.

[35] The Commission has also recommended (Recs 9-7, 9-8) that the approved form for an advance health directive be redrafted, and that this process should take into account a number of specified matters, including the effect of the Commission's recommendations in relation to the withholding and withdrawal of life-sustaining measures.

### **Proof of a copy of an advance health directive**

[36] The Commission has recommended (Rec 9-9) that section 45(2) and (3) of the *Powers of Attorney Act 1998* (Qld) be omitted and replaced by a new provision to reduce the likelihood of inadvertent non-compliance with the section.

### **Notification of advance health directives**

[37] The Commission has not recommended the establishment of a register for advance health directives. This is principally because it is anticipated that advance health directives will be able to be scanned and stored electronically with an adult's medical records as part of the nationally consistent electronic health system that is presently being developed.

[38] However, the Commission has recommended (Rec 9-11) that the *Guardianship and Administration Act 2000* (Qld) be amended to include new provisions that require:

- a person in charge of a health care facility to make enquiries about whether a person receiving care at a health care facility has an advance health directive or an enduring power of attorney dealing with health matters, and to take specified steps if the person has such a document; and
- a person, including a health provider, who becomes aware that an adult in a health care facility has made or revoked an advance health directive or an enduring power of attorney that applies to health matters, to tell the person in charge of the health care facility.

### **Recognition of advance health directives made in other jurisdictions**

[39] The Commission has recommended (Rec 9-12) that section 40 of the *Powers of Attorney Act 1998* (Qld) be retained in its present terms. In addition, the Commission has recommended (Rec 9-14) that the *Powers of Attorney Act 1998*

(Qld) be amended to clarify that it does not matter whether an advance health directive made under the *Powers of Attorney Act 1998* (Qld) is made in or outside Queensland.

### **Protection of health providers**

[40] The Commission has made recommendations (Recs 9-15, 9-16) in relation to the protection of a health provider who in acts in reliance on:

- a revoked advance health directive; or
- a direction that is inoperative.

[41] The Commission has also recommended (Rec 9-17) that the protection given by section 102 of the *Powers of Attorney Act 1998* (Qld) to a health provider who does not know that an adult has an advance health directive be limited to a health provider who is acting in good faith.

[42] The Commission has also recommended (Rec 9-18) the amendment of section 103 of the *Powers of Attorney Act 1998* (Qld) so that a health provider who does not act in accordance with an advance health directive will no longer be protected from liability for non-compliance on the basis that he or she has reasonable grounds to believe that a direction in the advance health directive is inconsistent with good medical practice. The Commission considers that the inclusion of this ground in section 103 seriously undermines an adult's right to self-determination.

### **Removal of an attorney or changing or revoking an advance health directive**

[43] The Commission has recommended (Rec 9-21(a)) that section 116(a)–(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, be amended so that the section does not empower the Supreme Court (or the Tribunal by operation of section 109A) to appoint an attorney to replace an attorney who has been removed, or to give a power that has been removed from an attorney to another attorney or to a new attorney

[44] The Commission considers that, where the need for the appointment of a substitute decision-maker arises from the removal of an attorney under an advance health directive, it is more appropriate 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.

[45] However, a majority of the Commission has recommended (Rec 9-22) that section 116(c) and (d) of the *Powers of Attorney Act 1998* (Qld), in so far as those provisions apply to an advance health directive, be retained. These provisions, among other things, enable the Supreme Court and the Tribunal to change the terms of an advance health directive or to revoke an advance health directive. The majority considers that this power could be necessary to rectify an advance health directive that omitted material words. As it is not possible to predict all of the

circumstances in which these powers could be needed, the majority considers that their omission could leave the Tribunal or the Supreme Court without the necessary power to deal with a particular situation.

### **The effect of the guardianship legislation on the operation of a consent or refusal that would otherwise be effective at common law**

[46] There is presently some ambiguity about whether sections 65 and 66 of the *Guardianship and Administration Act 2000* (Qld) have the effect that what would otherwise be recognised at common law as being an effective consent to, or refusal of, health care will not be effective.

[47] The Commission considers it important that the guardianship legislation does not affect what would otherwise be recognised at common law as an effective consent to, or refusal of, health care. The continued operation of the common law in this area is especially important in supporting the role that advance care planning plays in the care of adults who have a terminal illness by ensuring that decisions made at a time when they are competent will continue to be effective even if they reach the stage that they no longer have the capacity to make decisions about their health care.

[48] The Commission has therefore recommended that:

- Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) be amended to include a new provision to the effect that nothing in that Act affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter (Rec 9-25); and
- section 39 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that nothing in that Act affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter (Rec 9-27).

## **CHAPTER 10 — STATUTORY HEALTH ATTORNEYS**

[49] Section 63 of the *Powers of Attorney Act 1998* (Qld) provides that an adult's statutory health attorney is the first person who is readily available and culturally appropriate to exercise power for the matter in the listed order of the adult's spouse (if the relationship between the adult and the spouse is close and continuing), a person who has the care of the adult, and a close friend or relation of the adult. If no-one in that list is readily available and culturally appropriate, the Adult Guardian is the statutory health attorney.

[50] The Commission is generally of the view that, subject to some minor modifications (Recs 10-1 to 10-4), the current list, and order of priority, of persons who may be recognised as an adult's statutory health attorney is appropriate.

[51] One of the modifications recommended by the Commission relates to the definition of 'relation' that applies for the purposes of section 63. The definition, which is also referable to other provisions of the Act, includes persons who, for various reasons, may not be appropriate to make health care decisions for an adult. To ensure that the definition of 'relation' used in section 63 reflects a broad range of family and other close personal relationships and cultural considerations, the Commission has recommended (Rec 10-4) that a new definition of 'relation' be applied for the purposes of section 63.

[52] As an additional safeguard against potential conflicts of interest and abuse, the Commission has also made recommendations (Rec 10-5) in relation to the restrictions imposed under the Act on the persons who may be recognised as a statutory health attorney. These include the amendment of section 63 to clarify that a person who is the adult's health provider or a service provider for a residential service where the adult resides will not be recognised as the adult's statutory health attorney.

## **CHAPTER 11 — THE WITHHOLDING AND WITHDRAWAL OF LIFE-SUSTAINING MEASURES**

### **The definition of 'health care'**

[53] Section 5(2) of the definition of 'health care' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Powers of Attorney Act 1998* (Qld) provides that health care includes the withholding or withdrawal of a life-sustaining measure 'if the commencement or continuation of the measure would be inconsistent with good medical practice'.

[54] The Commission does not consider it appropriate to impose, by way of a definition, this kind of limitation. Accordingly, the Commission has recommended (Rec 11-1) that the definition of 'health care' be amended by omitting from section 5(2) the words 'if the commencement or continuation of the measure for the adult [principal] would be inconsistent with good medical practice'.

### **The definition of 'life-sustaining measure'**

[55] The definition of 'life-sustaining measure' in section 5A of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Powers of Attorney Act 1998* (Qld) provides, in section 5A(3), that a blood transfusion is not a life-sustaining measure. The purpose of excluding a blood transfusion appears to have been to avoid the application of the various provisions of the guardianship legislation that apply specifically to life-sustaining measures, in particular, the limitations imposed by section 36(2) of the *Powers of Attorney Act 1998* (Qld) on the operation of a direction to withhold or withdraw a life-sustaining measure.

[56] In the Commission's view, the more principled and transparent approach is for any concern about the application of section 36(2) to a direction refusing a blood transfusion to be addressed in the specific context of that provision, rather than by excluding blood transfusions from the definition of life-sustaining measure.

Accordingly, the Commission has recommended (Rec 11-2) that section 5A(3) of the definition of 'life-sustaining measure' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be omitted.

### **Withholding or withdrawal of a life-sustaining measure under an advance health directive**

[57] Section 36(2) of the *Powers of Attorney Act 1998* (Qld) provides that a direction in an advance health directive to withhold or withdraw a life-sustaining measure cannot operate unless:

- the adult's medical condition falls within one of four categories, the first one being that the adult has a condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the adult and another doctor, the adult may reasonably be expected to die within one year (section 36(2)(a)); and
- for a direction to withhold or withdraw artificial nutrition or artificial hydration — the commencement or continuation of the measure would be inconsistent with good medical practice (section 36(2)(b)); and
- the adult has no reasonable prospect of regaining capacity for health matters (section 36(2)(c)).

[58] The Commission considers that section 36(2) is an unjustified limitation on an adult's autonomy, and that better safeguards are provided by:

- the recommendation in Chapter 9 that a direction in an advance health directive does not operate if the direction is uncertain or circumstances, including advances in medical science, have changed to the extent that the adult, if he or she had known of the change in circumstances, would have considered that the terms of the direction are inappropriate;
- the provisions of the Act that deal with capacity to make an advance health directive and the execution requirements for making an advance health directive, together with the recommendations in Chapter 8 about those matters; and
- the recommendation in Chapter 9 that an advance health directive must be made in the approved form.

[59] In view of those safeguards, the Commission has recommended (Rec 11-3) that section 36(2) of the *Powers of Attorney Act 1998* (Qld) be omitted.

### **Consent to the withholding or withdrawal of a life-sustaining measure by an adult's substitute decision-maker**

[60] Section 66A of the *Guardianship and Administration Act 2000* (Qld) provides that a consent to the withholding or withdrawal of a life-sustaining measure for an adult does not operate unless the commencement or continuation of the measure would be inconsistent with good medical practice. The Commission considers that section 66A is unsatisfactory because:

- it effectively reposes in the adult's health provider the decision about whether a substitute decision-maker's consent to the withholding or withdrawal of a life-sustaining measure may operate; and
- the section introduces a requirement that does not form part of the redrafted Health Care Principle recommended in Chapter 5 (or of the current Health Care Principle).

[61] A majority of the Commission has therefore recommended (Rec 11-4) that section 66A of the *Guardianship and Administration Act 2000* (Qld) be omitted. In their view, the effect of the section, in preventing a substitute decision-maker's consent from operating, is too absolute. Further, given the Adult Guardian's power under section 43 of the Act, they consider that section 66A cannot be justified in terms of the need to safeguard the adult's interests.

[62] However, the Commission has recommended (Rec 11-5) a new provision dealing with the circumstances in which a health provider or certain other persons may refer a decision about a health matter to the Adult Guardian. The recommended provision is of general application, and is not limited to decisions about the withholding or withdrawal of a life-sustaining measure.

### **The effect of the consent requirements where the life-sustaining measure is 'medically futile'**

[63] The Commission has recommended that the guardianship legislation be amended to provide that 'withholding a life-sustaining measure' does *not* include not commencing a life-sustaining measure if the adult's health provider reasonably considers that commencing the measure would not be consistent with good medical practice. The effect of this recommendation is that, although ordinarily there will still be a requirement to obtain consent in order to withhold a life-sustaining measure, it will not be necessary to obtain consent in circumstances where the commencement of the measure would not be consistent with good medical practice.

[64] However, a majority of the Commission is concerned that, once the measure is in place, a change to the adult's treatment regime that will, in all likelihood, result in the adult's death should not occur without consent — whether from the adult's substitute decision-maker, the Adult Guardian or the Tribunal. Accordingly, these members have not recommended a similar definition of 'withdrawal of a life-sustaining measure'.

### **The effect of an adult's objection to the commencement, or continuation, of a life-sustaining measure**

[65] The Commission considers that section 67 of the *Guardianship and Administration Act 2000* (Qld) and the provision proposed by Recommendation 12-1 deal appropriately with the effect of an adult's objection to the commencement or continuation of a life-sustaining measure in non-urgent circumstances.

[66] The Commission also considers that, subject to the amendments to section 63 of the Act recommended in Chapter 12, that section deals appropriately with the effect of an adult's objection to the commencement or continuation of a life-sustaining measure in urgent circumstances.

### **The effect of an adult's objection to the withholding or withdrawal of a life-sustaining measure**

[67] The Commission considers that section 67 (and, in particular, section 67(2)(b)) of the *Guardianship and Administration Act 2000* (Qld) does not deal appropriately with the effect of an adult's objection to the withholding or withdrawal of a life-sustaining measure in non-urgent circumstances. Given that the adult's death is the likely result of withholding or withdrawing the measure, it is not appropriate to frame a test for overriding an adult's objection based on whether the 'health care' — in this case, the withholding or withdrawal of the life-sustaining measure — is likely to cause the adult 'no distress' or 'temporary distress that is outweighed by the benefit to the adult of the proposed health care'.

[68] The Commission has therefore recommended that:

- section 67 of the *Guardianship and Administration Act 2000* (Qld) be amended so that it does not apply to an adult's objection to the withholding or withdrawal of a life-sustaining measure (Rec 11-9); and
- the *Guardianship and Administration Act 2000* (Qld) be amended so that, generally, if an adult objects to the withholding or withdrawal of a life-sustaining measure, an adult's substitute decision-maker cannot override the adult's objection; the recommended provision instead confers on the Adult Guardian the power to override the adult's objection (Rec 11-10).

[69] The Commission considers it appropriate that section 63A of the *Guardianship and Administration Act 2000* (Qld), which applies in situations of urgency, has the effect that a life-sustaining measure may not be withheld or withdrawn without consent.

### **Potential criminal responsibility for withholding or withdrawing a life-sustaining measure**

[70] The Report outlines the current uncertainty about whether a health provider who withholds or withdraws a life-sustaining measure in accordance with the guardianship legislation may nevertheless be criminally responsible for the adult's death.

[71] To remove that uncertainty, the Commission has recommended that the Criminal Code (Qld) be amended to provide that a person is not criminally responsible for withholding or withdrawing, in good faith and with reasonable care and skill, a life-sustaining measure from an adult if the withholding or withdrawal of the life-sustaining measure:

- is in accordance with a valid refusal of the health care given by the adult at a time when he or she had capacity to make decisions about the health care;
- is authorised by the *Guardianship and Administration Act 2000* (Qld), the *Powers of Attorney Act 1998* (Qld) or another Act; or
- is authorised by an order of the Supreme Court.

## CHAPTER 12 — THE EFFECT OF AN ADULT’S OBJECTION TO HEALTH CARE

### Health matters other than life-sustaining measures

[72] The Commission is generally of the view that section 67(1)–(2) of the *Guardianship and Administration Act 2000* (Qld) deals appropriately with the effect of an adult’s objection to health care other than special health care or the withholding or withdrawal of a life-sustaining measure.

[73] The Commission recognises, however, that there may be some circumstances in which it should be possible for an adult’s objection to health care to be overridden even though the requirements of section 67(2) are not satisfied. To ensure that it is not necessary for an application to be made to the Supreme Court in these circumstances to authorise the health care, but also to ensure that an adult’s objection is not too readily discounted by the adult’s substitute decision-maker, the Commission has recommended (Recs 12-1, 12-2(a)) that the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Tribunal to confer on an adult’s substitute decision-maker the authority to exercise power for a health matter despite the adult’s objection and to give an effective consent to the health care.

### Special health matters: Sterilisation and termination of pregnancy

[74] The Commission has recommended (Rec 12-3) that sections 70 (Sterilisation) and 71 (Termination of pregnancy) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, in deciding whether to consent to the health care, the Tribunal must take into account any objection by the adult and any other matter relevant to the decision.

[75] The Commission has also recommended (Rec 12-2(b)) that section 67 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal may consent to the sterilisation of an adult or the termination of an adult’s pregnancy, despite the adult’s objection, if the Tribunal was constituted by, or included, a judicial member.

[76] The Commission has also made recommendations (Recs 12-4, 12-5) about ancillary matters relating to the hearing of an application for the sterilisation of an adult or the termination of an adult's pregnancy.

### **Objection to urgent health care**

[77] The Commission has made recommendations in relation to section 63 of the *Guardianship and Administration Act 2000* (Qld), which deals with the circumstances in which health care may be carried out urgently without consent.

[78] In relation to section 63(1)(b)(i), which deals with health care to meet imminent risk to the adult's life or health, the Commission has recommended (Rec 12-6) that the subparagraph be amended to add the words 'and it is not reasonably practicable to get consent from a person who may give it under this Act or the *Powers of Attorney Act 1998*'. This change will make section 63(1)(b)(i) consistent with section 63(1)(b)(ii), and ensure that, where practicable, health care is carried out with the consent of a person who has the appropriate authority.

[79] The Commission has recommended (Recs 12-7, 12-8) that section 63(2) and (3) be amended so that health care may not be carried out without consent under the authority of section 63 if the health provider knows that:

- the adult objects to the health care in an advance health directive (this exception currently only applies to health care mentioned in section 63(1)(b)(i)); or
- at a time when the adult had capacity to make decisions about the health care, he or she refused the health care.

## **CHAPTER 13 — CONSENT TO PARTICIPATION IN MEDICAL RESEARCH**

### **Consent mechanisms for participation in special medical research or experimental health care**

[80] The Commission has recommended (Rec 13-1) that section 72 of the *Guardianship and Administration Act 2000* (Qld), which provides that the Tribunal may consent to an adult's participation in special medical research or experimental health care, be retained.

[81] In addition, to provide greater flexibility, the Commission has recommended (Rec 13-2) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, in specified circumstances, the Tribunal may approve special medical research or experimental health care (as it can for clinical research). This will avoid the need for multiple applications to be made to the Tribunal for its consent for the participation of each adult in the research.

[82] The Commission has also recommended (Rec 13-7(a)) that section 7(d) of the definition of 'special health care' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be

amended so that special medical research or experimental health care that has been approved in accordance with the provision that gives effect to Recommendation 13-2 does not constitute 'special health care'. This change will ensure that, where the Tribunal has approved the special medical research or experimental health care, consent can be given by an adult's substitute decision-maker.

### **Consent mechanisms for participation in clinical research**

[83] The Commission has recommended (Rec 13-4) that section 13(3)–(5) of schedule 2 of the *Guardianship and Administration Act 2000* (Qld), which sets out the circumstances in which the Tribunal may approve clinical research (as distinct from matters of definition), be omitted from the schedule and relocated to the body of the Act.

[84] Further, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to include a provision to the general effect of section 45AB(1) of the *Guardianship Act 1987* (NSW) so that the Tribunal may order that consent for an adult's participation in clinical research be given by an adult's substitute decision-maker (which generally reflects the current approach) or that the Tribunal may itself consent to an adult's participation in the clinical research.

[85] Because the Tribunal will have the power not simply to approve clinical research, but also to consent to an adult's participation in it, the Commission has recommended (Rec 13-7(b)) that the definition of 'special health care' in section 7 of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) be amended to include, as a further category of special health care, approved clinical research (unless the Tribunal has ordered that consent for an adult's participation in the clinical research may be given by the adult's substitute decision-maker).

## **CHAPTER 14 — THE APPOINTMENT OF GUARDIANS AND ADMINISTRATORS**

### **The grounds for the appointment of a guardian or an administrator**

[86] Section 12 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an order appointing a guardian or an administrator for an adult. It 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) is established.

[87] First, the Tribunal must consider whether the adult has impaired capacity for the matter. In deciding this question, the Tribunal must apply the presumption of capacity which can be displaced only if, in applying the functional test of capacity provided under the Act, the Tribunal is satisfied that the 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(1) 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.

[88] The Commission is of the view that the grounds for the appointment of a guardian or an administrator under section 12 of the *Guardianship and Administration Act 2000* (Qld) are appropriate and has therefore recommended (Rec 14-1) that they be retained.

### **Consent to an appointment**

[89] The Commission has recommended that:

- generally, a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment (Rec 14-5);
- because the requirement for consent to an appointment is a substantive one, it should be located in the *Guardianship and Administration Act 2000* (Qld) rather than in the QCAT Rules (as is presently the case) (Rec 14-5); and
- the requirement for consent to an appointment should not apply to the Adult Guardian or the Public Trustee (Recs 14-6 to 14-7).

[90] The last of these recommendations will ensure that the Adult Guardian and the Public Trustee are always available for appointment, particularly if there is no other appropriate person available for appointment.

[91] To the extent that the implementation of the Commission's recommendations in relation to the removal of the general requirement for consent to an appointment may have resource implications for the Adult Guardian and the Public Trustee, the Commission has recommended (Rec 14-8) that, if necessary, the Adult Guardian and the Public Trustee should be given funding to satisfy their statutory obligations in this regard.

### **Appropriateness considerations for appointment**

[92] The Commission is of the view that the list of appropriateness considerations in section 15(1) of the *Guardianship and Administration Act 2000* (Qld) are all relevant considerations for the Tribunal to take into account when deciding whether a person is suitable for appointment as an adult's guardian or administrator.

[93] Although family conflict is not specifically mentioned 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. 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 Commission noted that there was a perception, among some respondents, that the appointment of the Adult Guardian or the Public Trustee is sometimes too readily made in situations of family conflict.

[94] The Commission is of the view 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 an adult's guardian or administrator. Accordingly, the Commission has recommended (Rec 14-9) that section 15 of the Act 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, a family member of the adult should be defined in terms of the new definition of 'relation', 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**

[95] The Commission has recommended (Rec 14-10) that 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. In this regard, the Commission has noted that, 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.

[96] The Commission has also recommended (Rec 14-11) that, 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. 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.

### **The appointment of the Adult Guardian and the Public Trustee**

[97] The Commission is generally of the view that the test for the appointment of the Adult Guardian in section 14(2) is appropriate. The Commission has recommended (14-13) that a similar test apply to the appointment of the Public Trustee as administrator. It has also recommended (Recs 14-14, 14-15) that a similar test apply in relation to both the Adult Guardian and the Public Trustee on the review of an appointment.

## CHAPTER 15 — THE POWERS AND DUTIES OF GUARDIANS AND ADMINISTRATORS

[98] The Commission is generally of the view that that the scope of powers that may be conferred on a guardian or an administrator under the *Guardianship and Administration Act 2000* (Qld) is appropriate.

[99] However, in order to give greater recognition under the Act to the rights and interests of adults who have fluctuating capacity, the Commission has recommended that:

- the Act 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 (Rec 15-1); and
- 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 (Rec 15-2).

## CHAPTER 16 — ENDURING POWERS OF ATTORNEY

[100] In this Chapter, the Commission has made a range of recommendations to help prevent abuse in the creation of enduring powers of attorney and 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 or convicted on indictment for an offence involving personal violence or dishonesty in the previous 10 years (Recs 16-1 to 16-6);
- the redrafting of the approved forms for an enduring power of attorney to more clearly explain the key features of an enduring power of attorney and the role, powers and duties of an attorney (Recs 16-11 to 16-13); and
- the inclusion of information in the approved forms for an enduring power of attorney to explain that the principal may elect to nominate particular persons who must be notified of the activation of the power of attorney (Rec 16-16).

[101] The Commission has also made recommendations to help address the issue of abuse of enduring powers of attorney in Chapter 8, which deals with the capacity to make an enduring document, and in Chapter 17, which deals with conflict transactions. In Chapter 30, the Commission has also emphasised the importance of giving attorneys adequate support and training to assist them in fulfilling their role, and in educating the wider community about the use and operation of enduring powers of attorney.

[102] 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.

[103] Consistent with that policy approach, the Commission has recommended (Rec 16-15) that the *Powers of Attorney Act 1998* (Qld) not be amended to require that all enduring powers of attorney be registered. 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, a registration system cannot necessarily detect fraud or abuse. There are also likely to be limitations on the extent to which a registration system can adequately record the status of an enduring instrument. 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. The Commission has serious concerns that these issues could inevitably discourage some adults from making an enduring power of attorney. The Commission has therefore concluded that the burdens of a mandatory registration system would likely outweigh its benefits.

[104] The Commission has also recommended (Recs 16-16, 16-25) that the *Powers of Attorney Act 1998* (Qld) not be amended to include a mandatory requirement for notification or for the auditing of accounts, as these measures are also likely to increase the complexity and costs of the scheme for enduring powers of attorney.

[105] The Commission has also made a recommendation (Rec 16-14) in relation to the requirements for proving an enduring power of attorney which is consistent with the recommendations it has made about those matters in relation to advance health directives. It has also recommended (Recs 16-22 to 16-24) some minor amendments to the legislative scheme for the recognition of enduring powers of attorney made in another jurisdiction.

[106] To give greater recognition to the principal's autonomy, the Commission has recommended (Recs 16-18, 16-19) that section 116 of the *Powers of Attorney Act 1998* (Qld) be amended to enable the Supreme Court or the Tribunal to remove an attorney only if it considers that the attorney is no longer competent to act in that position. The Commission has also recommended (Rec 16-20) that, in so far as section 116(a) and (b) apply to an attorney appointed under enduring powers of attorney, those provisions be amended so that:

- section 116(a) does not empower the court to appoint a new attorney or to replace a new attorney who has been removed; and
- 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.

## CHAPTER 17 — CONFLICT TRANSACTIONS

[107] The guardianship legislation imposes a duty on attorneys and administrators to avoid conflict transactions.

[108] To address the problem of financial abuse by attorneys and administrators, the Commission has made a series of recommendations to clarify:

- the scope of the duty to avoid a conflict transaction and to ensure that the legislation deals appropriately with the types of conflict situations which commonly arise, particularly in family situations (Recs 17-1, 17-3 to 17-11);
- the power of the Tribunal or the Supreme Court to authorise or ratify a conflict transaction (Recs 17-13, 17-14); and
- that a principal, who has capacity, may also authorise (or ratify) a conflict transaction retrospectively (Rec 17-2).

[109] Among other things, these recommendations are designed to make it clear that an attorney or an administrator must not enter into a conflict transaction unless the conflict transaction has been authorised prospectively.

[110] The Commission has also recommended (Rec 17-17) that the legislative remedies available for non-compliance with an attorney's or an administrator's duties under the guardianship legislation be expanded so that the Tribunal or the Supreme Court has power to order an attorney or an administrator, 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.

[111] The Commission has also recommended (Rec 17-18) that the Criminal Code (Qld) be amended to provide for an increased penalty for an attorney who commits fraud against his or her principal. It has also recommended (Rec 17-19) 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.

## CHAPTER 18 — BINDING DIRECTION BY A PARENT FOR THE APPOINTMENT OF A GUARDIAN OR AN ADMINISTRATOR

[112] The terms of reference for this review specifically required the Commission to consider 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.

[113] Although the Commission is sympathetic to the position of parents who are concerned to have greater control in relation to future decision-making for their children, the Commission has recommended (Rec 18-1) that the *Guardianship and*

*Administration Act 2000* (Qld) not be amended to enable parents to make binding directions appointing guardians or administrators for their adult children.

[114] 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 Court or the District Court. 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.

[115] However, to ensure that parents are aware of the Tribunal's power to appoint successive guardians and administrators, the Commission has recommended (Rec 18-2) that, 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

[116] The Commission considers it 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.

[117] The current 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.

[118] The Commission considers it 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 so that the rights and interests of *all* adults are adequately safeguarded.

[119] The Commission has therefore recommended (Recs 19-1, 19-2) that:

- Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) 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 who provide disability services, regardless of the source of their funding or whether they in fact receive funding;
- the current provisions of the restrictive practices legislation, including the requirements for the assessment of the adult and the development of a

positive behaviour support plan, 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; and

- the task of extending the legislation, as recommended above, be undertaken jointly by the Department of Communities and the Department of Justice and Attorney-General.

[120] The Report also examines a number of issues that have been raised during the review about 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 scope of that scheme. The Commission is of the view that there should be a single legislative approach for regulating the use of antilibidinal drugs, and that 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.

[121] Given 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 has recommended (Rec 19-3) that the reviews that are required to be undertaken by sections 233 and 233A of the *Disability Services Act 2006* (Qld) should consider:

- 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 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
- 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

### The power to give advice, directions and recommendations

[122] For the sake of clarity, the Commission has recommended (Rec 20-1) that section 138 of the *Guardianship and Administration Act 2000* (Qld) 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. For consistency, it has also recommended (Rec 20-2) that a similar amendment be made to section 138AA of the Act, which deals with directions to a former attorney.

### **The power to make an interim order**

[123] Section 129 of the *Guardianship and Administration Act 2000* (Qld), which empowers the Tribunal to make an interim order in a guardianship proceeding, does not expressly require that the Tribunal must be satisfied that there is evidence capable of showing that the adult has impaired capacity before it can make the order.

[124] The Commission has recommended (Rec 20-3) that section 129(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal must be satisfied that there is evidence capable of showing that the adult has impaired capacity before it can make an interim order.

### **The power to issue a warrant to enter a place and remove an adult**

[125] The current grounds on which the Tribunal may issue an entry and removal warrant under section 149 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'.

[126] The Commission has recommended (Rec 20-5) that the grounds be expanded to include the circumstance in which an adult who has impaired capacity is being unlawfully detained against his or her will.

### **A new power to issue a warrant to enter a place for the purpose of assessing the adult's circumstances**

[127] The role of the Adult Guardian is to protect the rights and interests of adults with impaired capacity. If the Adult Guardian is unable to obtain sufficient information about an adult's circumstances, the Adult Guardian may be unable to exercise his or her powers to apply for orders or take other action to protect the adult that may actually be warranted.

[128] To overcome this difficulty, the Commission has recommended (Rec 20-6) that the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Adult Guardian to apply to the Tribunal for the issue of a warrant authorising the Adult Guardian 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.

[129] Because the development of a legislative mechanism for the issue of an entry and assessment warrant raises evidential and privacy issues, the Commission has recommended (Recs 20-6 to 20-12) the inclusion of various safeguards in the proposed mechanism to ensure that such a warrant is issued only when necessary and appropriate in the circumstances and 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.

### **The power to make an order to give effect to a guardian's decision**

[130] A guardian for an adult may sometimes 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 a person associated with the adult. To address this issue, the Commission has recommended (Recs 20-13 to 20-18) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal, on application by an adult's guardian, may, in limited circumstances, make an order to give effect to a decision made by the guardian for the adult.

## **CHAPTER 21 — TRIBUNAL PROCEEDINGS**

### **The application form**

[131] The Commission has recommended (Rec 21-1) that the approved form for making an application for the appointment of a guardian or an administrator or for the review of an appointment should:

- be reworded to reflect more clearly the legislative requirement that the applicant must provide information about the members of the adult's family and any primary carer of the adult, regardless of whether or not the applicant perceives for himself or herself that the person may have an interest in the application; and
- require the applicant to state, if relevant, that he or she does not have actual knowledge of any other persons who may have an interest in the application.

### **The definition of 'interested person'**

[132] The Commission has recommended (Rec 21-2) that the definition of 'interested person' for an adult under the guardianship legislation be amended to refer to 'a person who has a sufficient and genuine concern for the rights and interests of the adult'.

### **Notification of an application and the hearing of an application**

[133] The Commission has recommended (Rec 21-3) that the notice of an application made under the *Guardianship and Administration Act 2000* (Qld) and the notice of the hearing of an application should include information about the possible outcomes of the application. In relation to an application for appointment or for the review of an appointment, that information should include:

- the names of any proposed appointees;
- the circumstances in which the Adult Guardian or the Public Trustee may be appointed;

- information that a person other than the person who is proposed for appointment in the application may be appointed; and
- what steps the person who has been notified of the application should take if he or she wishes to make an application for appointment.

[134] The Commission has also recommended (Rec 21-4) that information about how the adult concerned in an application may request further information about the application from the Tribunal should also be given to the adult in conjunction with a copy of the application.

[135] The Commission has also made recommendations (Recs 21-5, 21-6) about the circumstances in which the Tribunal is not required to give notice of an application or notice of the hearing of an application to the adult concerned.

## **Legal and other representation**

### ***The right of the adult to representation***

[136] Currently, section 124 of the *Guardianship and Administration Act 2000* (Qld) entitles the adult concerned in a guardianship proceeding to be represented if given leave by the Tribunal. Given that guardianship proceedings not only concern an adult's fundamental rights and interests but may also have serious consequences for the adult, the Commission has recommended (Rec 21-7) that section 124 be amended to provide expressly that, in a guardianship proceeding, the adult concerned in the proceeding is entitled to be represented without the need to be given leave by the Tribunal. Such an amendment is consistent with section 43(2)(b)(i) of the QCAT Act, which gives a person with impaired capacity an automatic right to representation.

### ***The right of other active parties to representation***

[137] Section 124 of the *Guardianship and Administration Act 2000* (Qld) also entitles an active party to a guardianship proceeding, who is not the adult concerned in the proceeding, to be represented if given leave by the Tribunal. However, the Tribunal's exercise of discretion is subject to section 43 of the QCAT Act, the main objective of which is to have parties represent themselves unless the interests of justice require otherwise.

[138] The Commission is of the view that the presumption in section 43(1) of the QCAT Act, that the parties should represent themselves unless the interests of justice require otherwise, is not appropriate to apply in guardianship proceedings. This is because, within the framework of the Tribunal's broad jurisdiction, the guardianship jurisdiction has special characteristics which set it apart from the other jurisdictions and which warrant a different policy approach to the representation of an active party (other than the adult concerned) in guardianship proceedings.

[139] Accordingly, the Commission has recommended (Rec 21-8) that section 124 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, despite section 43(1)–(3) of the QCAT Act, an active party, other than the adult

concerned, may be represented by a lawyer or agent, unless the Tribunal considers it is appropriate in the circumstances for that person not to be represented.

### ***The appointment of a separate representative***

[140] The Commission is of the view that section 125 of the *Guardianship and Administration Act 2000* (Qld) does not give sufficient guidance about the role of the separate representative for an adult in a guardianship proceeding. Accordingly, the Commission has recommended (Rec 21- 9) that section 125 be amended to clarify that the role of a separate representative for an adult in a guardianship proceeding is to:

- have regard to any expressed views or wishes of the adult;
- to the greatest extent practicable, present the adult's views and wishes to the Tribunal; and
- promote and safeguard the adult's rights, interests and opportunities.

### **Access to documents**

[141] The Commission has made recommendations (Recs 21-10 to 21-14) to clarify the entitlement of both an active party in a guardianship proceeding and a non-party to access a document in the Tribunal files and to obtain a copy of the document. These recommendations deal with these entitlements at different stages of an application — before, during and after the hearing of an application. They are designed to reflect the principle of open justice and the sensitive nature of guardianship proceedings.

### **Special witness provisions**

[142] To ensure that the Tribunal has a wide range of powers to make orders to facilitate the giving of evidence by vulnerable witnesses in Tribunal proceedings, the Commission has recommended (Rec 21-15) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the special witness provisions under section 99 of the QCAT Act also apply to proceedings under the *Guardianship and Administration Act 2000* (Qld) (subject to the operation of the provisions for making a closure order or an adult evidence order under the *Guardianship and Administration Act 2000* (Qld)).

### **Decisions and reasons**

[143] Given the complexity of the guardianship legislation and the desirability of providing transparent and sufficient reasons for decisions in guardianship proceedings, the Commission has recommended (Rec 21-16) that the QCAT Rules be amended to require that the written reasons for a decision, made in a proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld), must set out the principles of law applied by the

Tribunal in the proceeding and the way in which the Tribunal applied the principles of law to the facts.

## CHAPTER 22 — APPEALS, REOPENING AND REVIEW

### Appealing a Tribunal decision

[144] The Commission considers that the QCAT Act provides an appropriate mechanism for appealing against a Tribunal decision made in a proceeding under the *Guardianship and Administration Act 2000* (Qld) (Rec 22-1).

### Reopening a proceeding by a party

[145] The QCAT Act reflects a policy decision to allow a reopening in certain circumstances where the party's remedy might otherwise be an appeal. Given that approach within the legislation, the Commission has recommended (Rec 22-2) that the definition of 'reopening ground' in section 137 of the QCAT Act be amended to include, for a proceeding under the *Guardianship and Administration Act 2000* (Qld), that because significant new evidence has arisen that was not reasonably available when the proceeding was first heard and decided:

- the adult concerned would suffer substantial injustice if the proceeding was not reopened; or
- the needs of the adult would not be adequately met, or the adult's interests would not be adequately protected, if the proceeding was not reopened.

### Reopening a proceeding by a non-party

[146] Although a person mentioned in section 119(a)–(f) of the *Guardianship and Administration Act 2000* (Qld) is automatically an active party for a guardianship proceeding, a family member of an adult or a primary carer for an adult becomes an active party for a proceeding only if he or she is joined as a party to the proceeding by the Tribunal under section 119(g) of the Act. It is therefore important that there is a reopening ground that is available to such a person if he or she is not given notice of the hearing of a guardianship proceeding and, as a result, does not have the opportunity to become an active party.

[147] The Commission has therefore recommended (Rec 22-3) that the QCAT Act be amended so that, for the hearing of a proceeding under the *Guardianship and Administration Act 2000* (Qld), a member of the adult's family or any primary carer of the adult may apply for a reopening of the proceeding if the Tribunal did not give the person notice of the hearing under section 118(1) of the *Guardianship and Administration Act 2000* (Qld).

## Review of the appointment of a guardian or an administrator

[148] The Commission has recommended (Rec 22-4) that section 28(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an initial appointment of a guardian or an administrator must be reviewed within two years of the order making the appointment. Other appointments should continue to be reviewed at least every five years.

[149] The Commission considers that an appointment of the Public Trustee or a trustee company as an administrator should be subject to the same review mechanisms as any other administrator, including the requirement for periodic review. Accordingly, the Commission has recommended that section 28(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to omit the words '(other than the public trustee or a trustee company under the *Trustee Companies Act 1968*)'.

[150] The Commission has also recommended (Rec 22-6) that the *Guardianship and Administration Act 2000* (Qld) be amended to set out the grounds on which an application may be made for the review of the appointment of a guardian (including a guardian for a restrictive practice matter) or an administrator. Those grounds should be the grounds set out in paragraph 4 of QCAT Practice Direction No 8 of 2010, namely:

- new and relevant information has become available since the hearing;
- a relevant change in circumstances has occurred since the hearing; or
- relevant information that was not presented to the Tribunal at the hearing has become available.

## CHAPTER 23 — THE ADULT GUARDIAN

### The Adult Guardian's functions

[151] The Commission is generally of the view that the Adult Guardian's functions, as set out in section 174 of the *Guardianship and Administration Act 2000* (Qld), are appropriate and do not require amendment. However, the Commission has recommended (Rec 23-2) that section 174(3) be amended to clarify that the requirement for the Adult Guardian to apply the Health Care Principle applies only if the Adult Guardian is performing a function or exercising a power in relation to a health matter.

### The Adult Guardian's powers

[152] The Commission is generally of the view that the Adult Guardian's powers under the *Guardianship and Administration Act 2000* (Qld) are appropriate. However, the Commission has recommended that:

- section 43 of the *Guardianship and Administration Act 2000* (Qld) be amended so that the Adult Guardian's power to make a decision about a health matter for an adult applies if the refusal of the adult's substitute decision-maker to make a decision, or the decision, is contrary to the *General Principles* or the Health Care Principle (Rec 23-4);
- section 177(4) of the *Guardianship and Administration Act 2000* (Qld) be amended to widen the categories of persons to whom the Adult Guardian may delegate the power to make day-to-day personal decisions for an adult (Rec 23-5); and
- section 183 of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that the Adult Guardian's right to information includes the power to require an agency to disclose personal information about an individual (Rec 23-6).

[153] The Commission considers that, in some situations, it may be desirable for the Adult Guardian to be able to investigate a complaint or an allegation even though the adult has died. Accordingly, the Commission has recommended that:

- to avoid any doubt about the breadth of the investigative power conferred by section 180 of the *Guardianship and Administration Act 2000* (Qld), section 180 should be amended to provide that the Adult Guardian's power to investigate a complaint or an allegation is not limited by the death of the adult (Rec 23-7); and
- section 182 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that, notwithstanding the death of an adult, the Adult Guardian has the power to investigate the conduct of a person who was the adult's attorney with power for financial matters or who was the adult's administrator (Rec 23-8).

[154] The Commission has recommended (Rec 23-9) that the Adult Guardian retain the power under section 195 of the *Guardianship and Administration Act 2000* (Qld) to suspend all or some of an attorney's power under an enduring document. However, the Commission has recommended (Rec 23-10) that the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, if the Adult Guardian has suspended the power of an attorney, the suspension may not be extended by a further exercise of the Adult Guardian's power to suspend.

### **External review of the Adult Guardian's decisions for an adult**

[155] To foster public confidence in the guardianship system and to ensure that the mechanisms for reviewing the decisions of the Adult Guardian are as effective and transparent as possible, the Commission has made a number of recommendations to provide that decisions of the Adult Guardian are subject to QCAT's review jurisdiction.

[156] The Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

- a decision of the Adult Guardian under either Act about a personal matter for an adult is a reviewable decision for the purposes of the QCAT Act (Recs 23-11, 23-12);
- an application for the review of a reviewable decision may be made by the adult who is the subject of the decision or by an interested person (Rec 23-13).

[157] Because of the special nature of the guardianship system, the Commission has made several recommendations to change the provisions that would otherwise apply to the hearing of these applications. These include recommendations that:

- section 157 of the QCAT Act, which requires written notice of a decision to be given to each person who may apply for the review of a reviewable decision, should not apply to a reviewable decision of the Adult Guardian (Rec 23-14);
- different provisions should apply in relation to the notice that is given of an application and of the hearing of an application for the review of a reviewable decision of the Adult Guardian (Recs 23-15, 23-16); and
- different confidentiality and related provisions should apply in relation to an application for the review of a reviewable decision of the Adult Guardian and to the hearing of that application (Rec 23-17).

## CHAPTER 24 — THE FUNCTION OF SYSTEMIC ADVOCACY

[158] With a view to maintaining an independent systemic advocacy function once the Public Advocate's functions are transferred to the Adult Guardian, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that:

- the Adult Guardian's Annual Report must include information about the systemic advocacy that has been undertaken during the year; the expenditure on systemic advocacy; and the number of staff who were engaged in undertaking systemic advocacy (Rec 24-1); and
- the Adult Guardian may, at any time, prepare a report to the Minister on a systemic issue and the Minister must table a copy of the report in the Legislative Assembly within five sitting days after receiving the report (Rec 24-2); and
- within five years of the commencement of the provisions transferring the Public Advocate's functions and powers to the Adult Guardian, the Minister must review the systemic advocacy function of the Adult Guardian to ascertain whether an independent systemic advocacy role has been

maintained, and the Minister must table a report about the review in the Legislative Assembly as soon as practicable, but within one year after the end of the five year period (Rec 24-3).

[159] The Commission has also recommended (Rec 24-5) that the *Guardianship and Administration Act 2000* (Qld) be amended to give the Adult Guardian, as systems advocate, the power to give a notice to an agency, or a person who has the custody or control of information or documents, requiring the agency or person to give the Adult Guardian information and access to documents about:

- a system being monitored or reviewed by the Adult Guardian;
- arrangements for a class of individuals; and
- policies and procedures that apply within an agency, service or facility.

[160] The provision conferring these powers on the Adult Guardian should:

- generally be modelled on section 183 of the *Guardianship and Administration Act 2000* (Qld) (Rec 26-6(a));
- provide that the Adult Guardian's power to require information or access to documents includes the power to require (Rec 26-6(b)):
  - personal information about an adult if the provision of that information is necessary to comply with the Adult Guardian's notice; and
  - statistical information held by an agency or person; and
- provide that the maximum penalty for non-compliance is 100 penalty units (Rec 24-7).

## CHAPTER 25 — THE PUBLIC TRUSTEE

### The Public Trustee's powers as an administrator or attorney

[161] The Commission has recommended (Rec 25-1) that the Public Trustee's powers under the guardianship legislation as an administrator or attorney are generally appropriate.

[162] The Commission has recommended, however, that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to enable the Public Trustee:

- to delegate power under the Act for a financial matter to an appropriately qualified member of the Public Trust Office's staff (Rec 25-2); and
- to delegate the power to make day-to-day decisions about a financial matter for an adult to a person outside the Public Trust Office, similar to the Adult

Guardian's power to delegate day-to-day decisions under section 177(4) of the *Guardianship and Administration Act 2000* (Qld) (Recs 23-3 to 23-5).

### **External review of the Public Trustee decisions for an adult**

[163] To foster public confidence in the guardianship system and to ensure that the mechanisms for reviewing the decisions of the Public Trustee are as effective and transparent as possible, the Commission has made a number of recommendations to provide that decisions of the Public Trustee are subject to QCAT's review jurisdiction.

[164] The Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

- a decision of the Public Trustee under either Act about a financial matter for an adult is a reviewable decision for the purposes of the QCAT Act (Recs 25-6, 25-7);
- the charging of fees and costs by the Public Trustee is not a 'reviewable decision' of the Public Trustee (Rec 25-8); and
- an application for the review of a reviewable decision may be made by the adult who is the subject of the decision or by an interested person (Rec 25-9).

[165] The Commission has also recommended (Recs 25-10 to 25-13) that, in recognition of the special nature of the guardianship jurisdiction, modifications similar to those outlined at [157] above should apply to an application for the review of a reviewable decision of the Public Trustee and the hearing of that application.

## **CHAPTER 26 — COMMUNITY VISITORS**

### **Visitable sites**

[166] The Commission considers that the definition of 'visitable site' in section 222 of the *Guardianship and Administration Act 2000* (Qld) is appropriate and does not require amendment (Rec 26-1).

[167] However, the Commission has recommended (Rec 26-2) that the places prescribed as 'visitable sites' by schedule 2 of the *Guardianship and Administration Regulation 2000* (Qld) be widened to enable community visitors to visit relevant consumers living in residential services conducted in premises that are registered under the *Residential Services (Accreditation) Act 2002* (Qld), regardless of the level of accreditation of the service.

### Requesting a visit to a visitable site

[168] The Commission has recommended (Rec 26-4) that section 226(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, in addition to a consumer at a visitable site and 'a person for the consumer', each of the following may ask that a community visitor visit a visitable site:

- a consumer's guardian, administrator, attorney or statutory health attorney;
- an interested person for a consumer;
- the Adult Guardian;
- an advocacy organisation.

### Community visitor reports

[169] The Commission has made recommendations to widen the categories of persons who are entitled to receive a copy of a community visitor report.

[170] The Commission has recommended (Rec 26-5) that section 230(3) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if a report has been prepared in relation to a visit that was requested by a person or organisation under section 226 of the *Guardianship and Administration Act 2000* (Qld) (as amended in accordance with Rec 26-4), the chief executive must give a copy of the report to the person or organisation that requested the visit.

[171] The Commission has also recommended (Rec 26-6) that section 230(4) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the chief executive must, on request, give a copy of a report to the persons mentioned in that section, which should be expanded to include:

- a consumer's guardian, administrator, attorney or statutory health attorney; and
- an interested person for a consumer.

[172] Because of the widening of the categories of persons who will be entitled to receive a copy of a community visitor report, the Commission has recommended (Rec 26-7) that the *Guardianship and Administration Act 2000* (Qld) be amended to require the chief executive, before giving a copy of a report to a consumer, a consumer's guardian, administrator, attorney or statutory health attorney, an interested person for the consumer, or an advocacy organisation, to remove the personal information of any other consumer that is included in the report. However, the chief executive is not required to remove the personal information if he or she is satisfied on reasonable grounds that the disclosure of the personal information is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of the relevant consumer.

### **Appointment of community visitors**

[173] The Commission has made minor recommendations to amend section 231(5) of the *Guardianship and Administration Act 2000* (Qld) in order to express the provision dealing with the appointment of community visitors in more inclusive and contemporary terms (Rec 26-8).

### **Location of the Community Visitor Program**

[174] The Commission has recommended (Rec 26-9) that the Community Visitor Program is appropriately located within the Office of the Adult Guardian.

[175] To provide greater transparency about issues that might be raised with community visitors about the guardianship services of the Adult Guardian, the Commission has recommended (Rec 26-10) that:

- information about certain matters relating to referrals by community visitors to the Office of the Adult Guardian must be reported in the Annual Report of the Department of Justice ; and
- if a matter is referred by a community visitor to the Adult Guardian, the chief executive must give the Tribunal a copy of the community visitor's referral and the Adult Guardian's response.

## **CHAPTER 27 — WHISTLEBLOWER PROTECTION**

### **Protection from liability for making a disclosure**

[176] Section 247 of the *Guardianship and Administration Act 2000* (Qld) currently applies to a disclosure made to an official that reveals a breach of the guardianship legislation. However, whether a breach has in fact occurred is a matter that, in most cases, will not be known at the time a disclosure is made, but only after an allegation has been investigated.

[177] The Commission has therefore recommended (Rec 27-1) that section 247 be amended to protect a person from disclosing information to an official if:

- the person honestly believes on reasonable grounds that the person has information that tends to show that another person has breached the guardianship legislation or that an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse; or
- the information would help in the assessment or investigation of a complaint that another person has breached the guardianship legislation or that an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse; or
- without limiting the preceding two grounds, the disclosure is made in accordance with the section that gives effect to Recommendation 11-5,

which provides that, if a health provider or another specified person believes, on reasonable grounds, that a decision made by an adult's guardian or attorney about a health matter is not in accordance with the General Principles and the Health Care Principle, the health provider or other specified person may tell the Adult Guardian about the matter.

[178] Although the definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) refers to a community visitor, it does not refer to the staff of the Community Visitor Program. For consistency with the way in which the definition deals with the staff of the Adult Guardian and the Public Advocate, the Commission has recommended (Rec 27-2) that the definition of 'official' be amended to refer to 'a public service officer involved in the administration of a program called the community visitor program'.

### **Protection from a reprisal**

[179] In some situations, the real disincentive against making a disclosure may not be the person's potential liability for the disclosure (for which the person may well have a defence of qualified privilege), but the risk that the person making the disclosure or some other person, such as the adult with impaired capacity, will be subjected to a reprisal as a result of the making of the disclosure.

[180] Section 247 of the *Guardianship and Administration Act 2000* (Qld) does not protect a person who makes such a disclosure from being subjected to a reprisal as a result of making the disclosure; nor does it protect an adult with impaired capacity from being subjected to a reprisal as a result of a disclosure made by another person.

[181] The Commission has therefore recommended (Recs 27-3 to 27-5) that the *Guardianship and Administration Act 2000* (Qld) be amended to include provisions, modelled on sections 41 to 43 of the *Whistleblowers Protection Act 1994* (Qld):

- making it an indictable offence for a person to take a reprisal against a person because, or in the belief that, anybody has made, or may make a disclosure under section 247(1) of the *Guardianship and Administration Act 2000* (Qld); and
- providing that a person who takes a reprisal commits a tort for which the person may be liable in damages.

## **CHAPTER 28 — LEGAL PROCEEDINGS INVOLVING ADULTS WITH IMPAIRED CAPACITY**

[182] The Commission has made recommendations about a number of issues that arise when adults with impaired capacity are involved in legal proceedings.

## Appointment of a litigation guardian

[183] Because of the burdens and potential liability involved in acting as a person's litigation guardian, the Commission has recommended (Rec 28-2(a)) that rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) be amended to clarify that, generally, the court may appoint a person as a litigation guardian for a person under a legal incapacity only if the person consents to being appointed.

[184] However, the Commission is concerned that, if an adult is under a legal incapacity and no-one is willing to be appointed as the adult's litigation guardian, it effectively means that, if the adult is the plaintiff, the proceeding cannot continue and, if the adult is the defendant, the plaintiff is not able to seek to have his or her rights vindicated.

[185] The Commission has therefore recommended (Recs 28-1 and 28-2(b)) that:

- section 27 of the *Public Trustee Act 1978* (Qld) be amended to ensure that the Public Trustee's consent is not required for it to be appointed as a litigation guardian under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld);
- rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) be amended to provide that, despite the requirement that a person's consent is generally required in order to be appointed as the litigation guardian of a person under a legal incapacity, the court may appoint:
  - the Public Trustee, without the Public Trustee's consent, as litigation guardian for an adult in a proceeding that relates to the adult's financial or property matters;
  - the Adult Guardian, without the Adult Guardian's consent, as litigation guardian for an adult in a proceeding that does not relate to the adult's financial or property matters.

[186] To create greater certainty for the Public Trustee and the Adult Guardian (and other litigation guardians) in terms of their liability for costs, and to ensure that the court's power to award costs are sufficiently wide, the Commission has recommended (Rec 28-4) that the *Uniform Civil Procedure Rules 1999* (Qld) be amended to include new rules to the effect that:

- a litigation guardian for a defendant or respondent is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct; and
- if a party to a proceeding has a litigation guardian for a proceeding and the court considers it in the interests of justice, the court may order that all or part of the party's costs of the proceeding be borne by another party to the proceeding.

### **The test for impaired capacity for a litigant**

[187] The Commission has made recommendations to ensure that the test for determining whether an adult has impaired capacity for a proceeding is referable to the particular proceeding in which the adult is a party (and not proceedings generally), and takes account of whether or not the adult is, or will be, legally represented in the proceeding (Recs 28-5, 28-6).

### **The court's power to transfer the issue of an adult's capacity to the Tribunal**

[188] The Commission considers that the most appropriate body to appoint a litigation guardian for an adult is the court in which the relevant proceeding has been, or is to be, brought, and that the courts should therefore continue to have exclusive jurisdiction to appoint a litigation guardian.

[189] However, the Commission considers it desirable to enable the Tribunal to make an assessment of an adult's capacity for a proceeding. The Commission has therefore recommended (Rec 28-8) that section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that:

- the court's power under section 241(1) to transfer a 'proceeding' to the Tribunal includes power to transfer to the Tribunal the issue of the capacity of a party to the proceeding; and
- to provide that the power to transfer the issue of party's capacity may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

[190] The Commission has also recommended (Recs 28-7, 28-9) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if a court transfers to the Tribunal the issue of whether an adult is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld):

- the Tribunal may make a declaration about the person's capacity, and the court is entitled to rely on the Tribunal's declaration; and
- the Tribunal may make a finding about who would be appropriate to be appointed as the adult's litigation guardian, and the Tribunal's finding is evidence about the appropriateness of the person to be appointed as the adult's litigation guardian.

### **Jurisdiction of the Supreme Court and District Court to exercise the power of the Tribunal to appoint an administrator**

[191] At present, if a settlement has not been sanctioned by the court, and the court has not ordered that an amount be paid by a person to an adult, the court does not have the power under section 245 of the *Guardianship and Administration Act 2000* (Qld) to appoint an administrator for the adult to receive and manage the settlement proceeds.

[192] The Commission considers that section 245 does not adequately protect the interests of the parties (including the adult). It has therefore recommended (Rec 28-10) that section 245(1) be amended so that the section also applies if:

- in settlement of a civil proceeding, an amount is to be paid by another person to an adult; and
- the court considers that the adult is a person with impaired capacity to receive and manage that amount.

## CHAPTER 29 — REMUNERATION

### Remuneration of the Adult Guardian

[193] The Commission has recommended (Rec 29-1) that the *Guardianship and Administration Act 2000* (Qld) should not be amended to enable the Adult Guardian to charge for acting as an adult's guardian or attorney, for exercising power under sections 42 or 43 of the Act, or for acting as an attorney under section 196 of the Act during the suspension of an enduring power of attorney for personal matters.

### Remuneration of the Public Trustee

[194] The Commission has recommended (Rec 29-2) that the Public Trustee should continue to be entitled to charge for administration services provided under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

### Remuneration of trustee companies if State regulation becomes possible

[195] The Commission has made several recommendations that are intended to apply if, despite the amendments made to the *Corporations Act 2001* (Cth) by the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth), it becomes possible in the future for State legislation to regulate the remuneration of a trustee company that is acting as an adult's administrator under the *Guardianship and Administration Act 2000* (Qld) or as an adult's attorney for financial matters under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).

[196] The Commission has recommended that:

- section 48 of the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Tribunal to order that a trustee company that is appointed as an adult's administrator (including one that was appointed before the commencement of the provision amending section 48) is entitled, subject to section 48(2), to such remuneration from the adult as the Tribunal orders (Rec 29-4);

- section 245 of the *Guardianship and Administration Act 2000* (Qld) be amended to enable the court to authorise the remuneration of a trustee company that the court appoints as an adult's administrator (Rec 29-5); and
- the remuneration of a trustee company that is acting as an adult's attorney under an enduring power of attorney be regulated by a provision to the effect of the repealed section 41 of the *Trustee Companies Act 1968* (Qld) (Rec 29-6).

## CHAPTER 30 — MISCELLANEOUS ISSUES

### Contracts entered into by adults with impaired capacity

[197] The submissions raised two issues in relation to contracts entered into by adults with impaired capacity. The first issue related to the fact that the application of the general law governing contractual capacity may cause considerable hardship where an adult with impaired capacity has entered into a disadvantageous contract. The second related to the power of an administrator to avoid a contract entered into by an adult with impaired capacity on the adult's behalf. In response to these issues, the Commission has recommended (Recs 30-1 to 30-5) that the *Guardianship and Administration Act 2000* (Qld) be amended to include a new provision to deal with the power of an adult who has impaired capacity to enter into a transaction in relation to his or her property and the consequences of the entry into the transaction by the adult.

[198] The proposed new contractual capacity provision is intended to apply to all adults who have impaired capacity and not be limited to adults for whom an administrator has been appointed. The provision:

- overrides the general rule, recently confirmed in *Bergmann v DAW* [2010] QCA 143 that, if an adult has impaired capacity for a matter and is subject to an administration order under the *Guardianship and Administration Act 2000* (Qld), the adult cannot validly enter into any transactions in respect of that matter while the order is in force; and
- shifts the onus of proof that ordinarily applies under the general law governing contractual capacity in relation to an adult who has impaired capacity for a matter (but who does not have an administrator appointed to exercise power for the matter) in favour of the adult and ensures that a contract between the adult and another person that is not made for adequate consideration may be avoided by the adult or by specified persons on behalf of the adult.

[199] Accordingly, the Commission has recommended that the proposed new contractual capacity provision provide that:

- if the adult enters into a contract or makes a disposition with, or in favour of, another person, without the leave of the Tribunal or the Court, the contract or disposition is voidable by:

- the adult; or
- an administrator appointed for the adult; or
- an attorney appointed by the adult under an enduring power of attorney to exercise power for the adult for a financial matter to which the transaction relates during a period when the adult has impaired capacity;
- nothing in this provision affects any contract or disposition entered into or made by the adult if the other party to the contract or disposition proves that he or she acted in good faith and for adequate consideration and was not aware or could not have reasonably been aware that the adult had impaired capacity for the transaction; and
- nothing in this provision affects any contract for necessities entered into by the adult.

### **The Tribunal’s jurisdiction to make a declaration about an adult’s capacity to enter into a contract**

[200] To remove any doubt that the Supreme, District or Magistrates Court has express power to refer the issue of whether a person has capacity to enter into a contract to the Tribunal for a declaration, the Commission has recommended (Rec 30-6) that section 241(1) of the *Guardianship and Administration Act 2000* (Qld) be amended:

- to clarify that, for section 241(1), a ‘proceeding’ includes part of a proceeding, and includes but is not limited to, an issue about whether a person had capacity to enter into a contract; and
- to ensure that the power to transfer the issue of a party’s capacity to enter into a contract may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

[201] To clarify that the operation of section 147 is not limited to a subsequent proceeding but also extends to another proceeding that is already on foot, the Commission has recommended (Rec 30-7) that section 147 of the *Guardianship and Administration Act 2000* (Qld) be amended to refer to ‘another’ proceeding rather than to a ‘subsequent’ proceeding.

### **Substitute decision-makers’ right to information**

[202] To facilitate access to information by an attorney, the Commission has recommended (Recs 30-8 to 30-12) that section 81 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that:

- if a person who has custody or control of information does not comply with a request by an attorney to give information, the Tribunal may, on application by the attorney, order the person to give the information to the attorney;

- if the Tribunal orders a person to give information to the attorney, the person must comply with the order unless the person has a reasonable excuse; and
- it is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person.

[203] The Commission has also made recommendations (Recs 30-9 to 30-11) in relation to sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) to ensure that the right to information conferred on a substitute decision-maker by these provisions:

- is no greater or no less than the adult's right; and
- includes a right to require the disclosure by an agency of personal information about the adult for whom the decision-maker is authorised to make decisions.

### **Informal decision-makers' access to information**

[204] To facilitate access to information by an adult's informal decision-maker, the Commission has recommended (Recs 30-13, 30-14) that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an informal decision-maker may apply to the Tribunal for an order that a person with the custody or control of information give that information to the informal decision-maker. The Commission has also recommended (Recs 30-13, 30-14) that the proposed new provision also be subject to similar limitations to those described in [203] above.

### **Use of confidential information: informal decision-makers and other persons**

[205] The Commission is of the view that, in terms of the disclosure of confidential information, people who will have access to confidential information by reason of the Commission's recommendations about the right of informal decision-makers to information and about the right of certain persons to be given a copy of a community visitor report should be subject to the same requirements as people who receive confidential information by virtue of being a guardian, administrator, attorney or statutory health attorney.

[206] The Commission has therefore recommended (Rec 30-18) that the definition of 'relevant person' in section 246 of the *Guardianship and Administration Act 2000* (Qld) be amended to include:

- a person who obtains confidential information because of an order made under the provision that gives effect to Recommendations 30-13 to 30-17; and
- an interested person or advocacy organisation that receives a copy of a community visitor report under the amendments recommended in Chapter 26 in relation to section 230(3) or (4) of the *Guardianship and Administration Act 2000* (Qld).

[207] The Commission has also recommended (Rec 30-19) that section 249(3) of the *Guardianship and Administration Act 2000* (Qld) be amended to include an additional paragraph to ensure that a person who obtains confidential information because of an order made under the provision that gives effect to Recommendations 30-13 to 30-17 may use the confidential information for the purpose of making decisions on an informal basis for the adult.

### **The definition of 'support network' for an adult**

[208] The Commission considers it is important that the definition of 'support network' for an adult is sufficiently flexible to capture a diverse range of family and other supportive relationships for the adult. Accordingly, it has recommended (Rec 30-20) that the definition be retained in its present form, and should not, as suggested by one respondent, be limited to family members who have a close and continuing relationship with the adult and a personal interest in the adult's welfare.

### **Community education and awareness**

[209] The Commission has recommended (Rec 30-21) the provision of ongoing, publicly-funded and comprehensive community education programs about key aspects of the guardianship system. These programs should be widely available, easily accessible, and targeted to meet the specific needs of individuals and organisations in the general community.

# Summary of Recommendations

## CHAPTER 4 — THE GENERAL PRINCIPLES

### *Redrafting of the General Principles*

- 4-1 The General Principles should be redrafted to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*, to provide a more logical structure, and to avoid duplication within the General Principles.

### *Application to informal decision-makers*

- 4-2 Section 11 of the *Guardianship and Administration Act 2000* (Qld) should be amended by:
- (a) including a new subsection (3) to the effect that a person making a decision for an adult on an informal basis must apply the General Principles; and
  - (b) renumbering the current subsection (3) as subsection (4).

### *Redrafted General Principles*

- 4-3 General Principles 1 to 6 should be expressed in the following terms:

1 Presumption of capacity

An adult is presumed to have capacity for a matter.

*Note*

See sections [provisions that give effect to Recommendations 7-2, 7-3 and 15-2] of this Act [the *Guardianship and Administration Act 2000* (Qld)].

2 Same human rights and fundamental freedoms

- (1) The rights 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.
- (2) 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, include—
  - (a) respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons;
  - (b) non-discrimination;

- (c) full and effective participation and inclusion in society;
- (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity;
- (e) equality of opportunity;
- (f) accessibility; and
- (g) equality between men and women.

**3 Empowering adult to exercise human rights and fundamental freedoms**

The importance of the following matters must be taken into account—

- (a) empowering the adult to exercise the adult's human rights and fundamental freedoms;
- (b) encouraging and supporting the adult—
  - (i) to perform social roles valued in society;
  - (ii) to live a life in the general community, and to take part in activities enjoyed by the general community; and
  - (iii) to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable; and
- (c) the adult's right to participate, to the greatest extent practicable, in the development of policies, programs and services for people with impaired capacity for a matter.

**4 Maintenance of adult's existing supportive relationships**

- (1) The importance of maintaining an adult's existing supportive relationships must be taken into account.
- (2) So, for example, maintaining an adult's existing supportive relationships may involve consultation with either or both of the following—
  - (a) persons who have an existing supportive relationship with the adult;
  - (b) members of the adult's support network who are making decisions for the adult on an informal basis.

**5 Maintenance of adult's cultural and linguistic environment and values**

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

*Editor's notes—*

- 1 *Aboriginal tradition* means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954*, section 36.
- 2 *Island custom*, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to the particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954* (Qld), section 36.

**6 Respect for privacy**

An adult's privacy must be respected and taken into account.

**4-4 A majority of the Commission recommends that General Principles 7 and 8 should be expressed in the following terms:**

**7 Performance of functions or powers**

A person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,] must do so—<sup>1</sup>

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
- (b) in the way least restrictive of the adult's rights, interests and opportunities.

<sup>1</sup>

The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

## **8      Structured decision-making**

- (1) In applying General Principle 7, a person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>2</sup> must adopt the following approach.
- (2) First, the person or other entity must recognise and take into account the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions.
- (3) Second, the person or other entity must use the principle of substituted judgment, so that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views and wishes would be.
- (4) Third, the person or other entity must recognise and take into account any other views and wishes expressed by the adult.
- (5) Fourth, the person or other entity must recognise and take into account any other consideration that the General Principles require the person or other entity to recognise and take into account.
- (6) Fifth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (5), the person or other entity may perform the function, exercise the power, or make the decision.

**4-5      A minority of the Commission recommends that General Principles 7 and 8 should be expressed in the following terms:**

## **7      Performance of functions or powers**

- (1) A person or other entity in exercising a power for a matter for an adult under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>3</sup> must do so—
  - (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) in the way least restrictive of the adult's rights, interests and opportunities.

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2      Ibid.

3      Ibid.

- (2) In applying General Principle 7(1) in exercising a power for a matter for an adult under this Act, or in making a decision for an adult on an informal basis, [or an enduring document,]<sup>4</sup> a person or other entity must recognise an adult's right to make his or her own decision if the adult is able to exercise, or be supported to exercise, his or her capacity in relation to the decision.
- (3) When an adult is not able to make his or her own decision in relation to the matter, in applying General Principle 7(1) in exercising a power for a matter for an adult under this Act, or in making a decision for an adult on an informal basis, [or an enduring document,]<sup>5</sup> a person or other entity must—
- (a) take as the basis of its consideration the importance of using the principle of substituted judgment, which requires that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must give effect to what the person or other entity considers the adult's views and wishes would be; and
  - (b) recognise and take into account any other views and wishes expressed by the adult.

## **8 Performance of functions or other powers**

- (1) A person or other entity in performing a function or exercising a power under this Act other than a power mentioned in General Principle 7 must do so—
- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) in the way least restrictive of the adult's rights, interests and opportunities.
- (2) In applying General Principle 8(1) in performing a function or exercising a power under this Act other than a power mentioned in General Principle 7, a person or other entity must—
- (a) use the principle of substituted judgment, so that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views and wishes would be; and
  - (b) recognise and take into account any other views and wishes expressed by the adult.

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4 Ibid.

5 Ibid.

**4-6 General Principle 9 should be expressed in the following terms:****9 Maximising an adult's participation in decision-making**

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
- (2) An adult must be given any necessary support, and access to information, to enable the adult to make or participate in decisions affecting the adult's life.
- (3) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, or in making a decision for an adult on an informal basis,<sup>6</sup> must seek the adult's views and wishes.
- (4) An adult's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

***Compliance and enforcement***

**4-7** Section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the General Principles must be applied, rather than complied with, by a person or other entity who performs a function or exercises a power under that Act or under an enduring document.

**4-8** Neither the *Guardianship and Administration Act 2000* (Qld) nor the *Powers of Attorney Act 1998* (Qld) should be amended to create an offence of failing to apply the General Principles.

***Location of the General Principles***

**4-9** The General Principles should continue to be located in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and schedule 1 of the *Powers of Attorney Act 1998* (Qld).

6

The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or in making a decision for an adult on an informal basis'.

## CHAPTER 5 — THE HEALTH CARE PRINCIPLE

### *Redrafting of the Health Care Principle*

**5-1** The Health Care Principle should be redrafted to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*, to avoid duplicating matters dealt with by the General Principles, and to provide guidance about the application of the General Principles in the context of health care.

**5-2** The Health Care Principle should be expressed in the following terms:

**10** Application of the General Principles

A person or other entity who performs a function or exercises a power under this Act [, or an enduring document,]<sup>7</sup> for a health matter or a special health matter<sup>8</sup> in relation to an adult with impaired capacity for the matter must apply the General Principles.

**11** Same human rights and fundamental freedoms

In applying General Principle 2—

- (a) the principle of non-discrimination requires, among other things, that all adults be offered appropriate health care, including preventative health care, without regard to a particular adult's capacity; and
- (b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons.

**12** Performance of functions or powers

In applying General Principles 7 and 8, a person or other entity in performing a function or exercising a power under this Act [, or an enduring document,]<sup>9</sup> must take into account—

- (a) information given by the adult's health provider;
- (b) the nature of the adult's medical condition, if any;
- (c) if the adult has a medical condition, the adult's prognosis;

<sup>7</sup> The words in square brackets indicate the additional words that will need to be included in the Health Care Principle in the *Powers of Attorney Act 1998* (Qld).

<sup>8</sup> The reference to a special health matter should be omitted from the Health Care Principle that is included in the *Powers of Attorney Act 1998* (Qld).

<sup>9</sup> See n 7 above.

- (d) if particular health care is proposed, any alternative health care that is available;
- (e) the nature and degree of any significant risks associated with the proposed health care or any alternative health care;
- (f) whether the proposed health care can be postponed because a better health care option may become available or the adult is likely to become capable of making his or her own decisions about the proposed health care;
- (g) the consequences to the adult if the proposed health care is not carried out;
- (h) a consideration of the benefits versus the burdens of the proposed health care; and
- (i) the effect of the proposed health care on the adult's dignity and autonomy.

**13 Substituted judgment**

For the purpose of applying General Principle 8(3), which requires the principle of substituted judgment to be used, the views and wishes of an adult expressed when the adult had capacity may also be expressed—

- (a) in an advance health directive; or
- (b) by a consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the health care.

***Purpose of Chapter 5 of the Guardianship and Administration Act 2000 (Qld)***

**5-3 Section 61(b) of the *Guardianship and Administration Act 2000 (Qld)* should be omitted and replaced with the following paragraph:**

- (b) ensuring health care is given to the adult only if it is appropriate in all the circumstances.

***Special health care***

**5-4 Section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000 (Qld)* should be omitted from the Health Care Principle and relocated in Part 3 of Chapter 5 of the Act, which deals with consent to special health care.**

***Compliance and enforcement***

- 5-5** Section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Health Care Principle must be applied, rather than complied with, by a person or other entity who performs a function or exercises a power under that Act or under an enduring document.
- 5-6** Neither the *Guardianship and Administration Act 2000* (Qld) nor the *Powers of Attorney Act 1998* (Qld) should be amended to create an offence of failing to apply the Health Care Principle.

***Location of the Health Care Principle***

- 5-7** The Health Care Principle should continue to be located in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and schedule 1 of the *Powers of Attorney Act 1998* (Qld) immediately following the General Principles.

**CHAPTER 6 — THE SCOPE OF MATTERS**

- 6-1** Subject to recommendations 6-2 and 6-3 below, the definitions of ‘financial matter’, ‘personal matter’, ‘health matter’, ‘special health matter’, ‘special personal matter’ and ‘legal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are appropriate and should be retained without amendment.
- 6-2** The definition of ‘personal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to add the following to the examples of personal matters specifically listed in the definition:
- (a) contact with, or access visits to, the adult; and
  - (b) advocacy relating to the care and welfare of the adult.
- 6-3** The definition of ‘special personal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to include ‘entering a plea on a criminal charge’.

**CHAPTER 7 — DECISION-MAKING CAPACITY*****The presumption of capacity***

- 7-1 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, whenever the Tribunal or the Supreme Court makes a determination about an adult's capacity for a matter, the Tribunal or the Court must apply the presumption of capacity.
- 7-2 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, if the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to apply the presumption that the adult has capacity for that matter.
- 7-3 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, if the Tribunal or the Supreme Court has made a declaration that the adult has impaired capacity for a matter and no further declaration about the adult's capacity for that matter has been made, another person or entity who performs a function or exercises a power under the guardianship legislation is entitled to rely on the finding that the presumption that the adult has capacity for that matter has been rebutted.
- 7-4 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should continue to require that, if the Tribunal or the Supreme Court has not made a formal determination that the adult has impaired capacity for a matter, the person or entity must apply the presumption that the adult has capacity for that matter.
- 7-5 Section 11 of the *Guardianship and Administration Act 2000* (Qld) and section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended by deleting the words 'for a matter in relation to an adult with impaired capacity for the matter'.
- 7-6 The presumption of capacity, which is stated in General Principle 1, should continue to be located, along with the other General Principles, in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

***The approach to defining capacity***

- 7-7 The guardianship legislation should continue to apply the functional approach to defining 'capacity'.

***The definition of ‘capacity’ generally***

7-8 Paragraphs (a)–(c) of the definition of ‘capacity’ in schedule 4 of the *Guardianship and Administration Act 2000* (Qld) and schedule 3 of the *Powers of Attorney Act 1998* (Qld) should be retained without amendment, subject to Recommendation 7-9.

***Paragraph (c) of the definition of ‘capacity: ability to communicate the decisions in some way***

7-9 Paragraph (c) of the definition of ‘capacity’ should be amended only to the extent that it should contain a cross-reference (by way of a note or an example) to section 146(3) of the *Guardianship and Administration Act 2000* (Qld), which lists some of the different ways in which a person may be able to communicate (for example, talking, using sign language or any other means).

***The exclusion of specific matters***

7-10 The *Guardianship and Administration Act 2000* (Qld) should not be amended to expressly exclude certain factors from being taken into account in the assessment of capacity.

***Guidelines for assessing capacity***

7-11 The *Guardianship and Administration Act 2000* (Qld) should be amended to require the Minister responsible for administering the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) to prepare and issue guidelines for assessing ‘capacity’ under the legislation. These guidelines should be made in subordinate legislation.

7-12 The *Guardianship and Administration Act 2000* (Qld) should be amended to require that the preparation of the guidelines be informed by wide and inclusive consultation with individuals and organisations with qualifications and experience in making capacity assessments.

7-13 The *Guardianship and Administration Act 2000* (Qld) should be amended to require that the guidelines be reviewed at regular intervals by the Minister responsible to ensure that the information contained in the guidelines continues to satisfy a best practice standard for capacity assessments under the legislation.

7-14 The development and application of the guidelines should be informed by a set of principles for making capacity assessments, including:

- (a) the presumption that an adult has capacity for a matter;

- (b) the principle that in performing a capacity assessment, the assessment must be done in a way that promotes and safeguards the adult's rights, interests and opportunities and in the way least restrictive of the adult's rights, interests and opportunities;**
- (c) the importance of preserving, to the greatest extent practicable, the adult's right to make his or her decisions; and**
- (d) the adult's right to be given any necessary support and access to information to enable the adult to make or participate in decisions affecting the adult's life.**

**7-15 The guidelines should provide practical guidance, in the form of information and advice about assessing capacity under the guardianship legislation, to the range of persons who may be required to assess an adult's capacity and be supported by examples of best practice.**

**7-16 The guidelines should contain the following information and advice in relation to the assessment of an adult's ability to understand the nature and effect of his or her decision:**

- (a) the process of understanding covers the abilities to understand and retain the information relevant to the decision (including its likely consequences) and to use or weigh that information in the process of making the decision;**
- (b) the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision;**
- (c) a person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to the person in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means); and**
- (d) the fact that a person is able to retain the information relevant to a decision for a short period only does not, of itself, prevent the person from being regarded as able to make the decision.**

**7-17 The guidelines should include information and advice about the situation in which professional involvement in making a capacity assessment may be necessary.**

**CHAPTER 8 — CAPACITY TO MAKE AN ENDURING DOCUMENT*****The level of understanding required to make an enduring document***

- 8-1 Subject to Recommendations 8-3 and 8-4 below, the current list of the matters in sections 41(2) and 42(2) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand to make an enduring document are appropriate and do not require amendment.
- 8-2 The current list of the matters in section 41(2) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand to make an enduring power of attorney should continue to be expressed as an inclusive list.
- 8-3 Section 42(1) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide, amongst other things, that a principal has the capacity necessary to make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the nature and effect of the advance health directive.
- 8-4 Section 42(1) of the *Powers of Attorney Act 1998* (Qld) should be amended so that the current list of matters that a principal must understand to make an advance health directive is inclusive rather than exhaustive.

***Relationship to the definitions of ‘impaired capacity’ and ‘capacity’***

- 8-5 Section 41 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a principal has capacity to make an enduring power of attorney only if, in addition to understanding the nature and effect of the enduring document, the principal is capable of making the enduring document freely and voluntarily.
- 8-6 Section 42 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a principal has capacity to make an advance health directive only if, in addition to understanding the nature and effect of the enduring document, the principal is capable of making the enduring document freely and voluntarily.
- 8-7 The *Powers of Attorney Act 1998* (Qld) should be amended to provide that the general definition of capacity in the third schedule to the Act does not apply either to section 41 or 42 of the Act.

***Witnessing the principal’s capacity to make an enduring document***

- 8-8 The definition of ‘eligible witness’ in section 31(1)(a) of the *Powers of Attorney Act 1998* (Qld) should be amended to omit the reference to a commissioner for declarations.

**8-9** The requirement that a witness to an enduring document must be a justice of the peace (magistrates court), justice of the peace (qualified), notary public or lawyer, as recommended in Recommendation 8-8 above, should apply only to an enduring document made after the commencement of the legislation that gives effect to that recommendation.

**8-10** The approved forms for an enduring power of attorney and an advance health directive should be amended to clarify that a justice of the peace (commissioner for declarations) is not an eligible witness for an enduring document.

**8-11** The current requirement under section 31(1)(f) of the *Powers of Attorney Act 1998 (Qld)* for a witness to an advance health directive to be at least 21 years should be omitted.

***Steps the witness should take***

**8-12** If Recommendations 8-5 and 8-6 above are implemented, the approved forms and the guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General should be amended to refer to these additional requirements.

**8-13** The approved forms under the *Powers of Attorney Act 1998 (Qld)* for making an enduring document should specifically refer to the guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General, and recommend their use in witnessing the document.

**CHAPTER 9 — ADVANCE HEALTH DIRECTIVES*****Eligibility for appointment as an attorney under an advance health directive***

- 9-1 Section 29(2)(a) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that an eligible attorney for a matter under an advance health directive means, in addition to the categories of person currently mentioned in section 29(2)(a), a person who is not a service provider for a residential service where the principal is a resident.
- 9-2 Section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) should be omitted so that the Public Trustee is not an eligible attorney for a matter under an advance health directive.

***Operation of a direction in an advance health directive***

- 9-3 Section 36 of the *Powers of Attorney Act 1998* (Qld) should be amended in the following respects:
- (a) section 36(1)(b) should be amended so that it provides that a direction in an advance health directive is as effective as, *but no more effective than*, if:
    - (i) the principal gave the direction when decisions about the matter needed to be made; and
    - (ii) the principal then had capacity for the matter;
  - (b) new subsections should be inserted in section 36 to provide that:
    - (i) a direction in an advance health directive does not operate if:
      - (A) the direction is uncertain; or
      - (B) circumstances, including advances in medical science, have changed to the extent that the adult, if he or she had known of the change in circumstances, would have considered that the terms of the direction are inappropriate;
    - (ii) a direction in an advance health directive is not uncertain if its meaning can be ascertained by consultation with:
      - (A) an attorney appointed under the advance health directive; or

- (B) if an attorney is not appointed under the advance health directive, but the advance health directive names an attorney for health matters appointed under the adult's enduring power of attorney — the named attorney.

9-4 Section 113 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the court may decide whether a direction in an advance health directive is operative (whether in relation to a particular situation or generally) and may make a declaration to that effect.

*The approved form*

9-5 Section 44 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that an advance health directive must be made in the approved form.

9-6 The provision that gives effect to Recommendation 9-5 should apply only to an advance health directive made after the commencement of that provision.

9-7 The approved form for an advance health directive should be redrafted.

9-8 The redrafting of the approved form for an advance health directive should:

- (a) ensure that the provisions in the form dealing with the appointment of an attorney refer to the appointment of an attorney for 'health matters' and not to an attorney for 'personal/health matters';
- (b) take account of the fact that, as a result of the Commission's recommendation in Chapter 11 to omit section 36(2)(a) of the *Powers of Attorney Act 1998* (Qld) (Recommendation 11-3), a direction to withhold or withdraw a life-sustaining measure will be able to operate outside the specific situations currently mentioned in section 36(2)(a) of the Act and listed in section 3 of the approved form;
- (c) include questions that draw the principal's attention to whether a direction refusing particular health care is intended to operate in unforeseen circumstances, where the need for the health care does not arise as a result of an existing condition of the adult or the natural progression of such a condition;

- (d) as well as making continued provision for a principal to give specific directions about specific health care, give consideration to incorporating the 'outcomes-based' approach recommended by the South Australian Advance Directives Review Committee;
- (e) make provision for the principal to sign or initial each page that includes a statement or direction of the principal;
- (f) continue to encourage the principal to review the advance health directive periodically; and
- (g) continue to include information about the various ways in which the principal may bring the existence of the advance health directive to the attention of relevant people.

#### ***Copies and proof***

9-9 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.

9-10 The explanatory notes for the approved form for an advance health directive should:

- (a) encourage the principal to give a *certified* copy of the form to the principal's doctor, attorney, family member or friend, and solicitor; and
- (b) explain how a copy of the advance health directive should be certified in order to comply with section 45 of the *Powers of Attorney Act 1998* (Qld).

#### ***Notification of advance health directives***

9-11 The *Guardianship and Administration Act 2000* (Qld) should include new provisions, based generally on a combination of section 49 of the *Powers of Attorney Act 2006* (ACT) and sections 13 and 14 of the *Medical Treatment (Health Directions) Act 2006* (ACT), to the effect that:

- (a) the person in charge of a health care facility (being a hospital, residential aged care facility or residential disability care facility) must take reasonable steps to ensure that:

- (i) each person receiving care at the facility is asked whether the person has an advance health directive or an enduring power of attorney that applies to health matters; and
- (ii) if a person has either of those documents:
  - (A) a copy of the enduring document is brought to the attention of the adult's health providers; or
  - (B) if it is not possible to obtain a copy of the enduring document, the adult's health providers are informed of the existence of the enduring document; and
- (b) if a health provider or another person is, or becomes, aware that an adult in a health care facility has made or revoked an advance health directive or an enduring power of attorney that applies to health matters, the health provider or other person must tell the person in charge of the health care facility about the making or revocation of the enduring document and the circumstances in which it was made or revoked; and
- (c) if the person in charge of the health care facility is told about the making or revocation of an advance health directive or an enduring power of attorney that applies to health matters, the person must take reasonable steps to ensure that:
  - (i) a copy of the enduring document or revocation is brought to the attention of the adult's health providers; or
  - (ii) if it is not possible to obtain a copy of the enduring document or revocation, the adult's health providers are informed of the existence of the enduring document or revocation.

***Recognition of interstate advance health directives***

**9-12** Section 40 of the *Powers of Attorney Act 1998* (Qld) should be retained in its present terms.

**9-13** If New Zealand develops a scheme for statutory advance health directives, consideration should be given to whether section 40 of the *Powers of Attorney Act 1998* (Qld) should be amended to make provision for New Zealand instruments or those made in other countries to be prescribed by regulation.

**9-14** In addition to retaining section 40 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 advance health directive made under that Act is made in or outside Queensland.

***Protection of health provider who in good faith acts in reliance on an invalid or revoked enduring document***

**9-15** The *Powers of Attorney Act 1998* (Qld) should be amended (in either section 96 or 100) to define ‘invalidity, of an advance health directive’ and ‘know, of an advance health directive’s invalidity’ in the following terms:

*invalidity, of an advance health directive, means invalidity because—*

- (a) the document was made in another State and does not comply with the other State’s requirements; or
- (b) the document has been revoked.

*know, of an advance health directive’s invalidity, includes—*

- (a) know of the happening of an event that invalidates the document; or
- (b) have reason to believe the document is invalid.

**9-16** Section 100 of the *Powers of Attorney Act 1998* (Qld) should be amended so that it applies if a person other than an attorney in good faith and without knowing that:

- (a) an advance health directive or a power for a health matter under an enduring document is invalid; or
- (b) a direction in an advance health directive does not operate;

acts in reliance on the advance health directive, the purported exercise of power or the inoperative directive.

***Protection if health provider does not know of existence of advance health directive***

**9-17** Section 102 of the *Powers of Attorney Act 1998* (Qld) should be amended so that it applies to a health provider who ‘*acting in good faith*, does not know the adult has an advance health directive’.

***Protection of health provider for non-compliance with advance health directive***

**9-18 Section 103 of the *Powers of Attorney Act 1998* (Qld) should be amended in the following respects:**

- (a) section 103(1) should be amended:**
  - (i) so that section 103 does not apply to a health provider who has reasonable grounds to believe that a direction in an advance health directive is inconsistent with good medical practice; and**
  - (ii) to refer to ‘circumstances, including advances in medical science, have changed to the extent that *the adult, if he or she had known of the change in circumstances, would have considered that* the terms of the direction are inappropriate;**
- (b) the protection given by section 103(2) should be clarified by inserting a new subsection to the effect that, if the health provider carries out health care that is not in accordance with the direction, the health provider is protected only to the extent that, if the direction had been inoperative under section 36 of the Act, the health care would have been authorised or the subject of consent; and**
- (c) section 103(3) should be amended so that the requirement to consult applies in relation to:**
  - (i) an attorney appointed under the advance health directive; or**
  - (ii) if an attorney is not appointed under the advance health directive, but the advance health directive names an attorney for health matters appointed under the adult’s enduring power of attorney — the named attorney.**

**9-19 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).**

**9-20 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).**

***The power to remove and replace an attorney under an advance health directive or change or revoke an advance health directive***

**9-21** 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 advance health directive, 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.

**9-22** A majority of the Commission recommends that section 116(c) and (d) of the *Powers of Attorney Act 1998 (Qld)*, in so far as those provisions apply to an advance health directive, should be retained in their current form.

**9-23** A minority of the Commission recommends that:

- (a) section 116(c) of the *Powers of Attorney Act 1998 (Qld)* should be amended so that it does not enable the court to change the terms of an advance health directive; and
- (b) section 116(d) of the *Powers of Attorney Act 1998 (Qld)* should be amended so that it does not enable the court to revoke all or part of an advance health directive.

**9-24** A majority of the Commission recommends that section 117 of the *Powers of Attorney Act 1998 (Qld)* should be amended so that it provides:

Without limiting the grounds on which the court 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 1 of these documents, the court may make the order if the court considers the principal's circumstances or other circumstances (including, for a health power, advances in medical science) have changed to the extent that *the adult, if he or she had known of the change in circumstances, would have considered that 1 or more terms of the document are inappropriate.*

**9-25** A minority of the Commission recommends that section 117 of the *Powers of Attorney Act 1998 (Qld)* should be amended by omitting the current reference to an advance health directive.

***The effect of the guardianship legislation on the operation of a consent or refusal that would otherwise be effective at common law***

**9-26 Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision that:**

- (a) provides that nothing in that Act affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter; and**
- (b) includes a note referring to the similar provision in section 39 of the *Powers of Attorney Act 1998* (Qld).**

**9-27 Section 39 of the *Powers of Attorney Act 1998* (Qld) should be amended:**

- (a) to provide that nothing in that Act affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter; and**
- (b) to include a note referring to the similar provision in the *Guardianship and Administration Act 2000* (Qld) that gives effect to Recommendation 9-26.**

**9-28 Section 79 of the *Guardianship and Administration Act 2000* (Qld) should be amended to make it clear that, in addition to the circumstances currently mentioned in section 79(1), it is not an offence to carry out health care of an adult with impaired capacity for the health matter concerned if the adult consented to the health care at a time when he or she had capacity to make decisions about the matter.**

**9-29 Section 79(1) of the *Guardianship and Administration Act 2000* (Qld) should also be redrafted as follows to better reflect the usual requirements for consent:**

- (1) It is an offence for a person to carry out health care of an adult with impaired capacity for the health matter concerned unless—**
  - (a) the adult consented to the health care at a time when he or she had capacity to make decisions about the matter; or**
  - (b) consent to the health care is given under this or another Act; or**
  - (c) the health care is authorised by an order of the court made in its *parens patriae* jurisdiction; or**

*Editor's note—*

*Court* means the Supreme Court—see schedule 4 (Dictionary). The *parens patriae* jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint decision makers for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

- (d) **this or another Act provides the health care may be carried out without consent.**

*Editor's note—*

See sections 63 (Urgent health care), 63A (Life-sustaining measure in an acute emergency) and 64 (Minor, uncontroversial health care).

**CHAPTER 10 — STATUTORY HEALTH ATTORNEYS*****When a person has the care of an adult for the purposes of section 63***

- 10-1** Section 63(1)(a) of the *Powers of Attorney Act 1998 (Qld)* should include a footnote reference to the definition of ‘spouse’ in section 36 of the *Acts Interpretation Act 1954 (Qld)*.
- 10-2** Section 63(3) of the *Powers of Attorney Act 1998 (Qld)* should be amended to provide that a person has the care of an adult if the person *regularly* provides or arranges domestic services and support for the adult.

***The definition of ‘relation’ for the purposes of section 63***

- 10-3** The definition of ‘relation’ in schedule 3 of the *Powers of Attorney Act 1998 (Qld)* should not apply to the reference to a ‘close friend or relation’ in section 63 of the Act.
- 10-4** 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.

***Exclusions and limitations***

- 10-5** Section 63 of the *Powers of Attorney Act 1998 (Qld)* should be amended to clarify that:
- (a) the adult’s spouse will be recognised as the statutory health attorney only if he or she is at least 18 years old;
  - (b) a person will not be recognised as the statutory health attorney if he or she is a health provider for the adult; and

- (c) a person will not be recognised as the statutory health attorney if he or she is a service provider for a residential service where the adult resides.

***The effectiveness of a decision made by a statutory health attorney***

**10-6 Section 62 of the *Powers of Attorney Act 1998* (Qld) should be amended by inserting a new subsection to the effect that:**

A statutory health attorney's decision about a health matter for the adult is as effective as, but no more effective than, if:

- (a) the adult made the decision when decisions about the matter needed to be made; and
- (b) the adult then had capacity for the matter.

**10-7 Section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 66(5) is subject to section 62 of the *Powers of Attorney Act 1998* (Qld).**

**CHAPTER 11 — THE WITHHOLDING AND WITHDRAWAL OF LIFE-SUSTAINING MEASURES*****The definition of ‘health care’***

- 11-1 The definition of ‘health care’ in section 5 of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and section 5 of schedule 2 of the *Powers of Attorney Act 1998* (Qld) should be amended by omitting from section 5(2) the words ‘if the commencement or continuation of the measure for the adult [principal] would be inconsistent with good medical practice’.

***The definition of ‘life-sustaining measure’***

- 11-2 The definition of ‘life-sustaining measure’ in section 5A of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and section 5A of schedule 2 of the *Powers of Attorney Act 1998* (Qld) should be amended by omitting section 5A(3), which provides that a blood transfusion is not a life-sustaining measure.

***Withholding or withdrawal of a life-sustaining measure under an advance health directive***

- 11-3 Section 36(2) of the *Powers of Attorney Act 1998* (Qld) should be omitted.

***Consent to the withholding or withdrawal of a life-sustaining measure by a substitute decision-maker***

- 11-4 A majority of the Commission recommends that the *Guardianship and Administration Act 2000* (Qld) should be amended by:

- (a) omitting section 66A of the Act; and
- (b) omitting the words ‘and section 66A’ from section 66B(2)(b) of the Act.

- 11-5 The *Guardianship and Administration Act 2000* (Qld) should be amended by inserting a new provision based generally on section 85 of the *Powers of Attorney Act 2006* (ACT):

**Referral of health care decision to the adult guardian**

- (1) In this section:

*relevant person*, in relation to an adult with impaired capacity for a health matter, means—

- (a) a health provider who is treating, or has at any time treated, the adult;
  - (b) a person in charge of a health care facility where the adult is being, or has at any time been, treated; or
  - (c) an interested person.
- (2) This section applies if—
- (a) a guardian or attorney for a health matter for an adult—
    - (i) refuses to make a decision about the health matter for the adult; or
    - (ii) makes a decision about the health matter for the adult; and
  - (b) a relevant person believes, on reasonable grounds, that the decision is not in accordance with the general principles and the health care principle.
- (3) The relevant person may tell the adult guardian about the decision and explain why the relevant person believes the decision is not in accordance with the general principles and the health care principle.

*Editor's notes*

- 1 Under section 43(1), the adult guardian may exercise power for the health matter if the requirements of paragraph (a) or (b) are satisfied.
- 2 Under section 247(1)(c), a person is not liable civilly, criminally or under an administrative process, for disclosing to the adult guardian information in accordance with this section.

- (4) In this section—

*attorney* means an attorney acting under an enduring document or a statutory health attorney.

**11-6 A minority of the Commission recommends that the *Guardianship and Administration Act 2000* (Qld) should be amended by:**

- (a) replacing section 66A(2) with a provision to the following effect:

A consent to the withholding or withdrawal of a life-sustaining measure for the adult does not operate if the adult's health provider reasonably considers the withholding or withdrawal of the measure for the adult would be inconsistent with good medical practice.

- (b) omitting the section heading for section 66A and inserting a section heading that better reflects the effect of the provision, such as ‘When consent to withholding or withdrawal of life-sustaining measure does not operate’;
- (c) inserting a new provision to the effect that if, under section 66A(2), a substitute decision-maker’s consent to the withholding or withdrawal of a life-sustaining measure for the adult does not operate:

  - (i) the adult’s health provider (if the adult’s substitute decision-maker is not the Adult Guardian) must take the steps specified in Recommendation 11-6(d); or
  - (ii) the Adult Guardian (if the Adult Guardian is the adult’s substitute decision-maker) must take the steps specified in Recommendation 11-6(g);

to resolve the disagreement about the withholding or withdrawal of the life-sustaining measure;
- (d) inserting a new provision to the effect that, if the adult’s substitute decision-maker is not the Adult Guardian:

  - (i) the adult’s health provider must, within two days of forming the relevant view under section 66A(2) about the substitute decision-maker’s consent, refer to the Adult Guardian the decision whether to withhold or withdraw the life-sustaining measure for the adult; and
  - (ii) despite section 66A(2), if the adult’s health provider does not refer the decision to the Adult Guardian within that time, the substitute decision-maker’s consent to the withholding or withdrawal of the life-sustaining measure becomes operative;
- (e) inserting a new provision, based in part on section 43(2)(a)–(b), (d) and (3) of the Act, to the effect that:

  - (1) If a health provider refers a decision about the withholding or withdrawal of a life-sustaining measure for an adult to the adult guardian under [*the provision that gives effect to Recommendation 11-6(d)(i)*], the adult guardian must exercise power for the matter.
  - (2) The adult guardian must advise the tribunal in writing of the following details:

    - (a) the name of the adult;

(b) the name of the guardian or attorney; and

(c) the decision made by the adult guardian; and

(3) In this section—

*attorney* means an attorney under an enduring document or a statutory health attorney.

- (f) inserting, in the provision that gives effect to Recommendation 11-6(d), a note that refers to the provision proposed by Recommendation 11-6(e), which requires the Adult Guardian to decide whether to withhold or withdraw a life-sustaining measure;
- (g) inserting a new provision to the effect that, if the Adult Guardian is the adult's substitute decision-maker:
- (i) the Adult Guardian must apply to the Tribunal for a declaration that the withholding or withdrawal of the life-sustaining measure for the adult is a valid exercise of the Adult Guardian's power; and
  - (ii) despite section 66A(2), if the Tribunal makes such a declaration, the Adult Guardian's consent to the withholding or withdrawal of the life-sustaining measure becomes operative.

***The withholding or withdrawal of a medically futile life-sustaining measure***

11-7 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that 'withholding a life-sustaining measure' does *not* include not commencing a life-sustaining measure if the adult's health provider reasonably considers that commencing the measure would not be consistent with good medical practice.

11-8 A minority of the Commission recommends that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that 'the withdrawal of a life-sustaining measure' does *not* include the discontinuing of a life-sustaining measure if the adult's health provider reasonably considers that continuing the measure would not be consistent with good medical practice.

***The effect of an adult's objection to the withholding or withdrawal of a life-sustaining measure***

**11-9** Section 67 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, for the purpose of that section, 'health care' does not include the withholding or withdrawal of a life-sustaining measure.

**11-10** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision to the following effect:

**67A** Effect of an adult's objection to the withholding or withdrawal of a life-sustaining measure

(1) Generally, the consent of an adult's guardian or attorney to the withholding or withdrawal of a life-sustaining measure for the adult does not operate if the health provider knows, or ought reasonably to know, the adult objects to the withholding or withdrawal of the measure.

(2) If an adult objects to the withholding or withdrawal of a life-sustaining measure—

(a) the adult guardian may consent to the withholding or withdrawal of a life-sustaining measure for the adult; and

(b) the adult guardian's consent is effective despite the adult's objection.

(3) The adult guardian may exercise power under subsection (2) whether or not the adult guardian is the adult's guardian or attorney.

(3) In this section—

*attorney* means an attorney under an enduring document or a statutory health attorney.

*object*, by an adult, to the withholding or withdrawal of a life-sustaining measure means—

(a) the adult indicates the adult does not wish to have the life-sustaining measure withheld or withdrawn; or

(b) the adult previously indicated the adult did not wish to have the life-sustaining measure withheld or withdrawn and since then the adult has not indicated otherwise.

***The Tribunal's power in relation to the withholding or withdrawal of a life-sustaining measure***

**11-11** To support the Tribunal's function under section 81(1)(f) of the *Guardianship and Administration Act 2000* (Qld), the Act should be amended to confer on the Tribunal the express power to consent to the withholding or withdrawal of a life-sustaining measure.

**11-12** Section 66 of the *Guardianship and Administration Act 2000* (Qld) should be amended to ensure that subsections (1) and (3) to (5) of that section do not limit the operation of the provision that gives effect to Recommendation 11-11.

**11-13** Section 42 of the *Guardianship and Administration Act 2000* (Qld) should be amended by inserting a new subsection to the effect that section 42 does not limit the operation of the provision that gives effect to Recommendation 11-11.

**11-14** Section 43 of the *Guardianship and Administration Act 2000* (Qld) should be amended by inserting a new subsection to the effect that section 43 does not limit the operation of the provision that gives effect to Recommendation 11-11.

***Potential criminal responsibility for withholding or withdrawing a life-sustaining measure***

**11-15** The Criminal Code (Qld) should be amended to provide that a person is not criminally responsible for withholding or withdrawing, in good faith and with reasonable care and skill, a life-sustaining measure from an adult if the withholding or withdrawal of the life-sustaining measure:

- (a) is in accordance with a valid refusal of the health care given by the adult at a time when he or she had capacity to make decisions about the health care;
- (a) is authorised by the *Guardianship and Administration Act 2000* (Qld), the *Powers of Attorney Act 1998* (Qld) or another Act; or
- (b) is authorised by an order of the Supreme Court.

**11-16** Provided that the Criminal Code (Qld) is amended to give effect to Recommendation 11-15, section 238 of the *Guardianship and Administration Act 2000* (Qld) and section 37 of the *Powers of Attorney Act 1998* (Qld) should be retained.

**CHAPTER 12 — THE EFFECT OF AN ADULT'S OBJECTION TO HEALTH CARE*****Objection to health care generally***

**12-1** The *Guardianship and Administration Act 2000* (Qld) should be amended by inserting a provision, based generally on section 46A(1)–(3) of the *Guardianship Act 1987* (NSW), to the effect that:

- (1) The Tribunal may confer on an adult's guardian or attorney the authority to exercise power for a health matter for the adult, despite the adult's objection to the health care.
- (2) The Tribunal may confer that authority only at the request, or with the consent of, the guardian or attorney and only if it is satisfied that the adult's objection is, or will be made, because of the adult's lack of understanding of the nature of, or reason for, the treatment.
- (3) The Tribunal may at any time—
  - (a) impose conditions or give directions about the exercise of the guardian's or attorney's power; or
  - (b) revoke such power.
- (4) In this section—

*attorney* means an attorney under an enduring document or a statutory health attorney.

**12-2** Section 67 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in addition to and without limiting subsection (2):

- (a) if an adult's guardian or attorney exercises power for a health matter in accordance with the authority conferred by the Tribunal under the provision that gives effect to Recommendation 12-1, the exercise of power is effective to give consent to the health care despite an objection by the adult to the health care; and
- (b) the exercise of power by the Tribunal for the sterilisation of an adult or the termination of an adult's pregnancy is effective to give consent to the health care, despite an objection by the adult to the health care, if the Tribunal was constituted by, or included, a judicial member for the proceeding in which it consented to the health care.

***Objection to sterilisation or a termination of pregnancy***

- 12-3** Sections 70 (Sterilisation) and 71 (Termination of pregnancy) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in deciding whether to consent to the health care, the Tribunal must take into account any objection by the adult and any other matter relevant to the decision.
- 12-4** The Tribunal should develop a Practice Direction to facilitate the identification of those applications for the Tribunal's consent to the sterilisation of an adult or the termination of an adult's pregnancy that should be heard by a Tribunal panel that is constituted by, or includes, a judicial member.
- 12-5** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:
- (a) in the hearing of an application for the Tribunal's consent to the sterilisation of an adult or the termination of an adult's pregnancy, the Tribunal may adjourn the hearing and direct that, for the further hearing of the application, the Tribunal is to be constituted by, or is to include, a judicial member; and
  - (b) if the Tribunal, as constituted by or including a judicial member, decides the application, that decision is taken to be the Tribunal's decision.

***Objection to urgent health care***

- 12-6** Section 63(1)(b)(i) of the *Guardianship and Administration Act 2000* (Qld) should be amended by adding the words 'and it is not reasonably practicable to get consent from a person who may give it under this Act or the *Powers of Attorney Act 1998* (Qld)'.
- 12-7** Section 63(2) of the *Powers of Attorney Act 1998* (Qld) should be amended to add, as a further limitation on carrying out the health care mentioned in section 63(1)(b)(i), that the health care may not be carried out without consent if the health provider knows that, at a time when the adult had capacity to make decisions about the health care, he or she refused the health care.
- 12-8** Section 63(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended to add, as further limitations on carrying out the health care mentioned in section 63(1)(b)(ii), that the health care may not be carried out without consent if the health provider knows that:

- (a) the adult objects to the health care in an advance health directive; or**
- (b) at a time when the adult had capacity to make decisions about the health care, he or she refused the health care.**

**CHAPTER 13 — CONSENT TO PARTICIPATION IN MEDICAL RESEARCH*****Special medical research or experimental health care***

- 13-1** Section 72 of the *Guardianship and Administration Act 2000* (Qld) should be retained.
- 13-2** The *Guardianship and Administration Act 2000* (Qld) should be amended so that the Tribunal may approve special medical research or experimental health care.
- 13-3** The grounds on which the Tribunal may approve special medical research or experimental health care should generally be based on the grounds mentioned in section 72(1)–(2) of the *Guardianship and Administration Act 2000* (Qld).

***Approval of clinical research***

- 13-4** Section 13(3)–(5) of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) should be omitted from the schedule and relocated to the body of the *Guardianship and Administration Act 2000* (Qld).
- 13-5** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision to the general effect of section 45AB(1) of the *Guardianship Act 1987* (NSW).

***Information available to substitute decision-maker***

- 13-6** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision, based generally on section 45AB(2) of the *Guardianship Act 1987* (NSW), so that, as a requirement for the Tribunal:
- (a) to approve special medical research or experimental health care; or
  - (b) to order that an adult's substitute decision-maker may give consent to the adult's participation in approved clinical research

the Tribunal must be satisfied that the form for granting consent and the information available about the special medical research or experimental health care or clinical research provide sufficient information to enable the adult's substitute decision-maker to decide whether or not it is appropriate that the adult should take part in the special medical research or experimental health care or clinical research.

***Definition of 'special health care'***

**13-7** The definition of 'special health care' in section 7 of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Powers of Attorney Act 1998* (Qld) should be amended as follows:

- (a) section 7(d) should be amended to refer to 'participation by the adult in special medical research or experimental health care *unless the special medical research or experimental health care is approved by the Tribunal under [the provision that gives effect to Recommendation 13-2];* and
- (b) section 7 should include, as a further category of special health care, approved clinical research unless the Tribunal has ordered that consent for an adult's participation in the approved clinical research may be given by the adult's substitute decision-maker.

***Definition of 'health care'***

**13-8** The definition of 'health care' in section 5 of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that 'health care' also includes:

- (a) clinical research; and
- (b) special medical research or experimental health care.

**CHAPTER 14 — THE APPOINTMENT OF GUARDIANS AND ADMINISTRATORS*****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*****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.
- 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).

**CHAPTER 16 — ENDURING POWERS OF ATTORNEY*****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).

***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.

**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

### *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**

- 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**

- 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.
- 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*****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.

***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).

**CHAPTER 21 — TRIBUNAL PROCEEDINGS*****The application form***

**21-1** The approved form for making an application for the appointment of a guardian or an administrator or the review of an appointment should be reworded to reflect more clearly the legislative requirement that the applicant must provide information about the members of the adult's family and any primary carer of the adult, regardless of whether or not the applicant perceives for himself or herself that the person may have an interest in the application. The form should also require the applicant to state, if relevant, that he or she does not have actual knowledge of any other persons who may have an interest in the application.

***The definition of 'interested person'***

**21-2** The definition of 'interested person' for an adult under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to refer to 'a person who has a sufficient and genuine concern for the rights and interests of the adult'.

***Notification of an application and of the hearing of an application***

**21-3** The notice of an application made under the *Guardianship and Administration Act 2000* (Qld) and notice of a hearing of an application should include information about the possible outcomes of the application. In relation to an application for appointment or for the review of an appointment, that information should include:

- (a) the names of any proposed appointees;
- (b) the circumstances in which the Adult Guardian or the Public Trustee may be appointed;
- (c) information that a person other than the person who is proposed for appointment in the application may be appointed; and
- (d) what steps the person who has been notified of the application should take if he or she wishes to make an application for appointment.

**21-4** Information about how the adult concerned in an application may request further information about the application from the Tribunal should be given to the adult in conjunction with a copy of the application.

- 21-5 Rule 21(4)(a) of the QCAT Rules should be amended to provide that the Tribunal is not required to give notice of an application to the adult concerned if the Tribunal considers on reasonable grounds that giving notice to the adult might cause serious harm to the adult.
- 21-6 Section 118(2)(a) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal is not required to give notice of the hearing of an application to the adult concerned if the Tribunal considers on reasonable grounds that giving notice to the adult might cause serious harm to the adult.

***Legal and other representation***

- 21-7 Section 124 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide expressly that, in a guardianship proceeding, the adult concerned in the proceeding is entitled to be represented without the need to be given leave by the Tribunal.
- 21-8 The presumption against legal representation in Tribunal proceedings, as set out in section 43 of the QCAT Act, should not apply in a guardianship proceeding. Instead, section 124 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, despite section 43(1)–(3) of the QCAT Act, an active party, other than the adult concerned, may be represented by a lawyer or agent, unless the Tribunal considers it is appropriate in the circumstances for that person not to be represented.
- 21-9 Section 125 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that the role of a separate representative for an adult in a guardianship proceeding is to:
- (a) have regard to any expressed views or wishes of the adult;
  - (b) to the greatest extent practicable, present the adult's views and wishes to the Tribunal; and
  - (c) promote and safeguard the adult's rights, interests and opportunities.

***Access to documents: active parties***

- 21-10 Section 103 of the *Guardianship and Administration Act 2000* (Qld) should be amended to limit its application to active parties and:
- (a) to provide that an active party is entitled to obtain a copy of any document that the active party is entitled to inspect under section 103(1)(a) or (b) or (2);

- (b) to ensure that the right to inspect and obtain a copy of a document under section 103(2) is not limited to a reasonable time after a hearing;
- (c) to provide that, after a hearing, the Tribunal may, by order, authorise an active party to inspect or obtain a copy of a document before the Tribunal that the Tribunal did not consider credible, relevant and significant to an issue in the proceeding, including on terms the Tribunal considers appropriate; and
- (d) to provide that section 103 applies despite section 230(2) of the QCAT Act.

**21-11** To implement Recommendation 21-10, section 103 of the *Guardianship and Administration Act 2000* (Qld) should be replaced with a provision to the following effect:

**103 Access—active parties**

- (1) Each active party in a proceeding must be given a reasonable opportunity to present the active party's case and, in particular—
  - (a) before the start of a hearing, to inspect a document before the tribunal that the tribunal considers is relevant to an issue in the proceeding; and
  - (b) during a hearing, to inspect a document or access other information before the tribunal that the tribunal considers is credible, relevant and significant to an issue in the proceeding; and
  - (c) to make submissions about a document or other information accessed under this subsection.
- (2) An active party in a proceeding may, after a hearing, inspect a document before the tribunal that the tribunal considered credible, relevant and significant to an issue in the proceeding.
- (2A) An active party in a proceeding is entitled to obtain a copy of a document mentioned in subsection (1)(a) or (b) or (2).
- (2B) After a hearing, the tribunal may, by order, authorise an active party to inspect or obtain a copy of a document before the tribunal that the tribunal did not consider credible, relevant and significant to an issue in the proceeding, including on terms the tribunal considers appropriate.
- (3) For subsections (1), (2) and (2B), something is relevant only if it is directly relevant.

- (4) On request, the tribunal must give access to a document or other information in accordance with this section.
- (5) The tribunal may displace the right to access a document or other information only by a confidentiality order.
- (6) To remove any doubt, it is declared that the right to access a document or other information is not affected by an adult evidence order, a closure order or a non-publication order.
- (7) This section applies despite section 230(2) of the QCAT Act.

***Access to documents: non-parties***

**21-12** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a new section dealing with the entitlement of non-parties to inspect and obtain copies of documents in guardianship proceedings. The new section should provide that:

- (a) before a hearing, a non-party may not inspect or otherwise have access to a document before the Tribunal unless authorised by the Tribunal as provided for in paragraph (b);
- (b) the Tribunal may, by order, authorise a non-party to inspect or obtain a copy of a document before the Tribunal (other than a document, or part of a document, that is the subject of a confidentiality order) that the Tribunal considers is relevant to an issue in the proceeding, including on terms the Tribunal considers appropriate;
- (c) during a hearing, a non-party may, on payment of the prescribed fee (if any):
  - (i) inspect a document before the Tribunal that the Tribunal considers is credible, relevant and significant to an issue in the proceeding; and
  - (ii) obtain a copy of any document that the non-party may inspect;
- (d) after a hearing, a non-party may, on payment of the prescribed fee (if any):
  - (i) inspect a document before the Tribunal that the Tribunal considered credible, relevant and significant to an issue in the proceeding; and

(ii) obtain a copy of any document that the non-party may inspect; and

(e) the section applies despite section 230(3) of the QCAT Act.

**21-13** The parts of section 103(2) of the *Guardianship and Administration Act 2000* (Qld) that restrict non-party access to documents to a person the Tribunal considers has a sufficient interest in the proceeding and to access that is sought within a reasonable time after a hearing should be omitted.

**21-14** To implement Recommendations 21-12 and 21-13, the *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision to the following effect:

**103A Access—non-parties**

(1) Before the start of a hearing, a person or entity who is not an active party in a proceeding (a *non-party*) may not inspect or otherwise have access to a document before the tribunal unless authorised by the tribunal under subsection (2).

(2) The tribunal may, by order, authorise a non-party to inspect or obtain a copy of a document before the tribunal (other than a document, or part of a document, that is the subject of a confidentiality order) that the tribunal considers is relevant to an issue in the proceeding, including on terms the tribunal considers appropriate.

(3) During a hearing, a non-party may, on payment of the prescribed fee (if any)—

(a) inspect a document before the tribunal that the tribunal considers is credible, relevant and significant to an issue in the proceeding; and

(b) obtain a copy of a document mentioned in paragraph (a).

(4) After a hearing, a non-party may, on payment of the prescribed fee (if any)—

(a) inspect a document before the tribunal that the tribunal considered credible, relevant and significant to an issue in the proceeding; and

(b) obtain a copy of a document mentioned in paragraph (a).

(5) For subsections (2), (3) and (4), something is relevant only if it is directly relevant.

- (6) On request, the tribunal must give access to a document in accordance with this section.
- (7) The tribunal may displace the right to access a document under subsection (3) or (4) only by a confidentiality order.
- (8) To remove any doubt, it is declared that the right to access a document under subsection (3) or (4) is not affected by an adult evidence order, a closure order or a non-publication order.
- (9) This section applies despite section 230(3) of the QCAT Act.

### ***Special witness provisions***

21-15 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the special witness provisions under section 99 of the QCAT Act should apply to proceedings under the *Guardianship and Administration Act 2000* (Qld), subject to the operation of the provisions for making a closure order or an adult evidence order under the *Guardianship and Administration Act 2000* (Qld).

### ***Decisions and reasons***

21-16 The QCAT Rules should be amended to require that the written reasons for a decision, made in a proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld), must set out the principles of law applied by the Tribunal in the proceeding and the way in which the Tribunal applied the principles of law to the facts.

**CHAPTER 22 — APPEALS, REOPENING AND REVIEW*****Appealing a Tribunal decision***

**22-1** The QCAT Act provides an appropriate mechanism for appealing against a Tribunal decision made in a proceeding under the *Guardianship and Administration Act 2000* (Qld).

***Reopening of proceedings***

**22-2** The definition of ‘reopening ground’ in section 137 of the QCAT Act should be amended to include, for a proceeding under the *Guardianship and Administration Act 2000* (Qld), that because significant new evidence has arisen that was not reasonably available when the proceeding was first heard and decided:

- (a) the adult concerned would suffer substantial injustice if the proceeding was not reopened; or
- (b) the needs of the adult would not be adequately met, or the adult’s interests would not be adequately protected, if the proceeding was not reopened.

**22-3** The QCAT Act should be amended so that, for the hearing of a proceeding under the *Guardianship and Administration Act 2000* (Qld), a member of the adult’s family or any primary carer of the adult may apply for a reopening of the proceeding if the Tribunal did not give the person notice of the hearing under section 118(1) of the *Guardianship and Administration Act 2000* (Qld).

***Review of the appointment of a guardian or an administrator***

**22-4** Section 28(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- (a) an initial appointment of a guardian or an administrator must be reviewed within two years of the order making the appointment; and
- (b) any other appointment of a guardian or an administrator must be reviewed within five years of the order renewing or extending the appointment.

**22-5** Section 28(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to omit the words ‘(other than the public trustee or a trustee company under the *Trustee Companies Act 1968*)’ so that the Public Trustee and trustee companies are subject to the same requirement for periodic review as other administrators.

**22-6** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an application under section 29 of the Act for the review of an appointment of a guardian or an administrator, or a guardian for a restrictive practice matter, may be made on one of the following grounds:

- (a) new and relevant information has become available since the hearing;
- (b) a relevant change in circumstances has occurred since the hearing; or
- (c) relevant information that was not presented to the Tribunal at the hearing has become available.

**CHAPTER 23 — THE ADULT GUARDIAN*****The Adult Guardian's functions***

- 23-1** Subject to Recommendations 23-2 and 28-3(a), the Adult Guardian's functions in section 174 of the *Guardianship and Administration Act 2000* (Qld) are appropriate and do not require amendment.
- 23-2** Section 174(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in performing a function or exercising a power, the Adult Guardian must apply the General Principles *and, for a health matter*, the Health Care Principle.

***The Adult Guardian's powers***

- 23-3** Subject to Recommendations 23-4 to 23-8, 23-10 and 28-3(b), the Adult Guardian's powers are appropriate and do not require amendment.

***Substitute decision-maker acting contrary to the Health Care Principle***

- 23-4** Section 43(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to refer:
- (a) in paragraph (a) to a refusal that is contrary to *the General Principles* or the Health Care Principle; and
  - (b) in paragraph (b) to a decision that is contrary to *the General Principles* or the Health Care Principle.

***Delegation of the power to make day-to-day decisions about a personal matter***

- 23-5** Section 177(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Adult Guardian has power for a personal matter for an adult, the Adult Guardian may, in addition to the persons mentioned in paragraphs (a)–(d), delegate the power to make day-to-day decisions about the matter to any other person, other than the Public Trustee, who the Adult Guardian, in his or her discretion, considers appropriate.

***Power to require an agency to disclose personal information about an individual***

- 23-6** Section 183 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that the Adult Guardian's right to information includes the power to require an agency to disclose personal information about an individual.

***Investigations***

**23-7** Section 180 of the *Guardianship and Administration Act 2000* (Qld) should:

- (a) continue to provide that the Adult Guardian has a discretion in relation to the complaints and allegations that are investigated; and
- (b) be amended to provide that the Adult Guardian's power to investigate a complaint or an allegation is not limited by the death of the adult.

**23-8** Section 182 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that, despite the death of an adult, the Adult Guardian has the power to investigate the conduct of a person who *was* the adult's attorney with power for financial matters or who *was* the adult's administrator.

***Suspension of the power of an attorney under an enduring document***

**23-9** The Adult Guardian should retain the power under section 195 of the *Guardianship and Administration Act 2000* (Qld) to suspend all or some of an attorney's power under an enduring document.

**23-10** Section 195 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, if the Adult Guardian has suspended all or some of an attorney's power, the suspension may not be extended by a further exercise of the Adult Guardian's power to suspend.

***Extension of QCAT's review jurisdiction***

**23-11** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that each of the following decisions by the Adult Guardian is a reviewable decision for the purposes of the QCAT Act:

- (a) a decision made under the Act about a personal matter for an adult (including a decision made under section 42 or 43); and
- (b) a decision made under section 177(4) of the Act to delegate the power to make day-to-day decisions about a personal matter for an adult.

**23-12** The *Powers of Attorney Act 1998* (Qld) should be amended to provide that each of the following decisions by the Adult Guardian is a reviewable decision for the purposes of the QCAT Act:

- (a) a decision made under the Act about a personal matter for an adult; and
- (b) a decision made under an enduring document about a personal matter for an adult.

***Persons who may apply for the review of a reviewable decision of the Adult Guardian***

**23-13** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that the following persons may apply to the Tribunal, as provided under the QCAT Act, for the review of a reviewable decision made by the Adult Guardian:

- (a) the adult who is the subject of the decision; and
- (b) an interested person.

***Persons who should be advised that they may apply for the review of a reviewable decision***

**23-14** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that section 157 of the QCAT Act does not apply to a reviewable decision of the Adult Guardian.

***Notice requirements: application and hearing***

**23-15** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision, modelled on section 99E of the *Child Protection Act 1999* (Qld), requiring:

- (a) the principal registrar to give notice of the review application to the Adult Guardian; and
- (b) the Adult Guardian to give the principal registrar notice of the names and addresses of all persons, apart from the applicant, who would be entitled to receive notice of an application under rule 21 of the QCAT Rules or notice of a hearing under section 118 of the *Guardianship and Administration Act 2000* (Qld).

**23-16** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal must give notice of the application and of the hearing to those people to whom the Tribunal would be required to give notice if the hearing of the application were a guardianship proceeding under the *Guardianship and Administration Act 2000* (Qld).

***Application of confidentiality and related provisions***

**23-17** Either the *Guardianship and Administration Act 2000* (Qld) or the QCAT Act should be amended so that sections 103 to 113 (including the new section 103A that has been recommended in Chapter 21 of this Report) and section 114A of the *Guardianship and Administration Act 2000* (Qld), or provisions in those terms, apply to an application for the review of a reviewable decision of the Adult Guardian and the hearing of that application.

**CHAPTER 24 — THE FUNCTION OF SYSTEMIC ADVOCACY*****Reporting on systemic advocacy***

**24-1** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Adult Guardian's Annual Report must include information about:

- (a) the systemic advocacy that has been undertaken during the year;
- (b) the expenditure on systemic advocacy; and
- (c) the number of staff (expressed as full-time equivalents) who were engaged in undertaking systemic advocacy.

**24-2** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- (a) the Adult Guardian may, at any time, prepare a report to the Minister on a systemic issue and give a copy of the report to the Minister; and
- (b) the Minister must table a copy of the report in the Legislative Assembly within five sitting days after receiving the report.

***Review by the Minister***

**24-3** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- (a) within five years of the commencement of the provisions transferring the Public Advocate's functions and powers to the Adult Guardian, the Minister must review the systemic advocacy function of the Adult Guardian to ascertain whether an independent systemic advocacy role has been maintained; and
- (b) as soon as practicable, but within one year after the end of the five year period, the Minister must table a report about the review in the Legislative Assembly.

***Intervening in guardianship proceedings***

**24-4** Section 210(2) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include a note that refers to the Tribunal's power under section 41(2) of the QCAT Act to give leave for a person to intervene in a proceeding.

***Power to require information and access to documents***

**24-5** The *Guardianship and Administration Act 2000* (Qld) should be amended to give the Adult Guardian, as systems advocate, the power to require from an agency, or a person who has the custody or control of information or documents, information and access to documents about:

- (a) a system being monitored or reviewed by the Adult Guardian;
- (b) arrangements for a class of individuals; and
- (c) policies and procedures that apply within an agency, service or facility.

**24-6** The provision that gives effect to Recommendation 24-5 should:

- (a) generally be modelled on section 183(1), (2)(a), (c), (3)–(5) of the *Guardianship and Administration Act 2000* (Qld); and
- (b) provide that the Adult Guardian's power to require information or access to documents includes the power to require:
  - (i) personal information about an adult if the provision of that information is necessary to comply with the Adult Guardian's notice; and
  - (ii) statistical information that is in the custody or control of an agency or person.

***Sanctions***

**24-7** The provisions that give effect to Recommendations 24-5 and 24-6 should provide that the maximum penalty for non-compliance with the requirements of those provisions is 100 penalty units.

**CHAPTER 25 — THE PUBLIC TRUSTEE*****The Public Trustee's powers***

**25-1** Subject to Recommendations 25-2 to 25-5, the Public Trustee's powers under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are appropriate and do not require amendment.

***Delegation within the Public Trust Office***

**25-2** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that, if the Public Trustee has power under the Act for a financial matter for an adult, the Public Trustee may delegate the power to an appropriately qualified member of the Public Trust Office's staff.

***Delegation outside the Public Trust Office***

**25-3** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that, if the Public Trustee has power under the Act for a financial matter for an adult that includes the power to make day-to-day decisions about the matter, the Public Trustee may delegate the power to make day-to-day decisions about the matter to one of the following:

- (a) an appropriately qualified carer of the adult;
- (b) an attorney under an enduring document;
- (c) one of the persons who could be eligible to be the adult's statutory health attorney; or
- (d) any other person the Public Trustee, in the Public Trustee's discretion, considers appropriate.

**25-4** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that the Public Trustee may not, in exercising power under the provision that gives effect to Recommendation 25-3, delegate to the Adult Guardian the power to make day-to-day decisions about a financial matter.

***Definitions for delegation provisions***

**25-5** For the purposes of the provisions that give effect to Recommendations 25-2 to 25-4, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to include the following definitions, based on the similar definitions in section 177(5) of the *Guardianship and Administration Act 2000* (Qld):

- (a) *appropriately qualified*, for a person to whom a power may be delegated, includes having the qualifications, experience or standing appropriate to exercise the power;
- (b) *day-to-day decision* means a minor, uncontroversial decision about day-to-day issues that involves no more than a low risk to the adult.

***Extension of QCAT's review jurisdiction***

**25-6** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that each of the following decisions by the Public Trustee is a reviewable decision for the purposes of the QCAT Act:

- (a) a decision made under the Act about a financial matter for an adult; and
- (b) a decision to delegate the power to make day-to-day decisions about a financial matter for an adult.

**25-7** The *Powers of Attorney Act 1998* (Qld) should be amended to provide that each of the following decisions by the Public Trustee is a reviewable decision for the purposes of the QCAT Act:

- (a) a decision made under the Act about a financial matter for an adult;
- (b) a decision made under an enduring power of attorney about a financial matter for an adult; and
- (c) a decision to delegate the power to make day-to-day decisions about a financial matter for an adult.

**25-8** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that the charging of fees and costs by the Public Trustee is not a 'reviewable decision' of the Public Trustee.

***Persons who may apply for the review of a reviewable decision of the Public Trustee***

**25-9** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that the following persons may apply to the Tribunal, as provided under the QCAT Act, for the review of a reviewable decision of the Public Trustee:

- (a) the adult who is the subject of the decision; and
- (b) an interested person.

***Persons who should be advised that they may apply for the review of a reviewable decision***

**25-10** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that section 157 of the QCAT Act does not apply to a reviewable decision of the Public Trustee.

***Notice requirements: application and hearing***

**25-11** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision, modelled on section 99E of the *Child Protection Act 1999* (Qld), requiring:

- (a) the principal registrar to give notice of the review application to the Public Trustee; and
- (b) the Public Trustee to give the principal registrar notice of the names and addresses of all persons, apart from the applicant, who would be entitled to receive notice of an application under rule 21 of the QCAT Rules or notice of a hearing under section 118 of the *Guardianship and Administration Act 2000* (Qld).

**25-12** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal must give notice of the application and of the hearing to those people to whom the Tribunal would be required to give notice if the hearing of the application were a guardianship proceeding under the *Guardianship and Administration Act 2000* (Qld).

***Application of confidentiality and related provisions***

**25-13** Either the *Guardianship and Administration Act 2000* (Qld) or the QCAT Act should be amended so that sections 103 to 113 (including the new section 103A that has been recommended in Chapter 21 of this Report) and section 114A of the *Guardianship and Administration Act 2000* (Qld), or provisions in those terms, apply to an application for the review of a reviewable decision of the Public Trustee and the hearing of that application.

**CHAPTER 26 — COMMUNITY VISITORS*****Visitable sites***

- 26-1** The definition of ‘visitable site’ in section 222 of the *Guardianship and Administration Act 2000* (Qld) is appropriate and does not require amendment.
- 26-2** The places prescribed as ‘visitable sites’ by schedule 2 of the *Guardianship and Administration Regulation 2000* (Qld) should be widened to enable community visitors to visit relevant consumers living in residential services conducted in premises that are registered under the *Residential Services (Accreditation) Act 2002* (Qld), regardless of the level of accreditation of the service. To give effect to this recommendation, paragraph (d) of the places prescribed in schedule 2 should be omitted and replaced with the following paragraph:
- (d) for a consumer with impaired capacity for a personal matter or a financial matter or with a mental or intellectual impairment—a place where the consumer lives if a residential service conducted in the premises that the place is part of is registered under the *Residential Services (Accreditation) Act 2002*.

***Deciding priorities for visiting visitable sites***

- 26-3** Section 225(2) of *Guardianship and Administration Act 2000* (Qld) should continue to provide that the chief executive may decide priorities for visiting particular visitable sites that affect the frequency of visits to a visitable site by a community visitor.

***Requesting a visit to a visitable site***

- 26-4** Section 226(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, in addition to a consumer at a visitable site and ‘a person for the consumer’, each of the following may ask the chief executive, or a person employed at the visitable site, to arrange for a community visitor to visit the visitable site:
- (a) a consumer’s guardian, administrator, attorney or statutory health attorney;
  - (b) an interested person for a consumer;
  - (c) the Adult Guardian;
  - (d) an advocacy organisation.

***Community visitor reports***

**26-5** Section 230(3) of the *Guardianship and Administration Act 2000* (Qld) should:

- (a) continue to require the chief executive to provide a copy of a community visitor report to a person in charge of the visitable site; and
- (b) be amended to provide that, if a community visitor report has been prepared in relation to a visit that was requested by:
  - (i) a consumer at a visitable site;
  - (ii) a consumer's guardian, administrator, attorney or statutory health attorney;
  - (iii) an interested person for the consumer;
  - (iv) the Adult Guardian; or
  - (v) an advocacy organisation;

the chief executive must also give a copy of the report to the person or organisation that requested the visit.

**26-6** Section 230(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended:

- (a) to provide that the chief executive must, on request by any of the persons mentioned in that subsection, give a copy of the community visitor report to the person; and
- (b) to expand the persons who may request a copy of a community visitor report to include:
  - (i) a consumer's guardian, administrator, attorney or statutory health attorney; and
  - (ii) an interested person for the consumer.

**26-7** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision that:

- (a) applies if the chief executive is required to give a copy of a community visitor report:

- (i) under section 230(3) or (4) to:
  - (A) a consumer;
  - (B) a consumer's guardian, administrator, attorney or statutory health attorney; or
  - (C) an interested person for the consumer; or
- (ii) under section 230(3) to an advocacy organisation; and
- (b) provides that the chief executive must, before giving a copy of the community visitor report to a consumer, a consumer's guardian, administrator, attorney or statutory health attorney, an interested person for a consumer, or an advocacy organisation, remove from the report the personal information of any other consumer that is included in the community visitor report, unless the chief executive is satisfied on reasonable grounds that the disclosure of the personal information of the other consumer is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of the relevant consumer.

#### ***Appointment of community visitors***

**26-8** Section 231(5) of the *Guardianship and Administration Act 2000* (Qld) should be amended:

- (a) to refer, in paragraph (c), to the desirability of having balanced gender representation in the appointment of community visitors; and
- (b) to include a new paragraph that refers to the desirability of having community visitors who include Aboriginal people and Torres Strait Islanders.

#### ***Location of the Community Visitor Program***

**26-9** The Community Visitor Program is appropriately located within the Office of the Adult Guardian, and the Commission does not make any recommendation to change its place in the organisational structure of the Department of Justice and Attorney-General.

**26-10** Section 237 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the department's annual report must also include information about:

- (a) the number of matters referred by community visitors to an investigator or guardian within the Office of the Adult Guardian or to another function of the Adult Guardian;**
- (b) the basis of the referral; and**
- (c) the outcome of the referral.**

**26-11 The *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision that:**

- (a) applies if a matter involving the Adult Guardian's appointment as guardian is referred by a community visitor to the Adult Guardian; and**
- (b) requires the chief executive to give to the Tribunal a copy of:**
  - (i) the community visitor's referral to the Adult Guardian; and**
  - (ii) the Adult Guardian's response.**

**CHAPTER 27 — WHISTLEBLOWER PROTECTION*****Protection from liability for making a disclosure***

**27-1** Section 247(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended in the following general terms:

**Whistleblowers' protection**

- (1) A person is not liable, civilly, criminally or under an administrative process, for disclosing information to an official if:
- (a) the person honestly believes on reasonable grounds that the person has information that tends to show that—
    - (i) another person has breached the *Guardianship and Administration Act 2000* or the *Powers of Attorney Act 1998*; or
    - (ii) an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse;
  - (b) the information would help in the assessment or investigation of a complaint that—
    - (i) another person has breached the *Guardianship and Administration Act 2000* or the *Powers of Attorney Act 1998*; or
    - (ii) an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse; or
  - (c) without limiting paragraph (a) or (b), the disclosure is made in accordance with [*the section that gives effect to Recommendation 11-5*].

**27-2** The definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include a reference to 'a public service officer involved in the administration of a program called the community visitor program'.

***Protection from a reprisal***

**27-3** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision, based on section 41 of the *Whistleblowers Protection Act 1994* (Qld), to the following effect:

**Reprisal and grounds for reprisal**

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, anybody has disclosed, or may disclose, to an official information mentioned in section 247(1).
- (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.
- (3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.
- (4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.
- (5) For the contravention to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

**27-4** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision to the effect of section 42 of the *Whistleblowers Protection Act 1994* (Qld), so that it is an indictable offence for a person to take a reprisal.

**27-5** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision to the effect of section 43 of the *Whistleblowers Protection Act 1994* (Qld), so that the taking of a reprisal is a tort for which the person may be liable in damages.

**CHAPTER 28 — LEGAL PROCEEDINGS INVOLVING ADULTS WITH IMPAIRED CAPACITY*****The appointment of a litigation guardian***

**28-1** Section 27 of the *Public Trustee Act 1978* (Qld) should be amended to ensure that the Public Trustee's consent is not required for the Public Trustee to be appointed as a litigation guardian under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld).

**28-2** Rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) should be amended:

- (a) to provide that, generally, the court may appoint a person as litigation guardian for a person under a legal incapacity only if the person consents to being appointed as litigation guardian;
- (b) to provide that, despite the provision that gives effect to Recommendation 28-2(a), the court may:
  - (i) appoint the Public Trustee, without the Public Trustee's consent, as litigation guardian for an adult with impaired capacity for a proceeding that relates to the adult's financial or property matters; and
  - (ii) appoint the Adult Guardian, without the Adult Guardian's consent, as litigation guardian for an adult with impaired capacity in a proceeding that does not relate to the adult's financial or property matters; and
- (c) to include a note, in the provision that gives effect to Recommendation 28-2(b)(i), that refers to section 27 of the *Public Trustee Act 1978* (Qld) as the source of the Public Trustee's power to act as a litigation guardian.

**28-3** The *Guardianship and Administration Act 2000* (Qld) should be amended:

- (a) to include, as an additional function of the Adult Guardian in section 174, 'acting as the litigation guardian of an adult in a proceeding that does not relate to the adult's financial or property matters'; and
- (b) to provide that the Adult Guardian may exercise the power under rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld) to file a written consent to be the litigation guardian of an adult in a proceeding that does not relate to the adult's financial or property matters.

**28-4 The *Uniform Civil Procedure Rules 1999* (Qld) should be amended:**

- (a) to include a rule, based on rule 277(3) of the *Court Procedures Rules 2006* (ACT), to the effect that a litigation guardian for a defendant or respondent is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct; and
- (b) to include a rule, to the following general effect, dealing with the court's power to make an order in relation to the costs of a party who has a litigation guardian:
  - (1) This rule applies if a party to a proceeding has a litigation guardian for the proceeding.
  - (2) If the court considers it in the interests of justice, the court may order that all or part of the party's costs of the proceeding be borne by another party to the proceeding.
  - (3) The court may make an order under this rule at any stage of the proceeding or after the proceeding ends.

***The test for impaired capacity for a litigant***

**28-5 The definition of 'person with impaired capacity' in schedule 2 of the *Supreme Court of Queensland Act 1991* (Qld) should be amended to provide that:**

*person with impaired capacity* means a person who is not capable of making the decisions required of a litigant for conducting *the proceeding* or who is deemed by an Act to be incapable of conducting *the proceeding*.

**28-6 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in deciding whether a person has impaired capacity for the purpose of the *Uniform Civil Procedure Rules 1999* (Qld), the Tribunal must take into account whether or not the person is, or will be, legally represented in the proceeding.**

***Person appropriate for appointment as litigation guardian***

**28-7 The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:**

- (a) the Tribunal may make a finding about who would be appropriate to be appointed as the litigation guardian of an adult who is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld); and

- (b) the Tribunal's finding is evidence about the appropriateness of the person to be appointed as the adult's litigation guardian.

***The power to transfer the issue of an adult's capacity to the Tribunal***

**28-8** Section 241 of the *Guardianship and Administration Act 2000 (Qld)* should be amended:

- (a) to clarify that, for section 241(1), 'proceeding' includes the issue of the capacity of a party to a proceeding before the court; and
- (b) so that the power to transfer the issue of a party's capacity may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

**28-9** The *Guardianship and Administration Act 2000 (Qld)* should be amended to provide that, if a court transfers to the Tribunal the issue of whether an adult is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999 (Qld)*:

- (a) the Tribunal may make a declaration about the person's capacity; and
- (b) the court is entitled to rely on the Tribunal's declaration.

***Jurisdiction of the Supreme Court and District Court to exercise the powers of the Tribunal under Chapter 3 of the Guardianship and Administration Act 2000 (Qld)***

**28-10** Section 245(1) of the *Guardianship and Administration Act 2000 (Qld)* should be amended to provide as follows:

- (1) This section applies if—
  - (a) in a civil proceeding—
    - (i) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; or
    - (ii) an amount is to be paid by another person to an adult under the terms of a settlement of the proceeding; and
  - (b) the court considers the adult is a person with impaired capacity to receive and manage the amount payable under the settlement or order mentioned in subparagraph (a)(i) or the settlement mentioned in subparagraph (ii).

**CHAPTER 29 — REMUNERATION*****The remuneration of the Adult Guardian***

**29-1** The *Guardianship and Administration Act 2000* (Qld) should not be amended to enable the Adult Guardian to charge a fee or commission when:

- (a) acting as a guardian under the *Guardianship and Administration Act 2000* (Qld) or as an attorney or statutory health attorney under the *Powers of Attorney Act 1998* (Qld);
- (b) exercising power to make decisions about health matters under sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld) or the provision that gives effect to Recommendation 11-5; or
- (c) taken to be an adult's attorney under section 196 of the *Guardianship and Administration Act 2000* (Qld) during the suspension of an enduring power of attorney for personal matters.

***The remuneration of the Public Trustee***

**29-2** The Public Trustee should continue to be entitled to charge for administration services provided when:

- (a) acting as an administrator under the *Guardianship and Administration Act 2000* (Qld) or an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld); or
- (b) taken to be an adult's attorney under section 196 of the *Guardianship and Administration Act 2000* (Qld) during the suspension of an enduring power of attorney for financial matters.

***Remuneration of trustee companies if State regulation becomes possible***

**29-3** The Commission makes Recommendations 29-4 to 29-6 below if, despite the amendments made to the *Corporations Act 2001* (Cth) by the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth), it becomes possible in the future for State legislation to regulate the remuneration of a trustee company that is acting as:

- (a) an adult's administrator under the *Guardianship and Administration Act 2000* (Qld); or

- (b) an adult's attorney for financial matters under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).

**29-4** Section 48 of the *Guardianship and Administration Act 2000* (Qld) should be amended:

- (a) to enable the Tribunal, subject to section 48(2), to order that a trustee company that is appointed as an administrator is entitled to such remuneration from the adult as the Tribunal orders;
- (b) to enable the Tribunal to order that, in respect of future services provided to an adult, a trustee company that was appointed as the adult's administrator before the commencement of the provision amending section 48 is entitled, subject to section 48(2), to such remuneration from the adult as the Tribunal orders; and
- (c) by replacing section 48(3) with a provision to the following effect:

Nothing in this section affects the right of the public trustee, or a trustee company that is acting as an attorney for financial matters under an enduring power of attorney, to remuneration under another Act.

**29-5** Section 245 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, in addition to exercising all the powers of the Tribunal under Chapter 3, the court may exercise the power of the Tribunal under section 48 to authorise the remuneration of a trustee company that the court appoints as an adult's administrator.

**29-6** The remuneration of a trustee company that is acting as an adult's attorney under an enduring power of attorney should be regulated by a provision to the effect of the repealed section 41 of the *Trustee Companies Act 1968* (Qld).

**CHAPTER 30 — MISCELLANEOUS ISSUES*****Contracts entered into by adults with impaired capacity***

- 30-1** The *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision, modelled on former section 83(1)–(4) of the *Public Trustee Act 1978* (Qld), to deal with the power of an adult who has impaired capacity to deal with his or her property and the consequences of the entry into a transaction by the adult.
- 30-2** The proposed new contractual capacity provision should apply to all adults who have impaired capacity and not be limited to adults for whom an administrator has been appointed.
- 30-3** The proposed new contractual capacity provision should provide that if an adult with impaired capacity enters into a contract or makes a disposition with, or in favour of another person, without the leave of the Tribunal or the Court, the contract or disposition is voidable by:
- (a) the adult; or
  - (b) an administrator appointed for the adult; or
  - (c) an attorney appointed by the adult under an enduring power of attorney to exercise power for the adult for a financial matter to which the transaction relates during a period when the adult has impaired capacity.
- 30-4** The proposed new contractual capacity provision should provide that nothing in that section will affect any contract or disposition entered into or made by an adult with impaired capacity if the other party to the contract or disposition proves that he or she acted in good faith and for adequate consideration and was not aware or could not have reasonably been aware that the adult had impaired capacity for the transaction.
- 30-5** The proposed new contractual capacity provision should provide that nothing in that section affects any contract for necessities entered into by the adult.

***The Tribunal's jurisdiction to make a declaration about an adult's capacity to enter into a contract***

- 30-6** Section 241(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended:

- (a) to clarify that, for section 241(1), a 'proceeding' includes part of a proceeding, and includes but is not limited to, an issue about whether a person had capacity to enter into a contract; and
- (b) so that the power to transfer the issue of a party's capacity to enter into a contract may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court.

**30-7** Section 147 of the *Guardianship and Administration Act 2000* (Qld) should be amended to refer to 'another' proceeding rather than to a 'subsequent' proceeding.

***Substitute decision-makers' right to information***

**30-8** Section 81 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that:

- (a) if a person who has custody or control of information does not comply with a request by an attorney to give information, the Tribunal may, on application by the attorney, order the person to give the information to the attorney;
- (b) if the Tribunal orders a person to give information to the attorney, the person must comply with the order unless the person has a reasonable excuse; and
- (c) it is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person.

**30-9** Section 81(3) should be redrafted to clarify that the attorney's right to information is no greater but no less than the adult's right. Sections 44(6) and 76(8) of the *Guardianship and Administration Act 2000* (Qld), which are in nearly identical terms to section 81(3) of the *Powers of Attorney Act 1998* (Qld), should be amended similarly.

**30-10** The failure to give information in accordance with sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) or section 81 of the *Powers of Attorney Act 1998* (Qld) should not be an offence against the relevant Act.

**30-11** Sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) should be amended to clarify that the relevant substitute decision-maker's right to information includes a right to require the disclosure by an agency of personal information about the adult for whom the decision-maker is authorised to make decisions.

**30-12** The form of order under section 12 of the *Guardianship and Administration Act 2000* (Qld) appointing a guardian or an administrator should include a statement about the guardian's or an administrator's right to information. Similarly, the approved forms for making an enduring power of attorney and the approved form for making an advance health directive that appoints an attorney should also include a statement about the attorney's right to information.

***Informal decision-makers' access to information***

**30-13** The *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an informal decision-maker may apply to the Tribunal for an order that a person with the custody or control of information give that information to the informal decision-maker.

**30-14** The proposed new provision dealing with informal decision-makers' access to information should be modelled on section 44(3)–(6) of the *Guardianship and Administration Act 2000* (Qld), which applies to guardians and administrators and enables the Tribunal to make an order in respect of the information the adult would have been entitled to if the adult had capacity and which is necessary to make an informed decision.

**30-15** The proposed new provision dealing with informal decision-makers' access to information should provide that the attorney's right to information is no greater but no less than the adult's right.

**30-16** The proposed new provision dealing with informal decision-makers' access to information should provide that the informal decision-maker's right to information includes a right to require the disclosure by an agency of personal information about the adult for whom the informal decision-maker is making decisions.

**30-17** For the purposes of the proposed new provision, an informal decision-maker should be defined in terms similar to section 154(5) of the *Guardianship and Administration Act 2000* (Qld).

***Use of confidential information: informal decision-makers and other persons***

**30-18** The definition of 'relevant person' in section 246 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include:

- (a) a person who obtains confidential information because of an order made under the provision that gives effect to Recommendations 30-13 to 30-17 of this chapter; and

- (b) an interested person or advocacy organisation that receives a copy of a community visitor report under the amendments recommended in Chapter 26 in relation to section 230(3) or (4) of the *Guardianship and Administration Act 2000* (Qld).

**30-19** Section 249(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an additional paragraph to ensure that a person who obtains confidential information because of an order made under the provision that gives effect to Recommendations 30-13 to 30-17 of this chapter may use the confidential information for the purpose of making decisions on an informal basis for the adult.

***The definition of 'support network' for an adult***

**30-20** The definition of '*support network*', for an adult in the *Guardianship and Administration Act 2000* (Qld) should not be amended.

***Community education and awareness***

**30-21** Publicly-funded and comprehensive education programs about key aspects of the guardianship system should be provided on an ongoing basis for members of the general community. These programs should be widely available, easily accessible and targeted to meet the specific needs of individuals and organisations in the general community.



# Chapter 1

## Introduction

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### INTRODUCTION

1.1 This Report concludes the Commission's review of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), which together regulate decision-making by and for adults with impaired decision-making capacity.

1.2 The terms of reference for this review required the Commission to conduct this review in two stages.<sup>10</sup>

### STAGE ONE OF THE REVIEW

1.3 In stage one of the review, the Commission examined the confidentiality provisions of the guardianship legislation. The Commission completed stage one in mid-2007 with the production of its final report on confidentiality in the guardianship system.<sup>11</sup>

1.4 The Commission recommended a number of legislative changes to create greater openness in the guardianship system, to promote accountability and transparency, and to promote and safeguard the rights and interests of adults with impaired decision-making capacity. In particular, it recommended that the provisions in relation to 'confidentiality orders' be replaced with four new types of

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<sup>10</sup> The Commission's terms of reference are set out in Appendix 1.

<sup>11</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007).

orders (collectively called 'limitation orders') that better reflect the nature of the decision being made by the Tribunal.<sup>12</sup>

1.5 The Commission's recommendations were implemented, with minor modification, by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld), which commenced on 1 January 2009.

## STAGE TWO OF THE REVIEW

1.6 The second stage of the review has involved a consideration of the balance of the legislation. In undertaking this part of the review, the Attorney-General asked the Commission to give specific consideration to the following matters:

- (a) the law relating to 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 General Principles;
  - the scope of personal matters and financial matters and of the powers of guardians and administrators;
  - 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;
  - the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework; but not including consideration of who should exercise the systemic advocacy function and powers contained in Chapter 9 of the *Guardianship and Administration Act 2000*, these being matters already dealt with in the Government Response to recommendation 133 of the Part B Report of the Queensland Government Boards, Committees and Statutory Authorities tabled in the Legislative Assembly on 22 April 2009;<sup>13</sup>
  - the processes for review of decisions;
  - consent to special medical research or experimental health care;
  - the law relating to advance health directives and enduring powers of attorney;

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<sup>12</sup> The four types of limitation orders recommended by the Commission were adult evidence orders, closure orders, non-publication orders and confidentiality orders.

<sup>13</sup> The exclusion of the issue of who should exercise the systemic advocacy functions and powers contained in Chapter 9 of the *Guardianship and Administration Act 2000* (Qld) was made by an amendment to the terms of reference on 20 January 2010.

- the scope of the decision-making power of statutory health attorneys;
- the ability of an adult with impaired capacity to object to receiving medical treatment;
- the law relating to the withholding and withdrawal of life-sustaining measures;

...

- (c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity; and
- (d) 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.

On 16 November 2009, the terms of reference were amended as follows:

- The requirement to report upon the adequacy of the Public Advocate's current role and functions in the guardianship system is removed.
- The requirement to report on issues to be taken into account to ensure that an independent systemic advocacy role will be maintained when the functions of the Public Advocate are transferred to the Adult Guardian is added.

### The first Discussion Paper

1.7 In October 2008, the Commission published the first Discussion Paper for stage two of the review.<sup>14</sup> That paper examined the threshold issues of:

- the General Principles and the Health Care Principle; and
- the nature of decision-making capacity, and its assessment under the legislation.

### The second Discussion Paper

1.8 In November 2009, the Commission published the second Discussion Paper for stage two of the review.<sup>15</sup> That paper examined all the other substantive legal issues arising under the terms of reference, as well as addressing a number of procedural and other issues that had been raised with the Commission during the course of this review.

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<sup>14</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008).

<sup>15</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009).

## THE CONSULTATION PROCESS

1.9 The Commission is aware of the significant community interest in this review and has been keen to ensure that it heard from people who are affected by the guardianship legislation on a daily basis.

1.10 Both Discussion Papers for the second stage of the review were made available on the Commission's website.<sup>16</sup> In addition, a call for submissions in response to the issues raised in each paper was published in *The Courier-Mail*.

1.11 Following the release of the first Discussion Paper and the accompanying Companion Paper,<sup>17</sup> the Commission held a series of community forums in Brisbane, Bundaberg, Cairns, Rockhampton and Townsville, and at the Gold and Sunshine Coasts. The Commission also held a number of focus group meetings with health professionals and allied health professionals, as well as with adults with impaired capacity.

1.12 Following the release of the second Discussion Paper, the Commission held a series of community forums in Brisbane, Bundaberg, Cairns, Toowoomba and Townsville, and at the Gold and Sunshine Coasts. The Commission also held a number of focus group meetings with health professionals and allied health professionals.

1.13 Details of the dates, venues and times for the community forums were posted on the Commission's guardianship website<sup>18</sup> and were advertised in local newspapers.

1.14 The Commission also held a series of consultation meetings with key stakeholders during the course of the second stage of the review.

## THE ROLE OF THE GUARDIANSHIP REFERENCE GROUP

1.15 At the beginning of this review, the Commission established an informal Reference Group, whose members represented a cross-section of people who are affected by, administer, or are otherwise interested in, the guardianship legislation. The purpose of forming the Reference Group was to have access to the expertise and experience of the members in relation to their broad range of different interests.<sup>19</sup> The Reference Group met three times during stage one of the review. It also met twice during stage two of the review: in August 2008 to provide input into the first Discussion Paper and again in November 2009 to give preliminary feedback on the issues considered in the second Discussion Paper.

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<sup>16</sup> See <<http://www qlrc.qld.gov.au/guardianship>>.

<sup>17</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: A Companion Paper*, WP No 65 (2008).

<sup>18</sup> <<http://www qlrc.qld.gov.au/guardianship/docs/Forum%20venues%202009%20website.pdf>>.

<sup>19</sup> The membership of the Reference Group is set out in Appendix 2.

1.16 The Commission acknowledges the valuable contribution made to the review by the members of the Reference Group.

## **SUBMISSIONS**

1.17 Throughout the review, there has been a very high level of community interest. During the course of stage two of the review, the Commission received 245 submissions from 181 respondents. This was in addition to the 262 submissions received from 157 respondents during stage one of the review, many of which concerned issues that related to this second stage of the review.

1.18 The Commission would like to thank all those respondents who made submissions to the review.

## **THIS REPORT**

1.19 In this Report, the Commission has made wide-ranging recommendations about the many topics encompassed by the terms of reference. The principal recommendations made in this Report are outlined in the Executive Summary at the beginning of this volume. In addition, the Report includes a Summary of Recommendations (immediately following the Executive Summary), which sets out all of the recommendations made in this Report.

1.20 The Report is comprised of four volumes:

- Volume 1 (Chapters 1 to 8) examines a number of threshold issues that arise under the guardianship legislation, such as the General Principles; the Health Care Principle; the scope of matters; decision-making capacity; and the capacity to make an enduring document.
- Volume 2 (Chapters 9 to 13) examines a number of issues relating to an adult's health care: advance health directives; statutory health attorneys; the withholding and withdrawal of life-sustaining measures; the effect of an adult's objection to health care; and consent to an adult's participation in special medical research or experimental health care.
- Volume 3 (Chapters 14 to 20) examines a number of issues in relation to the appointment, powers and duties of substitute decision-makers. It also examines the Tribunal's functions and powers.
- Volume 4 (Chapters 21 to 30) examines issues in relation to Tribunal proceedings; appeals and reviews; the roles and functions of the various agencies within the guardianship system (namely, Adult Guardian, the Public Trustee and Community Visitors, and the function of systemic advocacy that is to be transferred from the Public Advocate to the Adult Guardian). This volume also examines the protection currently provided by the legislation to whistleblowers; issues relating to legal proceedings involving adults with impaired capacity; the issue of remuneration; and a number of miscellaneous issues.

## TERMINOLOGY

1.21 Throughout this Report, the following terminology has been used:

- A reference to ‘the adult’ means the adult with impaired decision-making capacity.
- The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) is referred to as the ‘QCAT Act’ and the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) are referred to as the ‘QCAT Rules’.
- Generally, the term ‘Tribunal’ is used to refer to the Queensland Civil and Administrative Tribunal, which has exercised jurisdiction in guardianship proceedings since 1 December 2009. However, where reference is made to decisions of the Tribunal before that date, or to the Tribunal’s policies or practices, that is a reference to the Guardianship and Administration Tribunal, which was replaced by the Queensland Civil and Administrative Tribunal from 1 December 2009.
- A reference to a Tribunal in another Australian jurisdiction is a reference to the body in that jurisdiction that exercises jurisdiction in relation to guardianship matters in accordance with the guardianship legislation of that jurisdiction.<sup>20</sup>
- The term ‘enduring document’ refers to an advance health directive and an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).<sup>21</sup>
- A reference to the Commission’s Discussion Paper is, depending on the context, a reference to one of the two Discussion Papers published as part of stage two of this review — *Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) or *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009).
- A reference to the Commission’s 2007 report on confidentiality is a reference to the final report published in stage one of this review.<sup>22</sup>
- A reference to the Commission’s original 1996 report is a reference to the final report published by this Commission in relation to the review it conducted in the 1990s in relation to substitute decision-making by and for

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In New South Wales, the relevant body is the Guardianship Tribunal; in South Australia and Tasmania, the relevant bodies are, respectively, the Guardianship Board and the Guardianship and Administration Board. In the Northern Territory, guardianship proceedings are heard by the Local Court. In the ACT, Victoria and Western Australia, guardianship proceedings are heard by a generalist tribunal with jurisdiction for a range of matters including guardianship — namely, the ACT Civil and Administrative Tribunal, the Victorian Civil and Administrative Tribunal and the State Administrative Tribunal.

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*Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) sch 4.

22

Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007).

adults with a decision-making disability.<sup>23</sup> The recommendations made by the Commission in that report were implemented, with some modifications, by the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>24</sup>

- A reference to the ‘United Nations Convention’, ‘the Convention’ or ‘the CRPD’ means the United Nations *Convention on the Rights of Persons with Disabilities* adopted by the United Nations General Assembly in 2006 and ratified by Australia on 17 July 2008. The Convention sets out the fundamental human rights of people with a disability, including people with a mental or an intellectual disability.

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<sup>23</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996).

<sup>24</sup> Note, however, that the Commission did not recommend implementation in two stages.



# Chapter 2

## Overview of the guardianship system

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### INTRODUCTION

2.1 Everyday living involves decision-making on a wide range of issues that vary greatly in their scope and complexity. These include decisions about personal matters, health matters and financial matters. An adult's capacity to make decisions may be impaired as a result of an intellectual disability, dementia, an acquired brain injury, mental illness, or an inability to communicate (for example, when an adult is in a coma). An adult may have impaired capacity for some types of decisions, such as complex financial decisions, but may still be able to make everyday decisions, such as where to live or where to work. An adult's impaired capacity may also be temporary or subject to fluctuation.

2.2 If an adult is unable to make some or all of his or her own decisions, decisions may need to be made for the adult by someone else. Queensland's guardianship legislation establishes a mechanism for decision-making by and for adults with impaired decision-making capacity.

2.3 This chapter gives an overview of Queensland's guardianship system.

### QUEENSLAND'S GUARDIANSHIP LEGISLATION

2.4 Queensland's guardianship legislation is comprised of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The guardianship legislation is concerned with the following questions:

- when is an adult unable to make his or her own decisions;
- what decisions can be made for an adult with impaired capacity;
- who can make substitute decisions for an adult;
- how are substitute decisions to be made; and
- what agencies are involved in the guardianship system.

### **WHEN IS AN ADULT UNABLE TO MAKE HIS OR HER OWN DECISIONS FOR A MATTER?**

2.5 An adult may be unable to make his or her own decisions if he or she has impaired decision-making capacity. Capacity has been described as ‘a gatekeeper concept’ in that it is ‘a mechanism by which individuals either retain or lose authority over and responsibility for decisions that affect their lives’.<sup>25</sup>

2.6 Under the guardianship legislation, the concept of capacity is specific to decisions about an individual matter. An adult has ‘capacity’ for a matter if he or she is capable of:<sup>26</sup>

- 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.

2.7 An adult who does not satisfy these requirements in relation to a matter is described as having ‘impaired capacity’ for that matter.<sup>27</sup> 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 type of decision to be made, including, for example, the complexity of the decision to be made’.<sup>28</sup>

2.8 Because the concept of capacity is specific to decisions about an individual matter, an adult may have capacity to make decisions about some matters but not about others.<sup>29</sup> For example, an adult with mild dementia may

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25 P Bartlett and R Sandland, *Mental Health Law Policy and Practice* (2000) [10.5.1].

26 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of ‘capacity’); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of ‘capacity’).

27 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of ‘impaired capacity’); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of ‘impaired capacity’).

28 *Guardianship and Administration Act 2000* (Qld) s 5(c)(ii).

29 See also *Guardianship and Administration Act 2000* (Qld) s 5(c)(ii).

have capacity to make day-to-day shopping or lifestyle decisions but may not have capacity to make a decision about complex financial matters.<sup>30</sup>

2.9 The guardianship legislation includes a presumption that an adult has capacity for a matter.<sup>31</sup> The legislation also promotes the right of adults to make their own decisions to the extent that they are capable.<sup>32</sup> This includes the right to make decisions with which other people may not agree.<sup>33</sup>

2.10 The Tribunal has the power to make a declaration about an adult's capacity.<sup>34</sup>

## WHAT DECISIONS CAN BE MADE FOR AN ADULT?

2.11 An adult with impaired capacity for a matter may need a substitute decision-maker to make decisions about that matter. The guardianship legislation makes provision for a wide range of personal and financial decisions to be made for an adult with impaired capacity. The legislation distinguishes between decisions concerning 'financial matters', which involve *administration*, and those concerning 'personal matters', which involve *guardianship*. Among personal matters, it also differentiates between 'health matters', 'special health matters', and 'special personal matters'.

2.12 The scope of these various types of matters is considered in Chapter 6 of this Report.

## WHO CAN MAKE SUBSTITUTE DECISIONS FOR AN ADULT?

2.13 The guardianship legislation provides for decisions for an adult to be made by several types of decision-makers, depending on the matter involved. The legislation recognises:<sup>35</sup>

- informal decision-makers;
- attorneys appointed in advance by the adult under an enduring document;
- statutory health attorneys;

<sup>30</sup> See eg *Re FHW* [2005] QGAAT 50, [46] where the Tribunal held that the adult had 'capacity for simple and complex personal matters and simple financial matters but he has impaired capacity for complex financial matters'.

<sup>31</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1. See also *Guardianship and Administration Act 2000* (Qld) s 7(a).

<sup>32</sup> In particular, see *Guardianship and Administration Act 2000* (Qld) ss 5(d), 6(a).

<sup>33</sup> *Guardianship and Administration Act 2000* (Qld) s 5(b).

<sup>34</sup> *Guardianship and Administration Act 2000* (Qld) s 146. In exercising this power, the Tribunal has regard to the medical and other evidence. See eg *Re MV* [2005] QGAAT 46.

<sup>35</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2). That provision also refers to the Supreme Court as a decision-maker. However, that role is infrequently performed.

- guardians and administrators appointed by the Tribunal;
- in limited circumstances, the Tribunal.

2.14 In addition, the legislation provides that, by making an advance health directive, an adult who still has the requisite capacity may give directions about his or her future health care, including about 'special health matters'.<sup>36</sup>

### **Informal decision-making**

2.15 The guardianship legislation recognises that decisions for an adult can be made informally by the adult's 'existing support network'<sup>37</sup> — that is, by members of the adult's family, close friends of the adult, and other people the Tribunal decides provide support to the adult.<sup>38</sup>

2.16 If there is doubt about the appropriateness of a decision, the Tribunal may ratify or approve a decision of an informal decision-maker.<sup>39</sup>

### **Formal decision-making**

2.17 Sometimes situations can arise where the decision-making process for an adult needs to be formalised. This might be because:

- the person wishing to make a decision for the adult does not have the necessary authority to do so;
- the authority of the person making the decision is disputed;
- there is no appropriate person to make the decision;
- a decision being made for the adult is considered inappropriate; or
- a conflict occurs over the decision-making process.

2.18 The following decision-makers are part of the formal decision-making processes established by the guardianship legislation.

### ***Attorneys appointed in advance by the adult***

2.19 An adult may formalise future substitute decision-making for himself or herself by appointing a person (an attorney) to make particular decisions for the adult in the event that the adult subsequently loses capacity. There are two types of instruments that an adult (the principal) may use to appoint an attorney: an

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<sup>36</sup> *Powers of Attorney Act 1998* (Qld) s 35(1).

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

<sup>38</sup> *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'support network').

<sup>39</sup> *Guardianship and Administration Act 2000* (Qld) s 154.

enduring power of attorney and an advance health directive.<sup>40</sup> An adult may make such a document only if he or she has sufficient capacity.<sup>41</sup>

2.20 By an enduring power of attorney, a principal may authorise one or more attorneys to do anything in relation to one or more financial matters or personal matters (including health matters) for the principal that the principal could lawfully do by an attorney if the principal had capacity for the matter when the power is exercised.<sup>42</sup> However, a principal cannot, by an enduring power of attorney, authorise an attorney to make decisions about 'special health matters' or 'special personal matters'.<sup>43</sup>

2.21 By an advance health directive, a principal may appoint one or more attorneys to exercise power for a health matter for the principal in the event that the directions in the advance health directive prove inadequate.<sup>44</sup> However, a principal cannot, by an advance health directive, authorise an attorney to make decisions about 'special health matters'.<sup>45</sup>

2.22 An attorney may exercise power for a personal matter only during a period when the principal has impaired capacity for the particular matter.<sup>46</sup> In contrast, a principal may specify in an enduring power of attorney a time when, or a circumstance in which, or an occasion on which, an attorney may exercise power for a financial matter for the principal. If the enduring power of attorney does not specify when power for a financial matter becomes exercisable, the attorney may exercise power for a financial matter when the enduring power of attorney is made.<sup>47</sup> If a principal specifies when power for a financial matter is to be exercisable, but the principal has impaired capacity before that time, power for a financial matter is also exercisable during any period that the principal has impaired capacity.<sup>48</sup>

2.23 The legislation imposes a range of obligations on attorneys as to how they exercise their power. For example, attorneys must act honestly and diligently<sup>49</sup> and must comply with the General Principles set out in the legislation and, for decisions

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40 There are particular formal requirements for the execution of such instruments: *Powers of Attorney Act 1998* (Qld) s 44. An adult may also appoint an attorney for financial matters in a general power of attorney although this is revoked if the adult becomes a person who has impaired capacity: *Powers of Attorney Act 1998* (Qld) ss 8(a), 18(1).

41 *Powers of Attorney Act 1998* (Qld) ss 41, 42.

42 *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

43 *Powers of Attorney Act 1998* (Qld) s 32(1)(a), sch 2 ss 2, 4.

44 *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

45 *Powers of Attorney Act 1998* (Qld) s 35(1)(c), sch 2 s 4.

46 *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3).

47 *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

48 *Powers of Attorney Act 1998* (Qld) s 33(3).

49 *Powers of Attorney Act 1998* (Qld) s 66(1).

about health matters, the Health Care Principle.<sup>50</sup> Attorneys for financial matters are also required, for example, to avoid conflict transactions<sup>51</sup> and to keep their property separate from that of the adult.<sup>52</sup> Attorneys are also regarded as the agents of their principal and so are subject to the general law of agency to the extent that it is not inconsistent with the guardianship legislation.<sup>53</sup>

2.24 Advance health directives and enduring powers of attorney are considered in Chapters 9 and 16 of this Report.

### **Statutory health attorneys**

2.25 A statutory health attorney is a person in a specified relationship with the adult who is given the power by the legislation to make decisions about health matters for the adult. The legislation lists the relationships in an order of priority. The first of the following who is 'readily available and culturally appropriate' to make the decision will be an adult's statutory health attorney:<sup>54</sup>

- the adult's spouse,<sup>55</sup> if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer<sup>56</sup> of the adult; or
- a close friend or relation of the adult 18 years or older and who is not a paid carer<sup>57</sup> of the adult.

2.26 If no-one from that list is 'readily available and culturally appropriate', the Adult Guardian is the adult's statutory health attorney.<sup>58</sup>

<sup>50</sup> *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are considered in Chapters 4 and 5 of this Report.

<sup>51</sup> *Powers of Attorney Act 1998* (Qld) s 73. A conflict transaction is one in which there may be conflict, or which results in conflict, between the attorney's duty to the adult and either the interests of the attorney or a person in a close personal or business relationship with the attorney, or another duty of the attorney: *Powers of Attorney Act 1998* (Qld) s 73(2). Conflict transactions are considered in Chapter 17 of this Report.

<sup>52</sup> *Powers of Attorney Act 1998* (Qld) s 86.

<sup>53</sup> S Fisher, *Agency Law* (2000) [12.2.1], [12.2.4], [12.2.5]; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 92.

<sup>54</sup> *Powers of Attorney Act 1998* (Qld) s 63(1).

<sup>55</sup> 'Spouse' includes a person's de facto partner: *Acts Interpretation Act 1954* (Qld) s 36. A reference in an Act to a 'de facto partner' is a reference to one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family: *Acts Interpretation Act 1954* (Qld) s 32DA(1). The gender of the persons is not relevant for s 32DA(1): s 32DA(5)(a).

<sup>56</sup> A 'paid carer' for an adult is defined as someone who performs services for the adult's care and who receives remuneration for those services from any source other than a Commonwealth or State Government carer payment or benefit for the provision of home care, or remuneration based on damages that may be awarded for voluntary services for the adult's care: *Powers of Attorney Act 1998* (Qld) sch 3; *Guardianship and Administration Act 2000* (Qld) sch 4.

<sup>57</sup> See n 56 above.

<sup>58</sup> *Powers of Attorney Act 1998* (Qld) s 63(2). The Adult Guardian is an independent statutory official appointed under the *Guardianship and Administration Act 2000* (Qld): see [2.51]–[2.53] below.

2.27 A statutory health attorney may make any decision about an adult's health matter that the adult could have made if he or she had capacity for the matter,<sup>59</sup> but only during a period when the adult has impaired capacity for the matter.<sup>60</sup> A statutory health attorney must comply with the General Principles and the Health Care Principle set out in the legislation when exercising his or her power.<sup>61</sup>

2.28 Statutory health attorneys are considered in Chapter 10 of this Report.

### ***Guardians and administrators appointed by the Tribunal***

2.29 In specified circumstances, the Tribunal may appoint a substitute decision-maker (that is, a guardian or an administrator) for particular matters for an adult.<sup>62</sup> The Tribunal may appoint a guardian for a personal matter, including a health matter (but not a special health matter),<sup>63</sup> and an administrator for a financial matter.<sup>64</sup>

2.30 A person may be appointed as a guardian or administrator for an adult only if that person is at least 18 years old, is not a health provider or a paid carer for the adult, and the Tribunal considers that the person is appropriate for appointment.<sup>65</sup>

2.31 The Tribunal is required by the guardianship legislation to take into account several considerations in deciding whether a person is appropriate for appointment.<sup>66</sup> These include:<sup>67</sup>

- 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;

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59 *Powers of Attorney Act 1998* (Qld) s 62(1).

60 *Powers of Attorney Act 1998* (Qld) s 62(2).

61 *Powers of Attorney Act 1998* (Qld) s 76.

62 *Guardianship and Administration Act 2000* (Qld) s 12(1). But see ch 5B of the Act for the appointment of a guardian for a restrictive practice matter. Note also that the Tribunal and the Supreme Court have the power to remove an attorney under an enduring document and to appoint a new attorney: *Powers of Attorney Act 1998* (Qld) ss 109A, 116(a).

63 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2.

64 *Guardianship and Administration Act 2000* (Qld) s 12(1).

65 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i), (b)(i), (c). The Adult Guardian is eligible for appointment as an adult's guardian and the Public Trustee is eligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(ii), (b)(ii). A person who is bankrupt 'or taking advantage of the laws of bankruptcy as a debtor' is ineligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i) and see s 15(4)(c).

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

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

- 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.

2.32 A guardian or administrator is authorised, subject to the terms of his or her appointment, to do anything in relation to a personal or financial matter for which he or she is appointed that the adult could have done if the adult had capacity for that matter.<sup>68</sup>

2.33 Given the breadth of this power, the guardianship legislation imposes strict requirements on the exercise of power by a guardian or an administrator. Such a person must exercise his or her power honestly and diligently,<sup>69</sup> must apply the General Principles contained in the legislation (and the Health Care Principle, if exercising power for a health matter),<sup>70</sup> and, if he or she is an administrator, must submit a management plan<sup>71</sup> and avoid conflict transactions.<sup>72</sup> The requirements to act honestly and diligently and to avoid conflict transactions are reflective of those imposed in respect of the common law of agency.<sup>73</sup>

2.34 The appointment of guardians and administrators and the powers and duties of guardians and administrators are considered in Chapters 14 and 15 of this Report.

### **The Tribunal**

2.35 The guardianship legislation provides that, in specified circumstances, the Tribunal may consent to certain types of 'special health care' (other than electroconvulsive therapy or psychosurgery)<sup>74</sup> for an adult.<sup>75</sup> If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal has power to give consent for the special health matter for the adult.<sup>76</sup>

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

69 *Guardianship and Administration Act 2000* (Qld) s 35.

70 *Guardianship and Administration Act 2000* (Qld) s 34. The General Principles and the Health Care Principle are discussed at [2.37]–[2.42] below.

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

72 *Guardianship and Administration Act 2000* (Qld) s 37(1).

73 See S Fisher, *Agency Law* (2000) [7.2.1]–[7.5.6].

74 Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

75 *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 69–72. The Tribunal's power to consent to an adult's participation in special medical research or experimental health care is considered in Chapter 13 of this Report.

76 *Guardianship and Administration Act 2000* (Qld) ss 65, 68.

2.36 The Tribunal also has a function of consenting to the withholding or withdrawal of a life-sustaining measure for an adult with impaired capacity (if the matter is not dealt with by a direction given in an advance health directive).<sup>77</sup>

## HOW ARE SUBSTITUTE DECISIONS FOR AN ADULT TO BE MADE?

2.37 Queensland's guardianship legislation contains eleven General Principles, which apply to all decisions for adults, and an additional Health Care Principle, which applies only in relation to decisions about health matters.

2.38 The General Principles and the Health Care Principle must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult, including a substitute decision-maker for the adult.<sup>78</sup> The guardianship legislation also makes specific provision for the application of these principles to the Tribunal,<sup>79</sup> the Adult Guardian,<sup>80</sup> and an adult's guardian or administrator.<sup>81</sup>

2.39 The legislation also states that the 'community is encouraged to apply and promote the general principles'.<sup>82</sup>

2.40 The General Principles include:<sup>83</sup>

- the presumption that an adult has capacity to make decisions;
- an adult's right to basic human rights and the importance of empowering an adult to exercise those rights;
- an adult's right to respect for his or her human worth and dignity;
- an adult's right to be a valued member of society and the importance of encouraging an adult to perform valued social roles;
- the importance of encouraging an adult to participate in community life;
- the importance of encouraging an adult to become as self-reliant as possible;

<sup>77</sup> *Guardianship and Administration Act 2000* (Qld) ss 66(3), 81(1)(f).

<sup>78</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1); *Powers of Attorney Act 1998* (Qld) s 76 (although note the different terminology of 'must be complied with' rather than 'must apply').

<sup>79</sup> There is a specific requirement for the Tribunal to consider the General Principles (and Health Care Principle if appropriate) when deciding whether a person is appropriate for appointment as an adult's guardian or administrator: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a)–(b).

<sup>80</sup> *Guardianship and Administration Act 2000* (Qld) s 174(3).

<sup>81</sup> *Guardianship and Administration Act 2000* (Qld) ss 34, 74(4).

<sup>82</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

<sup>83</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1; *Powers of Attorney Act 1998* (Qld) sch 1 pt 1. More than eleven issues are included in this list because some of the General Principles include a number of elements.

- an adult's right to participate in decision-making as far as possible and the importance of preserving wherever possible the adult's right to make his or her own decisions;
- the principle of substituted judgment and a requirement to exercise power in the way least restrictive of the adult's rights;
- the importance of maintaining an adult's existing supportive relationships;
- the importance of maintaining the adult's cultural, linguistic and religious environment; and
- an adult's right to confidentiality of information about himself or herself.

2.41 The Health Care Principle provides that power for a health matter or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power:<sup>84</sup>

- is necessary and appropriate to maintain or promote the adult's health or well-being; or
- is, in all the circumstances, in the adult's best interests.

2.42 In deciding whether the exercise of a power is appropriate, the adult's views and wishes and information given by the adult's health provider are to be taken into account.<sup>85</sup> In addition, in deciding whether to consent to special health care, the Tribunal, which is the only potential decision-maker for such matters, must take into account the views of the adult's guardian, attorney or statutory health attorney.<sup>86</sup>

2.43 The General Principles and the Health Care Principle are considered in Chapters 4 and 5 of this Report.

## WHAT AGENCIES ARE INVOLVED IN THE GUARDIANSHIP SYSTEM?

2.44 Queensland's guardianship legislation confers responsibilities on several agencies and officials. These include the Tribunal, the Adult Guardian, the Public Advocate, the Public Trustee, and community visitors.

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84 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1).

85 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(2).

86 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(5); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(5).

## The Tribunal

2.45 The Tribunal is established under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act').<sup>87</sup> 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>88</sup> namely:<sup>89</sup>

- exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity for matters, subject to section 245 of the *Guardianship and Administration Act 2000* (Qld);<sup>90</sup>
- concurrent jurisdiction with the Supreme Court in relation to enduring documents and attorneys appointed under enduring documents; and
- any other jurisdiction given to the Tribunal by the *Guardianship and Administration Act 2000* (Qld).

2.46 The Tribunal's functions under the *Guardianship and Administration Act 2000* (Qld) include:<sup>91</sup>

- making declarations about an adult's capacity for a matter;
- hearing applications for the appointment of guardians and administrators, appointing guardians and administrators if necessary, and reviewing their appointments;
- making declarations, orders or recommendations, or giving directions or advice in relation to guardians, administrators, attorneys, and enduring documents;
- ratifying or approving an exercise of power by an informal decision-maker for an adult;
- consenting to some types of special health care for an adult;
- consenting to the withholding or withdrawal of a life-sustaining measure for an adult; and
- giving approvals for the use by a relevant service provider of a restrictive practice in relation to an adult, and reviewing the approvals.

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<sup>87</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 161.

<sup>88</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 9(1).

<sup>89</sup> *Guardianship and Administration Act 2000* (Qld) s 82.

<sup>90</sup> *Guardianship and Administration Act 2000* (Qld) s 245 is considered in Chapter 28 of this Report.

<sup>91</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 16; *Guardianship and Administration Act 2000* (Qld) s 81(1).

2.47 Proceedings before the Tribunal are to be conducted with as little formality and technicality, and as much speed, as the requirements of the legislation and a proper consideration of the matters before the Tribunal permit.<sup>92</sup> The Tribunal may inform itself on a matter in any way it considers appropriate,<sup>93</sup> but it must observe the rules of natural justice.<sup>94</sup>

2.48 A decision of the Tribunal in a proceeding is binding on all parties to the proceeding, and contravention of a Tribunal decision, without reasonable excuse, is an offence against the QCAT Act.<sup>95</sup>

2.49 The Tribunal's appointment of a guardian or an administrator is subject to review at regular intervals and at any other time on the Tribunal's own initiative or on application by a person.<sup>96</sup> In certain circumstances, a Tribunal proceeding can be reopened and heard afresh.<sup>97</sup> An appeal against a Tribunal decision lies to either the Appeal Tribunal of QCAT or the Court of Appeal, depending on who constituted the Tribunal for the original proceeding.<sup>98</sup>

2.50 The functions and powers of the Tribunal are considered in Chapter 20 of this Report, and matters relating to Tribunal proceedings are considered in Chapter 21. Appeals and reviews are considered in Chapter 22 of this Report.

## The Adult Guardian

2.51 The Adult Guardian is an independent statutory official whose statutory role under the *Guardianship and Administration Act 2000* (Qld) is to protect the rights and interests of adults with impaired capacity.<sup>99</sup>

2.52 The legislation confers significant investigative and protective powers on the Adult Guardian. For example, the Adult Guardian may:

- temporarily suspend an attorney's powers if there are reasonable grounds to suspect that the attorney is not competent;
- apply to the courts to claim and recover possession of property that the Adult Guardian considers has wrongfully been held or detained;<sup>100</sup> and

<sup>92</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(d).

<sup>93</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(c).

<sup>94</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(a).

<sup>95</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 126, 213(1).

<sup>96</sup> *Guardianship and Administration Act 2000* (Qld) ss 28, 29.

<sup>97</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 138–140. The reopening of proceedings is considered in Chapter 22 of this Report.

<sup>98</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 138–140, 142, 149.

<sup>99</sup> *Guardianship and Administration Act 2000* (Qld) ss 173, 174(1), 176.

<sup>100</sup> *Guardianship and Administration Act 2000* (Qld) s 194.

- apply to the Tribunal for a warrant to remove an adult from a place if there are reasonable grounds to suspect that the adult is at immediate risk of harm due to neglect, exploitation or abuse.<sup>101</sup>

2.53 The role of the Adult Guardian is considered in Chapter 23 of this Report.

### The Public Advocate

2.54 The function of systemic advocacy is currently undertaken by the Public Advocate, an independent statutory official whose role is established by the *Guardianship and Administration Act 2000* (Qld).<sup>102</sup> That role is generally to promote and protect the rights of adults with impaired capacity and to promote the protection of such adults from neglect, exploitation and abuse.<sup>103</sup> These functions are aimed at *systemic* advocacy rather than advocacy on behalf of individual adults.

2.55 The Government has announced its intention to transfer the function of systemic advocacy from the Public Advocate to the Adult Guardian,<sup>104</sup> although legislation has not yet been enacted to implement that decision.

2.56 In accordance with the amendment of the terms of reference,<sup>105</sup> Chapter 24 of this Report considers issues to be taken into account to ensure that an independent systemic advocacy role will be maintained when the functions of the Public Advocate are transferred to the Adult Guardian.

### The Public Trustee

2.57 The Public Trustee of Queensland is established under the *Public Trustee Act 1978* (Qld).<sup>106</sup> The Tribunal may appoint the Public Trustee as an adult's administrator.<sup>107</sup> If appointed as an administrator, the Public Trustee has the same duties as any other administrator appointed under the guardianship legislation.<sup>108</sup> The Public Trustee may also be appointed as an attorney under an enduring power of attorney<sup>109</sup> or an advance health directive.<sup>110</sup>

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101 *Guardianship and Administration Act 2000* (Qld) s 197.

102 *Guardianship and Administration Act 2000* (Qld) s 208.

103 *Guardianship and Administration Act 2000* (Qld) s 209(a)–(b), 211.

104 See [24.5] below.

105 See [24.7]–[24.8] below.

106 *Public Trustee Act 1978* (Qld) ss 7–8.

107 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

108 However, unlike other administrators, the appointment of the Public Trustee (or a trustee company) as an administrator is not subject to periodic review: *Guardianship and Administration Act 2000* (Qld) s 28(1).

109 *Powers of Attorney Act 1998* (Qld) ss 29(1)(b), 32(1)(a).

110 *Powers of Attorney Act 1998* (Qld) ss 29(2)(b), 35(1)(c).

2.58 The role of the Public Trustee is generally considered in Chapter 25 of this Report. The Public Trustee's eligibility to be appointed as an attorney under an advance health directive is considered in Chapter 9 of this Report.

### Community visitors

2.59 Community visitors are appointed under the *Guardianship and Administration Act 2000* (Qld) to safeguard the interests of 'consumers' by regularly visiting 'visitable sites'.<sup>111</sup>

2.60 A 'consumer' means any person who lives or receives services at an authorised mental health service; or an adult with impaired capacity for a matter or with a mental or intellectual impairment and who lives or receives services at a visitable site.<sup>112</sup>

2.61 A 'visitable site' means a place where a consumer lives and receives services and is prescribed to be such a site under a regulation.<sup>113</sup> This includes residences and services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.<sup>114</sup>

2.62 The functions of community visitors include:<sup>115</sup>

- inquiring into and reporting on a range of matters about the visitable sites; and
- inquiring into and seeking to resolve complaints, and referring complaints to other entities for further investigation or resolution.

2.63 The role of community visitors is considered in Chapter 26 of this Report.

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111 *Guardianship and Administration Act 2000* (Qld) s 223(1).

112 *Guardianship and Administration Act 2000* (Qld) s 222.

113 *Guardianship and Administration Act 2000* (Qld) s 222.

114 *Guardianship and Administration Regulation 2000* (Qld) s 8 sch 2. 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.

115 *Guardianship and Administration Act 2000* (Qld) s 224(2).

## Chapter 3

# The United Nations Convention on the Rights of Persons with Disabilities

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### INTRODUCTION

3.1 The United Nations *Convention on the Rights of Persons with Disabilities* entered into force on 3 May 2008. This chapter gives an overview of the Convention and sets out those parts of it that are of particular relevance to this review.

### A NEW UNITED NATIONS CONVENTION

3.2 Changing attitudes towards people with mental or intellectual disabilities have been reflected in various international statements of human rights.<sup>116</sup>

3.3 The most recent significant international attention given to the rights of people with mental or intellectual disabilities was the adoption by the United Nations General Assembly in 2006 of the *Convention on the Rights of Persons with Disabilities* (the 'Convention').<sup>117</sup> It 'is the first ever binding international instrument concerned exclusively with disability rights'.<sup>118</sup>

3.4 The Convention was adopted after an intensive five-year negotiation process involving input from both government and non-government

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116 Eg International League of Societies for the Mentally Handicapped, *Declaration of General and Special Rights of the Mentally Handicapped* (1970); United Nations, *Declaration on the Rights of Disabled Persons*, GA Res 3447, 9 December 1975; United Nations, *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, 20 December 1971.

117 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006.

118 R Kayess and B Fogarty, 'The Rights and Dignity of Persons with Disabilities: A United Nations Convention' (2007) 32(1) *Alternative Law Journal* 22, 23.

organisations.<sup>119</sup> This included the Australian Government and a number of Australian non-government organisations, including delegates from Queensland.<sup>120</sup> The Convention entered into force on 3 May 2008 and has 146 signatories and 90 ratifications to date.<sup>121</sup> Australia ratified the Convention on 17 July 2008.<sup>122</sup>

3.5 The Convention sets out the fundamental human rights of people with a disability, including people with a mental or intellectual disability:<sup>123</sup>

The Convention marks a 'paradigm shift' in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

3.6 The Convention draws on the principles of the *Charter of the United Nations*<sup>124</sup> and places the rights and freedoms articulated in the *International Bill of Human Rights* and other human rights instruments<sup>125</sup> in the context of disability.<sup>126</sup>

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The negotiation process for this Convention has been called:

a revolutionary process, as it involved a high level of participation both by nation states and civil society. In fact, the development of the Convention involved the highest level of participation by representatives of organisations of people with disabilities of any human rights convention, or indeed any other United Nations process, in history.

See M Small, 'The Convention on the Rights of Persons with Disabilities' (Speech delivered at the Physical Disability Council of Australia forum, Hobart, 24 October 2007) <[http://www.hreoc.gov.au/disability\\_rights/speeches/2007/pdca.htm](http://www.hreoc.gov.au/disability_rights/speeches/2007/pdca.htm)> at 17 September 2010. For a history of the negotiation process, see United Nations Enable, 'Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>> at 17 September 2010.

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Eg, M Small, 'The Convention on the Rights of Persons with Disabilities' (Speech delivered at Physical Disability Council of Australia forum, Hobart, 24 October 2007) <[http://www.hreoc.gov.au/disability\\_rights/speeches/2007/pdca.htm](http://www.hreoc.gov.au/disability_rights/speeches/2007/pdca.htm)> at 17 September 2010; United Nations Enable, 'List of NGO Representatives, Registered for the Eighth Session' <<http://www.un.org/esa/socdev/enable/rights/ahc8ngolistpart.htm>> at 17 September 2010.

121

United Nations Enable, 'Convention and Optional Protocol Signatures and Ratifications' <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>> at 17 September 2010.

122

United Nations Enable, 'Convention and Optional Protocol Signatures and Ratifications' <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>> at 17 September 2010.

123

United Nations Enable, 'Convention on the Rights of Persons with Disabilities' <<http://www.un.org/disabilities/default.asp?id=150>> at 24 September 2010.

124

Available at <<http://www.un.org/aboutun/charter/>> at 24 September 2010.

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Including the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *Convention on the Elimination of All Forms of Discrimination against Women*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of the Child*; and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. For general information about United Nations human rights instruments, see Office of the United Nations High Commissioner for Human Rights, 'The Core International Human Rights Instruments and Their Monitoring Bodies' <<http://www2.ohchr.org/english/law/>> at 17 September 2010.

The 'International Bill of Human Rights' consists of the *Universal Declaration of Human Rights*, GA Res 217A (III), 10 December 1948; the *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 16 December 1966; and the *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 16 December 1966: see United Nations Office of the High Commissioner for Human Rights, 'Fact Sheet No 2 (Rev 1), The International Bill of Human Rights' <<http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>> at 24 September 2010.

3.7 Under the Convention, persons with disabilities include:<sup>127</sup>

those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

## WHAT THE CONVENTION PROVIDES

3.8 The Convention sets out the obligations of States Parties in relation to a broad range of topics, including access to the physical environment, community participation, personal mobility, freedom of expression, education, health, work and employment and participation in public and cultural life.<sup>128</sup>

3.9 The articles that are especially relevant to this review are articles 3, 12, 16 and 22.

3.10 The Convention is based on the eight principles set out in article 3:

### Article 3 General principles

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

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<sup>126</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Preamble, para (a), (b), (d), (u), (w). See also R Kayess and B Fogarty, 'The Rights and Dignity of Persons with Disabilities: A United Nations Convention' (2007) 32(1) *Alternative Law Journal* 22, 23.

<sup>127</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 1.

<sup>128</sup> Ibid arts 9, 21, 24, 25, 27, 29.

3.11 Article 12 of the Convention deals with the exercise of legal capacity by persons with disabilities and is of particular significance to substitute decision-making legislation. It provides:<sup>129</sup>

**Article 12**  
**Equal recognition before the law**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
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.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

3.12 Article 16 provides for the protection of persons with disabilities from exploitation, violence and abuse. This may also be important for guardianship legislation because of the vulnerability of adults who rely on others to make decisions on their behalf. Article 16 provides:

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Australia has made a formal declaration indicating its understanding of art 12 of the Convention: United Nations Enable, 'Declarations and Reservations' <<http://www.un.org/disabilities/default.asp?id=475>> at 17 September 2010. 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.

**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.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

3.13 Article 22 provides for the privacy of persons with disabilities to be respected:

**Article 22**  
**Respect for privacy**

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.
2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

3.14 The Convention also provides, among other things, that every human being has the inherent right to life, and that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.<sup>130</sup>

## THE EXTENT TO WHICH THE GUARDIANSHIP LEGISLATION IS PRESENTLY CONSISTENT WITH THE CONVENTION

3.15 In a number of important respects, the Queensland guardianship legislation is already consistent with the relevant articles of the Convention.

3.16 For example, the *Guardianship and Administration Act 2000* (Qld) includes the following acknowledgments in section 5:

### 5 Acknowledgements

This Act acknowledges the following—

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult with impaired capacity to make decisions may differ according to—
  - (i) the nature and extent of the impairment; and
  - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
  - (iii) the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision making.

3.17 The acknowledgments in section 5(a), (b) and (d) are consistent with the principle in article 3(a) of the Convention of 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'. Similarly, the recognition in General Principle 3 of an adult's human worth and dignity is also consistent with article 3(a). The *Powers of Attorney Act 1998* (Qld) also ensures respect for individual autonomy and the freedom to make

<sup>130</sup>

United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 10 (Right to life), 25 (Health).

one's own choices through the provisions that enable adults to make enduring powers of attorney and, in particular, advance health directives.<sup>131</sup>

3.18 The acknowledgment in section 5(e) and the requirement in General Principle 7(2) to take account of the importance of preserving an adult's right to make his or her own decisions reflect the approach in article 12(3) of the Convention that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

3.19 The *Guardianship and Administration Act 2000* (Qld) also includes a presumption of capacity,<sup>132</sup> which is consistent with the recognition in article 12(1) and (2) of the Convention that persons with disabilities have the right to recognition everywhere as persons before the law and that they enjoy legal capacity on an equal basis with others.

3.20 A critical provision of the Convention in terms of this review is article 12(4), which requires States Parties to ensure that all measures that relate to the exercise of legal capacity — in this case, substitute decision-making — provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. The *Guardianship and Administration Act 2000* (Qld) conforms to this article in two important respects.

3.21 First, the Act ensures that appointments of guardians and administrators are made only as a last resort. It does this by employing a functional test of decision-making capacity and by setting a high bar for appointment in section 12 of the Act. An adult will satisfy the functional test of capacity if he or she is capable of understanding the nature and effect of decisions about a matter; of freely and voluntarily making decisions about the matter; and of communicating the decisions in some way.<sup>133</sup> The fact that an adult may need support to be capable of understanding the nature and effect of decisions, such as having information explained in an appropriate way, does not detract from the adult's capacity.<sup>134</sup> Further, under section 12, the fact that an adult has impaired capacity is not of itself sufficient for the Tribunal to appoint a guardian or an administrator for the adult. The Tribunal must also be satisfied that:<sup>135</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

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131 Enduring powers of attorney and advance health directives are considered respectively in Chapters 16 and 9 of this Report.

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

133 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity'). Decision-making capacity is considered in Chapter 7 of this Report.

134 The appointment of guardians and administrator is considered in Chapter 14 of this Report.

135 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity').

- without an appointment, the adult's needs will not be adequately met or the adult's interests will not be adequately protected.

3.22 The effect of the test in section 12 is that, if informal decision-making is effectively meeting the adult's needs, the grounds for an appointment will not be satisfied.<sup>136</sup>

3.23 Secondly, the *Guardianship and Administration Act 2000* (Qld) conforms to the requirements of article 12(4) by providing that appointments are subject to safeguards that ensure that substitute decision-making under the legislation respects the rights, will and preferences of the person, is free of conflict of interest and undue influence, is proportional and tailored to the person's circumstances, applies for the shortest time possible, and is subject to regular review by a competent, independent and impartial authority or judicial body. The current legislative safeguards include:

- the recognition in General Principle 2 of the right of all adults to the same basic human rights regardless of their capacity;
- the requirement in General Principles 7(3)(b) and (4) to seek the adult's views and wishes and to apply the substituted judgment approach;<sup>137</sup>
- the requirement for guardians, administrators and attorneys to exercise power honestly and with reasonable diligence to protect the adult's interests<sup>138</sup> and the restrictions on entering into conflict transactions;<sup>139</sup>
- the requirement in General Principle 7(3)(c) that any power under the Act must be exercised in a way that is least restrictive of the adult's rights, which constrains both the matters for which guardians and administrators may be appointed and the duration of their appointments; and
- the requirement for the Tribunal to review the appointment of guardians and administrators at least every five years and the Tribunal's power to review an appointment on its own initiative.<sup>140</sup>

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136 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.

137 General Principle 7 is considered in detail in Chapter 4 of this Report.

138 *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66.

139 *Guardianship and Administration Act 2000* (Qld) s 37; *Powers of Attorney Act 1998* (Qld) s 73. Conflict transactions are considered in Chapter 17 of this Report.

140 *Guardianship and Administration Act 2000* (Qld) ss 28(1), 29(1)(a).

## THE STATUS OF THE CONVENTION

3.24 Because the United Nations Convention has not been enacted as part of the domestic law of Australia, it does not form part of Australian law.<sup>141</sup> Accordingly, Australia's ratification of the Convention 'cannot operate as a direct source of individual rights and obligations'.<sup>142</sup>

3.25 However, ratification of a convention can give rise to a legitimate expectation that the executive government and its agencies will act in accordance with the convention.<sup>143</sup>

ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ...

3.26 Further, because of an assumption that the legislature intends to give effect to Australia's obligations under international law, where a statute or subordinate legislation is ambiguous, 'the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument'.<sup>144</sup>

## THE EFFECT OF THE CONVENTION ON THE COMMISSION'S REVIEW

3.27 In its review of the laws relating to decision-making by and for adults with impaired decision-making capacity in the 1990s, this Commission considered that the existing law was disparate and gave insufficient recognition to human rights principles.<sup>145</sup> The Commission therefore recommended that its proposed guardianship legislation should recognise the human rights enunciated in existing international statements of the rights of adults with mental or intellectual disabilities.<sup>146</sup>

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141 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J), 298 (Toohey J), 304 (Gaudron J), 315 (McHugh J).

142 *Ibid* 287 (Mason CJ and Deane J).

143 *Ibid* 291. See also 301 (Toohey J), 304–5 (Gaudron J).

144 *Ibid*. See also *Kidd v Chief Executive, Department of Corrective Services* [2000] QSC 405, [22] (White J); *Acts Interpretation Act 1954* (Qld) s 14B(1), (3)(d); *Acts Interpretation Act 1901* (Cth) s 15AB(1), (2)(d).

145 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, 23–5.

146 *Ibid* 27.

3.28 The United Nations Convention is now the most recent international statement about the rights of people with a disability. Under article 4, States Parties, such as Australia, have undertaken a number of general obligations.<sup>147</sup> Article 4 provides:

**Article 4**  
**General obligations**

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
  - (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
  - (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

3.29 In view of the significance of the Convention as a statement of the rights of people with disabilities, and Australia's recent ratification of the Convention, the Commission considers it appropriate for its review of the guardianship legislation to be informed by the Convention, and to ensure that this legislation reflects the principles enunciated in the Convention.

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United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 4(1)(a), (b).

# Chapter 4

## The General Principles

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## INTRODUCTION

4.1 The Commission's terms of reference direct it to review the General Principles set out in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>148</sup> They also require the Commission to have regard to 'the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity'.

4.2 The two duties that are common to all guardians, administrators and attorneys<sup>149</sup> under the guardianship legislation are:<sup>150</sup>

- to exercise power honestly and with reasonable diligence to protect the adult's interests;<sup>151</sup> and
- to apply, or comply with, the General Principles.<sup>152</sup>

4.3 These two duties are fundamental to the exercise of a substitute decision-maker's power under the legislation to make decisions for an adult with impaired capacity.

4.4 However, the requirement to apply, or comply with, the General Principles is not confined to substitute decision-makers. The *Guardianship and Administration Act 2000* (Qld) provides that a person or other entity who performs a function or exercises a power under that Act for a matter in relation to an adult with impaired capacity must apply the General Principles.<sup>153</sup> Similarly, the *Powers of Attorney Act 1998* (Qld) provides that the General Principles must be complied with by 'a person or other entity who performs a function or exercise a power under the Act, or an enduring document,<sup>154</sup> for a matter in relation to an adult who has impaired capacity'.<sup>155</sup> As a result, the requirement to apply, or comply with, the General Principles also applies to the Tribunal and the Supreme Court<sup>156</sup> when those bodies exercise jurisdiction under the guardianship legislation.

<sup>148</sup> The terms of reference are set out in Appendix 1. The General Principles are set out at [4.8] below.

<sup>149</sup> In this chapter, unless otherwise stated, the term 'attorney' includes a statutory health attorney.

<sup>150</sup> Further, a guardian who is appointed by the Tribunal under s 74(1) of the *Guardianship and Administration Act 2000* (Qld) to consent to the continuation of special health care or the carrying out of special health care similar to the special health care to which the Tribunal has consented must, in deciding whether to consent, apply the General Principles (and the Health Care Principle): s 74(4).

<sup>151</sup> *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

<sup>152</sup> *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(1); *Powers of Attorney Act 1998* (Qld) s 76.

<sup>153</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1).

<sup>154</sup> An enduring document means an enduring power of attorney or an advance health directive: *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'enduring document'); *Powers of Attorney Act 1998* (Qld) s 28.

<sup>155</sup> *Powers of Attorney Act 1998* (Qld) s 76.

<sup>156</sup> *VJC v NSC* [2005] QSC 68, [16] (Wilson J).

4.5 This will be relevant when the Tribunal exercises its role under the *Guardianship and Administration Act 2000* (Qld) as a substitute decision-maker for an adult in relation to special health care or the withholding or withdrawal of a life-sustaining measure. In addition, the General Principles will guide the exercise of power in relation to matters that do not involve the Tribunal acting as an adult's substitute decision-maker, for example, when:

- appointing a guardian or an administrator for an adult;<sup>157</sup>
- authorising a conflict transaction; and
- changing the terms of, or revoking, an enduring power of attorney or advance health directive.

4.6 In addition, the *Guardianship and Administration Act 2000* (Qld) requires a person or other entity who is authorised to make a decision for an adult about 'prescribed special health care' to apply the General Principles.<sup>158</sup> The Act specifically requires the Adult Guardian to apply the General Principles in the performance and exercise of his or her functions and powers.<sup>159</sup>

4.7 This chapter considers the role and content of the General Principles in Queensland, and outlines the law in the other Australian jurisdictions. In reviewing the General Principles, the Commission has had regard to the different contexts in which various persons and entities are required to apply, or comply with, the General Principles. The Commission has also examined the General Principles in light of the United Nations *Convention on the Rights of Persons with Disabilities* with a view to ensuring that the General Principles reflect the contemporary terminology and statements of rights contained in the Convention.

## THE GENERAL PRINCIPLES UNDER THE GUARDIANSHIP LEGISLATION

### Content of the General Principles

4.8 The General Principles are located in the first schedule of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). There are 11 General Principles, some of which include a number of elements. There are some minor differences in wording to reflect the different

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In addition to the requirement for the Tribunal to apply the General Principles, 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 consider a number of 'appropriateness considerations', including the General Principles 'and whether the person is likely to apply them': s 15(1)(a). The appropriateness considerations are discussed in Chapter 14 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 11(2). 'Prescribed special health care' means health care prescribed under a regulation: *Guardianship and Administration Act 2000* (Qld) sch 2 s 17. To date, no such regulation has been made.

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*Guardianship and Administration Act 2000* (Qld) s 174(3).

persons to whom each Act applies, but the General Principles are otherwise the same under each Act:<sup>160</sup>

**1 Presumption of capacity**

An adult is presumed to have capacity for a matter.

**2 Same human rights**

- (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

**3 Individual value**

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

**4 Valued role as member of society**

- (1) An adult's right to be a valued member of society must be recognised and taken into account.
- (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

**5 Participation in community life**

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

**6 Encouragement of self-reliance**

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

**7 Maximum participation, minimal limitations and substituted judgment**

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
- (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.

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The text in square brackets in General Principles 7(4)–(5) and 10 reflects the additional words that appear in the General Principles in the *Powers of Attorney Act 1998* (Qld).

- (3) So, for example—
- (a) 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; and
  - (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
  - (c) 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.
- (4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act [, or an enduring document,] must take into account what the person or other entity considers would be the adult's views and wishes.
- (5) However, a person or other entity in performing a function or exercising a power under this Act [, or an enduring document,] must do so in a way consistent with the adult's proper care and protection.
- (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

## 8 Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

## 9 Maintenance of environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

*Editor's notes—*

1 **Aboriginal tradition** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954*, section 36.

2 **Island custom**, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to the particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954* (Qld), section 36.

**10 Appropriate to circumstances**

Power for a matter should be exercised by a guardian or administrator [an attorney] for an adult in a way that is appropriate to the adult's characteristics and needs.

**11 Confidentiality**

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

4.9 The General Principles have been recognised by the Supreme Court of Queensland as 'an important statement of contemporary values in relation to the welfare of an intellectually disabled person'.<sup>161</sup> In *Re JD*,<sup>162</sup> the Tribunal described the role of the General Principles in this way:<sup>163</sup>

The Tribunal's view is that a guardian does possess wide powers but the Act contains a balance to these powers in the form of the General Principles and the Health Care Principle. A guardian must apply these principles and these principles contain the essential protections to any possible abuse of a guardian's power. These principles are essentially a restatement of the UN Declarations in relation to the Rights of the Mentally Ill and ensure appropriate decision making by both guardians and administrators.

**Development of the General Principles**

4.10 The inclusion of the General Principles in the guardianship legislation gave effect to a recommendation of this Commission in its original 1996 report. In that report, the Commission expressed concern that, at the time, there was insufficient provision requiring substitute decision-makers to respect the rights of people with decision-making disabilities.<sup>164</sup> The Commission recommended the inclusion of a set of principles to give statutory recognition to the right of people with a decision-making disability to respect for their human dignity.<sup>165</sup> This was considered an important step in moving away from a paternalistic philosophy towards a more positive approach, which affirmed the human rights of people with impaired decision-making capacity.<sup>166</sup> The Commission commented that the recommended principles:<sup>167</sup>

<sup>161</sup> *VJC v NSC* [2005] QSC 68, [16] (Wilson J).

<sup>162</sup> [2003] QGAAT 14.

<sup>163</sup> *Ibid* [39].

<sup>164</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.

<sup>165</sup> *Ibid* 27.

<sup>166</sup> See, generally, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making for people who need assistance because of a mental or intellectual disability*, Discussion Paper, WP No 38 (1992) 1–2.

<sup>167</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, 27.

attempt to strike a balance between, on the one hand, the right of people with a decision-making disability to adequate and appropriate support in their decision-making and to protection from neglect, abuse and exploitation when their disability prevents them from looking after their own interests and, on the other, their right to the greatest possible degree of autonomy.

### Principles for substitute decision-making

4.11 As explained in Chapter 3 of this Report, the United Nations *Convention on the Rights of Persons with Disabilities* (the 'Convention') is now the most recent international statement of rights for people with disabilities, including people with mental or intellectual disabilities, to which Australia is a party.<sup>168</sup>

4.12 The Convention recognises that adults with impaired decision-making capacity are entitled to the same human rights, and respect for their dignity, as others. At the same time, adults with impaired decision-making capacity are entitled to be protected from exploitation and abuse.<sup>169</sup>

4.13 The Convention is based on a number of principles including 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.<sup>170</sup>

4.14 Article 12 of the Convention deals with the exercise of legal capacity and 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.<sup>171</sup>

4.15 The following four concepts, which have generally been recognised as appropriate to underpin substitute decision-making for adults with impaired capacity, are also reflected in the Convention:<sup>172</sup>

- The presumption of competence — every adult should be presumed to be legally competent to make his or her own decisions unless it is shown otherwise. Competence should be assessed in relation to individual decisions and it should not be assumed that lack of competence in one area

168 United Nations Enable, 'Convention and Optional Protocol Signatures and Ratifications' <<http://www.un.org/disabilities/countries.asp?id=166>> at 22 September 2010.

169 See especially, United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, arts 12 (Equal recognition before the law), 16 (Freedom from exploitation, violence and abuse).

170 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 3(a). Article 3 is set out at [3.10] above.

171 Article 12 is set out at [3.11] above.

172 See generally I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 205–9; T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 29–30; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 40–3; J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 136–8; Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.1]–[2.8].

of activity necessarily means the person does not have competence in another area.<sup>173</sup>

- Normalisation and inclusion — people with disabilities or mental illness should be treated, as far as possible, in the same ways as other members of society. People's self-reliance and participation in community life should be encouraged.
- The least restrictive option — the available option that is least restrictive of the adult's rights, when intervention is necessary, should be adopted.
- Respect for autonomy — the preceding three principles reflect the importance of respect for an adult's autonomy. The autonomy principle has been given expression by the 'substituted judgment' standard of decision-making.<sup>174</sup> This requires the decision-maker to make decisions that he or she considers best equate with the decisions the adult would have made. This is contrasted with the 'best interests' standard, which requires a decision-maker to make decisions that he or she considers best promote the adult's welfare.

4.16 These concepts are also reflected in the 'General Principles' of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>175</sup>

## THE LAW IN OTHER JURISDICTIONS

4.17 The guardianship legislation in each of the other Australian jurisdictions also contains general or guiding principles.

4.18 Although the number and content of the principles in each of the jurisdictions varies, there are three requirements common to most of the jurisdictions:

- the means that are least restrictive of the adult's rights or freedom of decision and action are to be adopted;<sup>176</sup>

<sup>173</sup> Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.3]. See also The Bamford Review of Mental Health and Learning Disability (Northern Ireland), *A Comprehensive Legislative Framework*, Report (2007) [5.1]; Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.39]; Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.2], [3.14]; Law Reform Commission of Nova Scotia, *Reform of the Laws Dealing with Adult Guardianship and Personal Health Care Decisions*, Report (1995) 24, 26.

<sup>174</sup> R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 41.

<sup>175</sup> Similar guiding principles have also been adopted in other Queensland statutes, such as the *Mental Health Act 2000* (Qld), the *Disability Services Act 2006* (Qld) and, in relation to children, the *Child Protection Act 1999* (Qld); *Mental Health Act 2000* (Qld) s 8; *Disability Services Act 2006* (Qld) pt 2; *Child Protection Act 1999* (Qld) s 5.

<sup>176</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 s 1.6(1)–(3); *Guardianship Act 1987* (NSW) s 4(b); *Adult Guardianship Act* (NT) s 4(a); *Guardianship and Administration Act 1993* (SA) s 5(d); *Guardianship and Administration Act 1995* (Tas) s 6(a); *Guardianship and Administration Act 1986* (Vic) s 4(2)(a); *Guardianship and Administration Act 1990* (WA) ss 4(2)(c)–(e), 51(2)(f), 70(2)(f).

- the wishes and/or views of the adult are to be considered;<sup>177</sup> and
- the adult's welfare and interests<sup>178</sup> or best interests<sup>179</sup> are to be promoted.

## Australian Capital Territory

4.19 Section 4 of the *Guardianship and Management of Property Act 1991* (ACT), which sets out the decision-making principles that apply to a person exercising a function in relation to a protected person, provides a staged approach to addressing the potential conflict between the wishes of a protected person and the interests of a protected person:<sup>180</sup>

### 4 Principles to be followed by decision-makers

- (1) This section applies to the exercise by a person (the **decision-maker**) of a function under this Act in relation to a person with impaired decision-making ability (the **protected person**).
- (2) The **decision-making principles** to be followed by the decision-maker are the following:
  - (a) the protected person's wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person's interests;
  - (b) if giving effect to the protected person's wishes is likely to significantly adversely affect the person's interests—the decision-maker must give effect to the protected person's wishes as far as possible without significantly adversely affecting the protected person's interests;
  - (c) if the protected person's wishes cannot be given effect to at all—the interests of the protected person must be promoted;
  - (d) the protected person's life (including the person's lifestyle) must be interfered with to the smallest extent necessary;
  - (e) the protected person must be encouraged to look after himself or herself as far as possible;

<sup>177</sup> *Powers of Attorney Act 2006* (ACT) s 44, sch 1 s 1.6(3), (4); *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a), (b); *Guardianship Act 1987* (NSW) s 4(d); *Adult Guardianship Act* (NT) s 4(c); *Guardianship and Administration Act 1993* (SA) s 5(a), (b); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(c), 28(2)(e), 49(2)(b); *Guardianship and Administration Act 1990* (WA) ss 4(2)(f), 51(2)(e), 70(2)(e).

<sup>178</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(c) ('interests'); *Guardianship Act 1987* (NSW) s 4(a) ('welfare and interests').

<sup>179</sup> *Adult Guardianship Act* (NT) ss 4(b), 20(1); *Guardianship and Administration Act 1995* (Tas) ss 6(b), 27(1), 57(1); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(b), 28(1), 49(1); *Guardianship and Administration Act 1990* (WA) ss 4(2)(a), 51(1), 70(1).

<sup>180</sup> See Explanatory Memorandum, *Guardianship and Management of Property Amendment Bill 2001* (ACT) 2–3.

- (f) the protected person must be encouraged to live in the general community, and take part in community activities, as far as possible.
- (3) Before making a decision, the decision-maker must consult with each carer of the protected person.
- (4) However, the decision-maker must not consult with a carer if the consultation would, in the decision-maker's opinion, adversely affect the protected person's interests.
- (5) Subsection (3) does not limit the consultation that the decision-maker may carry out.

4.20 Section 5A of the Act contains an inclusive definition of a person's interests:

**5A What are a person's interests?**

A person's *interests* include the following:

- (a) protection of the person from physical or mental harm;
- (b) prevention of the physical or mental deterioration of the person;
- (c) the ability of the person to—
  - (i) look after himself or herself; and
  - (ii) live in the general community; and
  - (iii) take part in community activities; and
  - (iv) maintain the person's preferred lifestyle (other than any part of the person's preferred lifestyle that is harmful to the person);
- (d) promotion of the person's financial security;
- (e) prevention of the wasting of the person's financial resources or the person becoming destitute.

4.21 In addition, the *Powers of Attorney Act 2006* (ACT) provides that the General Principles set out in schedule 1 of the Act must be complied with, to the maximum extent possible, by a person who exercises the functions of an attorney under an enduring power of attorney in relation to a principal with impaired decision-making capacity.<sup>181</sup>

4.22 The ACT General Principles include principles in similar terms to General Principles 3, 4, 5, 7, 8, 9 and 11 of the Queensland guardianship legislation. They also include the following principles that do not have an equivalent under the Queensland legislation:

<sup>181</sup>

*Powers of Attorney Act 2006* (ACT) s 44.

### 1.1 Access to family members and relatives

- (1) An individual's wish and need to have access to family members and relatives, and for them to have access to the individual, must be recognised and taken into account.
- (2) An individual's wish to involve family members and relatives in decisions affecting the individual's life, property, health and finance must be recognised and taken into account.

### 1.5 Quality of life

An individual's need and wish to have a reasonable quality of life must be recognised and taken into account.

### 1.7 Individual taken to be able to make decisions

An individual must not be treated as unable to take part in making a decision only because the individual makes unwise decisions.

## New South Wales

4.23 In New South Wales, the *Guardianship Act 1987* (NSW) sets out principles that must be observed by everyone exercising a function under that Act. The community is also encouraged to apply and promote the principles.<sup>182</sup>

4.24 Section 4 of the *Guardianship Act 1987* (NSW) provides:

#### 4 General principles

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

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*Guardianship Act 1987* (NSW) s 4.

- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

## Northern Territory

4.25 In the Northern Territory, section 4 of the *Adult Guardianship Act* (NT) provides:

### **4 Best interests of represented person to be promoted**

Every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—

- (a) those means which are the least restrictive of a represented person's freedom of decision and action as is possible in the circumstances are adopted;
- (b) the best interests of a represented person are promoted; and
- (c) the wishes of a represented person are, wherever possible, given effect to.

4.26 Although section 4(b) requires the 'best interests' of the represented person to be promoted, the requirement in section 4(c) to give effect to the wishes of the represented person means that the section reflects a combination of the best interests and substituted judgment approaches.

4.27 In addition, section 20 of the Act requires a guardian to act in the best interests of the represented person, and defines when a guardian acts in the best interests of a represented person:

### **20 Exercise of authority**

- (1) Without derogating from section 4, a guardian must act in the best interests of the represented person.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible—
  - (a) as an advocate for the represented person;
  - (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community;
  - (c) in such a way as to encourage and assist the represented person to become capable of caring for himself or herself and of making reasonable judgments in respect of matters relating to his or her person;
  - (d) in such a way as to protect the represented person from neglect, abuse or exploitation; and

- (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.
- (3) A guardian may on behalf of a represented person sign and do all such things as are necessary to give effect to any power or duty vested in the guardian.

## South Australia

4.28 In South Australia, the *Guardianship and Administration Act 1993* (SA) sets out the principles that are to be observed by guardians, administrators, the Public Advocate, the Guardianship Board and any court or other person making a decision or order or exercising powers under the Act. Section 5 provides:

### 5 Principles to be observed

Where a guardian appointed under this Act, an administrator, the Public Advocate, the Board or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to this Act or pursuant to powers conferred by or under this Act—

- (a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and
- (b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and
- (c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and
- (d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.

## Tasmania

4.29 In Tasmania, section 6 of the *Guardianship and Administration Act 1995* (Tas) provides:<sup>183</sup>

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These principles are similar to those set out in s 4 of the *Adult Guardianship Act* (NT); see [4.25] above.

## **6 Principles to be observed**

A function or power conferred, or duty imposed, by this Act is to be performed so that—

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and
- (c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

4.30 In addition, the *Guardianship and Administration Act 1995* (Tas) contains separate provisions dealing with the exercise of power by guardians and administrators.

4.31 Section 27 requires a guardian to act in the best interests of the person under guardianship, and defines when a guardian acts in the best interests of such a person:<sup>184</sup>

### **27 Exercise of authority by guardian**

- (1) A guardian must act at all times in the best interests of the person under guardianship.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a person under guardianship if the guardian acts as far as possible—
  - (a) in consultation with that person, taking into account, as far as possible, his or her wishes; and
  - (b) as an advocate for that person; and
  - (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
  - (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgements relating to his or her person; and
  - (e) in such a way as to protect that person from neglect, abuse or exploitation.

4.32 Section 57 requires an administrator to act in the best interests of the represented person and defines when an administrator acts in the best interests of such a person:

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This provision is similar to s 20 of the *Adult Guardianship Act* (NT): see [4.27] above.

### 57 Exercise of power by administrator

- (1) An administrator must act at all times in the best interests of the represented person.
- (2) Without limiting subsection (1), an administrator acts in the best interests of the represented person if the administrator acts as far as possible—
  - (a) in such a way as to encourage and assist the represented person to become capable of administering his or her estate; and
  - (b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

## Victoria

4.33 In Victoria, the *Guardianship and Administration Act 1986* (Vic) sets out the manner in which every function, power, authority, discretion, jurisdiction and duty conferred or imposed by the Act is to be performed. Section 4(2) provides:

### 4 Objects of Act

...

- (2) It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—
  - (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
  - (b) the best interests of a person with a disability are promoted; and
  - (c) the wishes of a person with a disability are wherever possible given effect to.

4.34 The Act contains additional provisions that apply to the exercise of power by guardians and administrators.

4.35 Section 28 requires a guardian to act in the best interests of the represented person and defines inclusively when a guardian acts in the best interests of such a person:<sup>185</sup>

<sup>185</sup>

This provision is similar to s 20 of the *Adult Guardianship Act* (NT) and s 27 of the *Guardianship and Administration Act 1995* (Tas): see [4.27], [4.31] above.

**28 Exercise of authority by guardian**

- (1) A guardian must act in the best interests of the represented person.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible—
  - (a) as an advocate for the represented person; and
  - (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community; and
  - (c) in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person; and
  - (d) in such a way as to protect the represented person from neglect, abuse or exploitation; and
  - (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.

4.36 Section 49 requires an administrator to act in the best interests of the represented person, and also includes an inclusive definition of when an administrator acts in the best interests of such a person:

**49 Exercise of power by administrator**

- (1) An administrator must act in the best interests of the represented person.
- (2) Without limiting subsection (1) an administrator acts in the best interests of the represented person if the administrator acts as far as possible—
  - (a) in such a way as to encourage and assist the represented person to become capable of administering the estate; and
  - (b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

**Western Australia**

4.37 In Western Australia, the *Guardianship and Administration Act 1990* (WA) sets out the principles to be observed by the State Administrative Tribunal. Section 4 provides:

**4 Principles stated**

- (1) In dealing with proceedings commenced under this Act the State Administrative Tribunal shall observe the principles set out in subsection (2).

- (2) (a) The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made.
- (b) Every person shall be presumed to be capable of—
- (i) looking after his own health and safety;
  - (ii) making reasonable judgments in respect of matters relating to his person;
  - (iii) managing his own affairs; and
  - (iv) making reasonable judgments in respect of matters relating to his estate, until the contrary is proved to the satisfaction of the State Administrative Tribunal.
- (c) A guardianship or administration order shall not be made if the needs of the person in respect of whom an application for such an order is made could, in the opinion of the State Administrative Tribunal, be met by other means less restrictive of the person's freedom of decision and action.
- (d) A plenary guardian shall not be appointed under section 43(1) or (2a) if the appointment of a limited guardian under that section would be sufficient, in the opinion of the State Administrative Tribunal, to meet the needs of the person in respect of whom the application is made.
- (e) An order appointing a limited guardian or an administrator for a person shall be in terms that, in the opinion of the State Administrative Tribunal, impose the least restrictions possible in the circumstances on the person's freedom of decision and action.
- (f) In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions.

4.38 The Act separately provides that guardians and administrators are required to act in the best interests of the represented person.

4.39 Section 51 of the *Guardianship and Administration Act 1990* (WA), which applies to guardians, provides:<sup>186</sup>

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This provision is similar to s 20 of the *Adult Guardianship Act* (NT), s 27 of the *Guardianship and Administration Act 1995* (Tas) and s 28 of the *Guardianship and Administration Act 1986* (Vic): see [4.27], [4.31], [4.35] above.

**51 Guardian to act in best interests of represented person**

- (1) Subject to any direction of the State Administrative Tribunal, a guardian shall act according to his opinion of the best interests of the represented person.
- (2) Without limiting the generality of subsection (1), a guardian acts in the best interests of a represented person if he acts as far as possible—
  - (a) as an advocate for the represented person;
  - (b) in such a way as to encourage the represented person to live in the general community and participate as much as possible in the life of the community;
  - (c) in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person;
  - (d) in such a way as to protect the represented person from neglect, abuse or exploitation;
  - (e) in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions;
  - (f) in the manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person;
  - (g) in such a way as to maintain any supportive relationships the represented person has; and
  - (h) in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment.
- (3) Nothing in subsection (2)(a) shall be read as authorising a guardian to act contrary to the *Legal Profession Act 2008*.

4.40 Section 70, which applies to administrators, is in similar terms. It provides:

**70 Administrator to act in best interests of represented person**

- (1) An administrator shall act according to his opinion of the best interests of the represented person.
- (2) Without limiting the generality of subsection (1), an administrator acts in the best interests of a represented person if he acts as far as possible—
  - (a) as an advocate for the represented person in relation to the estate;

- (b) in such a way as to encourage the represented person to live in the general community and participate as much as possible in the life of the community;
  - (c) in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person;
  - (d) in such a way as to protect the represented person from financial neglect, abuse or exploitation;
  - (e) in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions;
  - (f) in the manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person;
  - (g) in such a way as to maintain any supportive relationships the represented person has; and
  - (h) in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment.
- (3) Nothing in subsection (2)(a) shall be read as authorising an administrator to act contrary to the *Legal Profession Act 2008*.
- (4) Nothing in subsection (2) shall be read as restricting the functions of an administrator at common law or under any written law.

## THRESHOLD ISSUES

### Consistency with the United Nations Convention

4.41 In the Discussion Paper, the Commission expressed the preliminary view that the General Principles should reflect the United Nations Convention, and that any revisions to the General Principles should be guided by the objectives of simplicity and conformity with contemporary, internationally agreed principles.<sup>187</sup>

4.42 The Commission raised the issue of whether the existing principles provide too little, or too much, detail — for example, where the wording of a principle may be unclear or confusing because it is too vague, complex or heavily reliant on subjective interpretation.<sup>188</sup> On the other hand, it acknowledged that it

<sup>187</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.50].

<sup>188</sup> Eg M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 183–5, 188.

may be desirable to maintain flexibility in the application of the principles.<sup>189</sup>

4.43 Although the Commission acknowledged that the General Principles were in many respects consistent with the Convention, it sought submissions on whether the General Principles should be amended to more closely reflect the terms of articles 3 and 12 of the Convention.<sup>190</sup> The Commission also sought submissions on whether the General Principles should be redrafted anew or retained in their current form but refined.<sup>191</sup>

### The role and purpose of the General Principles

4.44 When the Powers of Attorney Bill 1997 (Qld) was introduced into Parliament, the then Attorney-General described the General Principles as ‘the philosophical cornerstone’ of the legislation ‘which guide and regulate the conduct of an attorney when making decisions for a person with impaired capacity’.<sup>192</sup> The Explanatory Notes to the Bill stated that:<sup>193</sup>

These principles recognize the rights of people with a decision-making disability as reflected in United Nations Declarations on such rights. They provide guidance for attorneys and others in relation to the exercise of powers for a person with impaired capacity.

4.45 In the Discussion Paper, the Commission commented that the role and purpose of the General Principles would necessarily influence the level of detail and specificity that the principles should have, what principles should be included in the legislation, and how the principles should be applied.<sup>194</sup>

4.46 The Commission noted that the General Principles may fulfil several roles.<sup>195</sup> The principles may affirm the basic rights of adults with impaired decision-making capacity, provide a set of guidelines for making substitute decisions for an adult,<sup>196</sup> act as a safeguard to protect an adult’s rights and interests,<sup>197</sup> or serve an

<sup>189</sup> Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.56].

<sup>190</sup> *Ibid* 51.

<sup>191</sup> *Ibid*.

<sup>192</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3690 (Denver Beanland, Attorney-General and Minister for Justice).

<sup>193</sup> Explanatory Notes, Powers of Attorney Bill 1997 (Qld) 37.

<sup>194</sup> Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.44].

<sup>195</sup> *Ibid* [4.45].

<sup>196</sup> Eg M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166.

<sup>197</sup> Eg Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) 5–6; J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 136.

educative function.<sup>198</sup>

4.47 The Commission considered two approaches in terms of the role and purpose of the General Principles.

4.48 On the one hand, the Commission suggested that the General Principles might be kept entirely general — that is, that the role of the General Principles might be to enunciate the philosophy underlying the legislation, rather than to act as a specific or detailed decision-making checklist. It further suggested that it might be appropriate to supplement such general statements of philosophy with more specific principles or provisions directed at how particular decisions should be made. It noted that it might be more appropriate for guidance of that kind to be included with other substantive provisions of the legislation rather than as part of the General Principles.<sup>199</sup>

4.49 On the other hand, the Commission suggested that the General Principles could have the more specific purpose of providing comprehensive or detailed guidance on making decisions for, or about, an adult. It raised as an issue whether it might be appropriate to provide different principles for different types of decisions. It suggested, however, that it might be better to include specific principles of this nature alongside other obligations and responsibilities set out in the legislation rather than in a statement of ‘General Principles’.<sup>200</sup>

4.50 The Commission sought submissions on the following questions:<sup>201</sup>

- What role and purpose should the General Principles have in the Queensland guardianship legislation?
- Should the General Principles be expressed in general terms, or more specifically to provide detailed guidance about particular issues?

## Submissions

### ***Consistency with the United Nations Convention***

4.51 There was strong support in the submissions for ensuring that the General Principles are consistent with the Convention.<sup>202</sup>

4.52 Queensland Advocacy Incorporated emphasised the legal importance of the Convention and explained why it should act as the benchmark for any redraft of

198 Eg R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 39. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 22 April 1998, 837 (Matthew Foley).

199 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.46].

200 Ibid [4.47].

201 Ibid 49.

202 Submissions 9, 13, 14, 15, 19, 20A, 22, 34A, 42, 50, 52, 53, 56, 64, 67, 69, 71, 81, 90, 91, 93, 162.

the General Principles:<sup>203</sup>

The CRPD [Convention on the Rights of Persons with Disabilities] now sets the standard against which all initiatives for people with disability will be judged. Its judgment is stern. Its stated purpose is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. Signatory States must support this purpose. The CRPD tells them how. They must take all measures necessary to promote and ensure the human rights and fundamental freedoms of people with disability. They must prevent individuals or organisations from infringing the human rights of people with disability. They must abolish all laws, customs, regulations and practices that are inconsistent with the rights set out in the CRPD.

Australia ratified the CRPD in July 2008. It is appropriate therefore to regard it in the current review as more than a mere guide. It should be adopted as a compliance benchmark to which all potential outcomes from the current review should be elevated. It is important to remember, however, that even the CRPD aims to strike a balance between upholding rights and ensuring the appropriate levels of support and protection.

Articles in the CRPD of particular relevance to this review would appear to be: 1 (Purpose), 3 (General Principles), 4 (General Obligations), 5 (Equality and Non-Discrimination), 11 (Situations of Risk and Humanitarian Emergency), 12 (Equal Recognition before the Law) and 16 (Freedom from Exploitation, Violence and Abuse). However, the CRPD must be applied to this investigation to the full extent that it is relevant either in part or in full. (notes omitted)

4.53 Legal Aid Queensland commented that 'it is appropriate that all legislation in Australian jurisdictions impacting on people with disabilities should be consistent with the terms of the Convention'.<sup>204</sup>

4.54 The former Public Advocate, as part of her suggested new scheme for substitute decision-making, also endorsed the notion that the Convention should inform the content of the General Principles:<sup>205</sup>

the Convention covers a broader range of issues than the current General Principles which are relevant to decision-making about substantive issues, including housing and legal matters.

4.55 However, some submissions raised concerns about basing the General Principles on the Convention.

4.56 One respondent warned of possible budgetary implications if the General Principles were redrafted to reflect too literally the Convention. The argument was illustrated with an example:<sup>206</sup>

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203 Submission 34A.

204 Submission 63.

205 Submission 90.

206 Submission 54.

a person with a significant intellectual disability may wish to parent a child but may need resources well above the average to raise the child to be an average law abiding member of society. Currently Government/s are unwilling to fund the support of the proportion of our community with a disability to achieve their individual human rights ...

4.57 The then Director-General of Queensland Health also referred to the issue of resourcing:<sup>207</sup>

Careful consideration must be given to the practicalities and resourcing issues that might be associated with any proposed recommendations relating to the adoption of Convention articles in domestic legislation.

### **Role and purpose**

4.58 Almost all of the submissions received by the Commission were of the view that the General Principles should continue to underpin the operation of the guardianship regime. They were described as being the 'cornerstone'<sup>208</sup> of the system and the 'backbone, ribcage and heart of the legislation'.<sup>209</sup>

4.59 Three key themes emerged from the submissions about the proper role and purpose of the General Principles. Respondents considered that the General Principles should:

- reflect the basic human rights of adults with impaired decision-making capacity;<sup>210</sup>
- act as a safeguard to protect the rights and interests of people with impaired decision-making capacity;<sup>211</sup> and
- guide and regulate the conduct of substitute decision-makers, ensuring decisions made on behalf of an adult are made in a structured manner.<sup>212</sup>

4.60 Queensland Advocacy Incorporated considered that the General Principles were more than a statement of the philosophy underlying the guardianship legislation, noting that they also have the important function of providing an objective standard for decision-makers to follow:<sup>213</sup>

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207 Submission 66.

208 Submission 81.

209 Submission 13.

210 Submissions 1, 9, 34A, 91, 93.

211 Submissions 34A, 55, 90, 91, 93.

212 Submissions 9, 14, 15, 20A, 27, 34A, 50, 55, 56, 63, 90, 91.

213 Submission 34A.

They embody a set of human rights for people with disability. They also help to safeguard these rights by providing a set of prescriptive guidelines describing the factors individuals and entities must consider and processes they must follow when exercising powers or performing functions under the Act. This makes them much more than a mere enunciation of the philosophy underlying the Act. It is important that they remain more than this.

...

Many people acting under the [guardianship legislation] have no background in human rights or capacity matters. It is imperative that these people are provided with a clearly defined description of the human rights people with disability are legally entitled to enjoy. It is imperative they are given a clear and detailed decision-making process to follow that will ensure they do not violate these rights. It is appropriate for the General Principles to provide these standards. Without an objective set of standards to follow, decision-makers are apt to fall back upon their own subjective opinions about what is the proper course to pursue.

4.61 The former Public Advocate argued strongly that the legislation must include a clearly ascertainable basis for decision-making:<sup>214</sup>

It is argued that there should be a basis for decision-making which is ascertainable. Unless this is so, the fundamental rights of the adults with [impaired decision-making capacity] for whose benefit the regime was established and operates cannot be properly protected and respected.

Decision-making on the basis of an exercise of discretion which is not properly examinable against clear criteria is inadequate. Unless there is certainty regarding the approach to decision-making, it is difficult to assess whether a [substitute decision-maker] has had regard to the rights of the adult concerned when making a decision/s.

4.62 She observed that the General Principles are ‘the only legislative foundations/basis provided to indicate how decision-making about the particular matter for the particular adult should be approached by a substitute decision-maker’. In her view, if the General Principles provide only general guidance, they will allow substitute decision-makers ‘to make decisions according to their own belief systems, rather than giving close attention to the views and wishes and the interests of the adults concerned’.

### ***The degree of specificity***

4.63 The majority of submissions received by the Commission on this issue considered that the General Principles should continue to be expressed in general terms.<sup>215</sup>

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214 Submission 91.

215 Submissions 9, 13, 14, 27, 68, 93.

4.64 Disability Services Queensland (now Disability and Community Care Services<sup>216</sup>) commented that expressing the General Principles in broad terms was essential to allow for flexible decision-making.<sup>217</sup>

Depending on the nature of the decision to be made under the guardianship legislation, some of the General Principles may be of more relevance than others. It would be difficult to specifically set out decision-making guidelines and the relevant General Principles that would apply in different specific circumstances. Therefore, flexibility in the application of General Principles should be preserved, by collectively regarding them as general statements of philosophy and contemporary values in relation to the welfare of a person with impaired decision-making capacity.

4.65 Another respondent expressed a similar view:<sup>218</sup>

attempting to be too specific may lead to a level of rigidity that could be counter-productive for good outcomes for the adult with impaired decision-making capacity.

4.66 Another respondent commented:<sup>219</sup>

It is submitted they should be expressed in general terms to allow the decision-maker to consider all facts and then make the best decision in the interest of the adult. That there might be some tension between various principles should not be of concern as the decisions are based on best interest.

4.67 The New South Wales Public Trustee doubted that amending the General Principles to make them more specific would resolve concerns about the legislation.<sup>220</sup>

We do not believe a review that seeks to include in legislation very specific definitions and an extension of Principles to cover every possible situation that might arise will meet with any more success. It is helpful to ask if the problem is actually a legal one or is the problem more about the adequacy of education and training. The NSW experience revealed it was the latter.

4.68 However, the respondents who considered that the General Principles should be more specific argued that substitute decision-making would be improved with increased guidance.<sup>221</sup> One respondent observed:<sup>222</sup>

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216 Disability and Community Care Services forms part of the Department of Communities.

217 Submission 93.

218 Submission 9.

219 Submission 27.

220 Submission 68.

221 Submissions 1, 20A, 23.

222 Submission 20B.

At the moment the General Principles are very confusing for decision-makers as they are open to individual interpretation. If the General Principles are to continue to be used to provide a set of guidelines to assist decision-makers when making important substitute decisions for an adult then the General Principles should be expressed in more specific terms with examples. This would create a uniform understanding of the General Principles and assist decision-makers in the performance of their substitute decision-making and caring duties.

4.69 Other respondents stated that the use of examples in the legislation would be beneficial,<sup>223</sup> explaining that the General Principles often needed ‘contextual application’.<sup>224</sup>

4.70 Queensland Advocacy Incorporated argued that it was ‘imperative that people acting under the [legislation] are given a clear and detailed decision-making process to follow that will ensure they do not violate [adults’] rights.’<sup>225</sup>

4.71 As mentioned earlier, the former Public Advocate suggested that the legislation should provide a clear basis for decision-making. She suggested that the General Principles should embody:<sup>226</sup>

- **a procedural principle** which provides a framework for making decisions which must be applied by all decision-makers; and
- **principles to guide quality substantive decision-making** which contain some core principles for application to all decisions *and other decision-specific principles* based on articles within the UN Convention relating to particular matters. (emphasis in original)

4.72 The former Public Advocate suggested that the General Principles should have a role in ensuring ‘quality decision-making about the substantive matter concerned where the adult’s wishes are not to be implemented’. Accordingly, she suggested that they should ‘provide a manner for determining what is in an adult’s interests’:

For the substantive General Principles to be meaningful for decision-makers, it is suggested that the guardianship regime could provide specifically for some core General Principles relevant to all types of decision to be made. For example, General Principles could be to the effect that adults with [impaired decision-making capacity] have the same human and legal rights as adults with capacity and for the least restrictive option principle. However, it is not helpful for [substitute decision-makers], especially lay decision-makers to have to work out which rights might be relevant to the particular decision. Accordingly, some greater specificity about relevant rights is desirable. This could be achieved in several ways. Firstly, all of the rights set out in the UN Convention could be briefly specified in an inclusive list within the GP setting out this ambit principle. Alternatively, [substitute decision-makers] could be referred to the following

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223 Submissions 20A, 81.

224 Submission 81.

225 Submission 34A.

226 Submission 91.

detailed specific rights considered relevant. In the absence of a bill of rights, at least those matters contained in the UN Convention could be included.

For example, UN Convention Article 19 regarding living independently and being included in the community, and Article 22 regarding respect for privacy (including of family and home) could guide decisions about accommodation. Where the GPs specifically include an article/s about the particular type of decision, it or they should guide the particular decision.

It could be provided that where the particular type of decision is not covered specifically, the core principles are to be applied together with prescribed key elements underpinning the principles. The latter should include, for example, those matters referred to in UN Convention Article 3, such as respect for the adult and their dignity and individual autonomy.

4.73 The former Public Advocate noted that it ‘would be impossible and impractical to provide specific principles for each type of financial, personal and health matter which may require decision-making, but for the most significant decisions this seems appropriate’. She suggested that other significant decisions that might be considered for inclusion are:

accommodation decisions; education, work and employment decisions; decisions to withdraw or withhold life-sustaining measures; decisions to consent (or not) to major medical procedures; and decisions about the extent to which a person controls their day-to-day spending/purchases; and matters for consideration when administering financial affairs of an adult. (note omitted)

4.74 Finally, the former Public Advocate observed that:

These suggestions are not intended to make the operation of the regime unwieldy, rather to make it more respectful of the rights of the adults and to provide meaningful guidance for those entrusted with decision-making on their behalf which has enormous potential to impoverish as well as enhance their life experiences.

4.75 The submissions revealed some support for the General Principles to be redrafted anew.<sup>227</sup>

4.76 One respondent commented that the General Principles must be kept simple but ‘any ambiguity should be removed’.<sup>228</sup> Another observed that ‘a more cohesive document usually results from a fresh start’.<sup>229</sup>

4.77 The Endeavour Foundation observed:<sup>230</sup>

Any consideration of rights must be accompanied by an equal consideration of responsibilities. We would like to see this recognised in any refinements to the legislation.

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227 Submissions 9, 15, 19, 20A, 42, 50, 55, 56, 68.

228 Submission 14.

229 Submission 9.

230 Submission 69.

4.78 Only a few respondents considered that the current General Principles did not require any amendment.<sup>231</sup>

### The Commission's view

4.79 As explained earlier, the United Nations *Convention on the Rights of Persons with Disabilities* is now the most recent international statement of rights for people with disabilities, including people with a mental or intellectual disability. As presently drafted, the General Principles are broadly consistent with the articles of the Convention that are relevant to the exercise of power under the guardianship legislation — in particular, articles 3, 5, 12, 16 and 22.

4.80 However, the Commission considers that, in some respects, the General Principles should be amended to ensure that they more closely reflect these articles.

4.81 The Commission considers that the General Principles serve two important functions, which are not mutually exclusive.

4.82 First, they articulate the overall philosophy underpinning the guardianship legislation. For instance, they affirm a number of basic human rights for adults with impaired capacity (in particular, General Principles 1 to 6).

4.83 Secondly, they provide practical guidance to persons and entities performing a function or exercising a power under the legislation. For instance, General Principle 7 currently provides a framework for making substitute decisions for an adult with impaired capacity.

4.84 Given these different considerations, the level of particularity with which an individual principle should be expressed must necessarily depend on the nature of that principle. It is appropriate, for example, that those General Principles that affirm an adult's basic human rights are expressed in relatively general terms. However, the framework for making substitute decisions, which is set out in General Principle 7, needs to be sufficiently detailed to provide meaningful guidance to substitute decision-makers.<sup>232</sup>

4.85 The Commission does not consider that the General Principles should include separate decision-making principles governing such matters as accommodation, education, work and employment, and financial matters. Such an approach would, in the Commission's view, be too complicated. In particular, it may weigh against the appointment of individuals (rather than, say, statutory agencies) as guardians or administrators; this is because one of the appropriateness considerations for appointment under section 15(1) of the

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231 Submissions 52, 73.

232 General Principle 7 is considered in greater detail later in this chapter: see the discussion beginning at [4.149] below.

*Guardianship and Administration Act 2000* (Qld) is whether the proposed appointee is likely to apply the General Principles.<sup>233</sup>

4.86 The Commission considers that the General Principles should be redrafted to ensure that, as well as reflecting more closely the relevant articles of the Convention, they are presented in a more logical structure and in that way avoid duplication, and are simpler for people to understand and apply.

4.87 The Commission's recommended changes in relation to individual General Principles are discussed below.

## APPLICATION OF GENERAL PRINCIPLES TO INFORMAL DECISION-MAKERS

4.88 The *Guardianship and Administration Act 2000* (Qld) provides that the 'community is encouraged to apply and promote' the General Principles.<sup>234</sup> However, subject to one exception in relation to restrictive practices,<sup>235</sup> the Act does not expressly require an adult's informal decision-makers to apply the General Principles.<sup>236</sup>

### Discussion Paper

4.89 In the Discussion Paper, the Commission raised as an issue whether informal decision-makers should be required, or specifically encouraged, to apply the General Principles. The Commission suggested that this might promote greater consistency with formal decision-making. It acknowledged, however, that there might be practical difficulties in enforcing such an obligation on informal decision-makers, who are not otherwise regulated by the guardianship legislation.<sup>237</sup>

4.90 In the Discussion Paper, the Commission sought submissions on whether:<sup>238</sup>

- all informal substitute decision-makers should be required to apply the General Principles; or

<sup>233</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1)(a).

<sup>234</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

<sup>235</sup> Certain informal decision-makers are required to apply the General Principles when deciding whether to consent to the use of certain restrictive practices in relation to particular adults: *Guardianship and Administration Act 2000* (Qld) s 80ZS(2)(a), (3)(a). An informal decision-maker for this provision means a member of the adult's support network, other than a paid carer for the adult: *Guardianship and Administration Act 2000* (Qld) s 80U; *Disability Services Act 2006* (Qld) s 123E. Restrictive practices are considered in Chapter 19 of this Report.

<sup>236</sup> However, see Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) n 161 in relation to an argument that the effect of s 9 of the *Guardianship and Administration Act 2000* (Qld) is that an informal decision-maker is performing a function or power under the *Guardianship and Administration Act 2000* (Qld), and is therefore required by s 11 to apply the General Principles.

<sup>237</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.122].

<sup>238</sup> *Ibid* 71.

- alternatively, informal decision-makers should be specifically encouraged to apply the General Principles.

## Submissions

4.91 Most of the submissions considered it desirable for the legislation to require all informal substitute decision-makers to apply the General Principles.<sup>239</sup>

4.92 Disability Services Queensland argued that the ‘spirit and purpose’ of the Act would be better fulfilled if the requirement to apply the General Principles was applied consistently to all people who undertake a guardianship role, whether appointed formally or not.<sup>240</sup> Similarly, the Law Society of New South Wales considered it ‘inconceivable to understand how or why it would not be more appropriate to make sure all persons are subject to the same general principles’.<sup>241</sup>

4.93 The Public Trustee stated that it would be ‘incongruous for decision-makers, contingent upon the degree of formality of their role, to be at liberty to apply different considerations to decisions’. However, he considered that there may be some practical difficulties, including the general awareness of the General Principles among informal decision-makers.<sup>242</sup>

4.94 The former Public Advocate considered that an obligation on all decision-makers (including informal decision-makers) to comply with the General Principles could be justified in view of the length of time that the guardianship legislation has been in operation:<sup>243</sup>

The guardianship regime is now not new. It has been operational, in part, for some ten years and is now firmly entrenched in Queensland society. Accordingly, at this stage, it appears reasonable to require compliance with the Principles by informal decision-makers generally. In other areas, ignorance of the law is not an excuse to non-compliance. ... A robust approach to requiring compliance is arguably now appropriate, consistent with the applicability of the UN Convention, to promote the rights and interests of the vulnerable adults for whose benefit the regime operates.

4.95 Alternatively, she suggested that a general obligation to apply, or comply with, the General Principles could be imposed on all decision-makers but that, if an offence for non-compliance with the General Principles were created, the offence provision should not apply to informal decision-makers.

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239 Submissions 1A, 9, 13, 14, 15, 19, 20A, 42, 50, 53, 55, 56, 63, 67, 73, 81, 93.

240 Submission 93.

241 Submission 73.

242 Submission 90.

243 Submission 91.

4.96 However, some respondents were strongly of the view that informal decision-makers should not be subject to a legislative requirement to apply the General Principles.<sup>244</sup>

4.97 Carers Queensland explained:<sup>245</sup>

we do not consider that there is reason to enforce compliance of the principles on informal decision makers ... if informal decision-makers were required to apply the General Principles all decision-makers would, effectively, be regulated by the legislation without good reason. This would seem contrary to the notion that underpins the laws — that the appointment of a decision-maker is only necessary where the adult's interests are not being met or their needs protected.

4.98 Another respondent commented that 'parents and carers were abiding by the General Principles long before the [Act] was even thought of'. This respondent did not support the inclusion of a mandatory obligation to apply the General Principles.<sup>246</sup>

4.99 However, a number of respondents supported a provision that specifically encouraged informal decision-makers to apply the General Principles.<sup>247</sup> Carers Queensland observed:<sup>248</sup>

The community should be actively encouraged to apply and promote the Principles. Families and carers should be supported to better understand these principles and to put them into practice ... most informal decision-makers know little of their existence so requiring them to comply with them would be challenging. We consider it an issue of community education rather than enforcement.

4.100 Several other respondents also referred to the need for further community education about the contents of the General Principles.<sup>249</sup>

### The Commission's view

4.101 A number of provisions of the *Guardianship and Administration Act 2000* (Qld) recognise the existence of informal decision-making either directly or indirectly.

4.102 Section 5(d) of the *Guardianship and Administration Act 2000* (Qld) acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent. This approach is reflected in the grounds for the appointment of a guardian or an

244 Submissions 23, 52, 54, 57.

245 Submission 71.

246 Submission 61.

247 Submissions 1A, 13, 24, 27, 54, 91.

248 Submission 71.

249 Submissions 9, 54, 71, 90, 91.

administrator under section 12, which require that, without an appointment, the adult's needs will not be adequately met or the adult's interests will not be adequately protected.<sup>250</sup> Although it is not stated explicitly in section 12, the grounds for an appointment will not be satisfied if informal decision-making is adequately meeting the adult's needs and adequately protecting the adult's interests.<sup>251</sup>

4.103 The occurrence of informal decision-making is also acknowledged in section 9 of the Act, which recognises that, depending on the type of matter involved, decisions for an adult may be made 'on an informal basis by members of the adult's existing support network'.<sup>252</sup>

4.104 Section 154 of the Act makes express reference to informal decision-makers. It provides that the Tribunal may:

by order, ratify an 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.

4.105 For the purpose of section 154, 'informal decision maker, for a matter for an adult' is defined to mean a person who is:<sup>253</sup>

- (a) a member of the adult's support network; and
- (b) not an attorney under an enduring document, administrator or guardian for the adult for the matter.

4.106 The restrictive practices legislation also refers to informal decision-makers.<sup>254</sup> It provides that, in specified 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>255</sup> 'Informal decision-maker' is defined for the purpose of the restrictive practices legislation in the following terms:<sup>256</sup>

**informal decision-maker**, for an adult with an intellectual or cognitive disability, means a member of the adult's support network, other than a paid carer for the adult within the meaning of the GAA.

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250 See *Guardianship and Administration Act 2000* (Qld) s 12(1)(c).

251 The appointment of guardians and administrators is considered in Chapter 14 of this Report.

252 *Guardianship and Administration Act 2000* (Qld) s 9(1)–(2).

253 *Guardianship and Administration Act 2000* (Qld) s 154(5).

254 A reference in this chapter to the 'restrictive practices legislation' is a reference to pt 10A of the *Disability Services Act 2006* (Qld) and ch 5B of the *Guardianship and Administration Act 2000* (Qld). Restrictive practices are considered in Chapter 19 of this Report.

255 See Table 19.1 at [19.41] below.

256 *Disability Services Act 2006* (Qld) s 123E; *Guardianship and Administration Act 2000* (Qld) s 80U.

4.107 In these various ways, the *Guardianship and Administration Act 2000* (Qld) recognises the extent to which informal decision-making occurs for adults with impaired capacity, and its importance in minimising the need for the appointment of a guardian or an administrator for an adult.

4.108 The Commission considers that it is important to ensure, as far as possible, that informal decision-making is guided by the same principles as formal decision-making under the legislation. Accordingly, the Commission is of the view that the requirement to apply the General Principles should not be limited to substitute decision-makers who have formal authority, but should be extended to decision-makers for an adult who do not have formal authority.

4.109 The Commission has considered how this requirement should be expressed and, in particular, whether the provision that gives effect to this recommendation should refer to an informal decision-maker (and use one of the existing definitions of that term) or whether the requirement should be framed in some other way.

4.110 The definition of ‘informal decision maker’ in section 154(5) of the Act refers to a person who is a member of the adult’s support network.<sup>257</sup> ‘Support network’ is defined in schedule 4 of the Act as follows:

**support network**, for an adult, consists of the following people—

- (a) members of the adult’s family;
- (b) close friends of the adult;
- (c) other people the tribunal decides provide support to the adult.

4.111 In the context of section 154, the definition of ‘informal decision maker’ is appropriate because it applies in circumstances where a person is making an application to the Tribunal for ratification of a decision or approval of a proposed decision. An applicant who did not fall within paragraphs (a) or (b) of the definition of ‘support network’ would base the application on the fact that he or she is nevertheless a person who provides support to the adult and is therefore part of the adult’s support network.

4.112 The definition of ‘informal decision-maker’ that applies for the purposes of the restrictive practices legislation also refers to a person who is a member of the adult’s support network. However, it is narrower than the definition in section 154 as it excludes a person who is a paid carer for the adult. Given that the restrictive practices legislation confers on an informal decision-maker the power to consent to a relevant service provider using certain restrictive practices in relation to the adult,<sup>258</sup> it is appropriate that the legislation uses a narrow definition of ‘informal decision-maker’ and excludes a paid carer.

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<sup>257</sup> See [4.105] above.

<sup>258</sup> See Table 19.1 at [19.41] below.

4.113 However, the imposition of a requirement to apply the General Principles in relation to informal decision-making will not confer any decision-making authority. Accordingly, the primary consideration for the Commission in framing the requirement to apply the General Principles is to ensure that the requirement applies to informal decision-making in all its forms. A provision that applies to too narrow a class of decision-makers will not limit the power that is exercised by informal decision-makers, but will simply have the effect that there will be decision-makers who are not subject to the requirement to apply the General Principles.

4.114 In the Commission's view, the definitions of 'informal decision-maker' that apply for the purposes of section 154 of the *Guardianship and Administration Act 2000* (Qld) and for the restrictive practices legislation are both too narrow for this purpose. The definition in section 154 will not include a paid carer unless the Tribunal decides that the person provides support to the adult (which necessarily requires an application to be before the Tribunal) and a paid carer is expressly excluded from the definition that applies for the restrictive practices legislation. However, if, as a matter of fact, a paid carer is making day-to-day lifestyle decisions for an adult about matters such as what the adult wears or what activities the adult participates in, it is desirable that the paid carer should be subject to the requirement to apply the General Principles.

4.115 Given that neither of the existing definitions of 'informal decision-maker' is appropriate in this context, the Commission considers that, to avoid confusion, the provision that imposes the requirement to apply the General Principles in relation to informal decision-making should avoid the term 'informal decision-maker'. Instead, the provision should be expressed to apply to a person making a decision for an adult on an informal basis. This uses part of the language of section 9(2)(a) of the *Guardianship and Administration Act 2000* (Qld), but avoids the limiting reference in that section to 'members of the adult's support network'.

4.116 Section 11 of the *Guardianship and Administration Act 2000* (Qld) should therefore be amended to include a new subsection (3) to the effect that a person making a decision for an adult on an informal basis must apply the General Principles.<sup>259</sup>

4.117 Further, section 11(3), which encourages the community to apply and promote the General Principles, should be renumbered as section 11(4).

4.118 The Commission considers it important that any community education undertaken in relation to the guardianship legislation emphasises this new requirement.<sup>260</sup>

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As explained at [5.26] above and [5.251] below, the effect of the *Guardianship and Administration Act 2000* (Qld) is that decisions about health care may not be made for an adult on an informal basis.

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See [30.186] and Recommendation 30-21 of this Report.

## GENERAL PRINCIPLE 1: PRESUMPTION OF CAPACITY

### Introduction

4.119 General Principle 1 provides that an adult is presumed to have capacity for a matter. As stated earlier, this principle is one of the four key concepts that underpin substitute decision-making for adults with impaired capacity.<sup>261</sup>

4.120 It is also consistent with article 12, clause 2 of the Convention, which provides that:

States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

### Submissions

4.121 In its submission to the Commission, the Public Trustee referred to the difficulty for an administrator of applying the presumption of capacity:<sup>262</sup>

it is difficult for the Public Trustee as an administrator to apply a presumption of capacity when acting in that role; the role of administrator for a particular matter is predicated upon a decision having been made by the Guardianship and Administration Tribunal that the adult concerned lacks capacity for that matter.

4.122 Other respondents have also referred to this difficulty.<sup>263</sup>

4.123 Legal Aid Queensland suggested that the presumption of capacity should be removed from the General Principles and relocated as a separate provision of the Act. It considered that this would establish it as the fundamental or threshold consideration each time a person exercises a power or performs a function under the legislation.<sup>264</sup>

### The Commission's view

4.124 In Chapter 7, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to clarify how the presumption of capacity is to be applied, namely:

- *Recommendation 7-1*: Whenever the Tribunal or the Supreme Court makes a determination about an adult's capacity for a matter, the Tribunal or the Court must apply the presumption of capacity.

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261 See [4.15] above.

262 Submission 90.

263 See [7.67]–[7.71] below.

264 Submission 63.

- *Recommendation 7-2*: If the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to apply the presumption that the adult has capacity for that matter.<sup>265</sup>
- *Recommendation 7-3*: If the Tribunal or the Supreme Court has made a declaration that the adult has impaired capacity for a matter and no further declaration about the adult's capacity for that matter has been made, another person or entity who exercises a power or performs a function under the guardianship legislation is entitled to rely on the finding that the presumption that the adult has capacity for that matter has been rebutted.
- *Recommendation 7-4*: If the Tribunal or the Supreme Court has made no formal determination that the adult has impaired capacity for a matter, the person or entity must apply the presumption that the adult has capacity for that matter.

4.125 Recommendation 7-2 addresses the concern that has been raised by the Public Trustee. If the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator will not ordinarily be required to apply the presumption that the adult has capacity for that matter.<sup>266</sup>

4.126 Except where Recommendations 7-2 and 7-3 apply, other entities, as well as guardians, administrators and attorneys, will still be required to apply the General Principles. For that reason, it is appropriate for the presumption of capacity to remain in the General Principles.

4.127 However, to avoid confusion about circumstances in which guardians, administrators and attorneys must apply the General Principles, the General Principles should be amended to include a note, after General Principle 1, that refers to the provisions that give effect to Recommendations 7-2, 7-3 and 15-2.

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Recommendation 7-2 is subject to the recommendations in Chapter 15 in relation to the exercise of power by a guardian or an administrator for an adult who has fluctuating capacity. The Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if 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: Recommendation 15-2.

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See the exception mentioned at n 265 above.

## GENERAL PRINCIPLES 2 TO 6: AN EXPRESSION OF VARIOUS HUMAN RIGHTS PRINCIPLES

### Discussion Paper

4.128 In the Discussion Paper, the Commission sought submissions on whether any of the existing General Principles should be reworded or changed in some way.<sup>267</sup>

### Submissions

4.129 The Endeavour Foundation strongly supported the retention of General Principles 2 to 6.<sup>268</sup>

4.130 Queensland Advocacy Incorporated commented generally, that substitute decision-makers should be required to give maximum practicable effect to the matters in these General Principles without exposing the adult or the adult's interests to significant risk.<sup>269</sup> Other submissions commented on specific General Principles.

### **General Principle 2: Same human rights**

4.131 The Public Trustee commented that 'General Principle 2 is one of those principles which might have had better expression in one clause'. He commented further:<sup>270</sup>

In any event one of the passing issues which has attended the Public Trustee's mind in the past is that whilst the expression is to be fully supported, the concept of 'basic human rights' is a concept not necessarily fully described in domestic Queensland law — although it is developed particularly in international law.

The concept does not bear definition in the existing Act.

It is to these concepts that the United Nations Convention, if incorporated as the foundation for the general principles will find clarity — for example, including as 'basic human rights' Article 3(a) (autonomy, choices and independence), (b) (non-discrimination), (e) (equality of opportunity), (g) (equality between men and women) and freedom from abuse (Article 12(4)).

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<sup>267</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 52.

<sup>268</sup> Submission 69.

<sup>269</sup> Submission 34A.

<sup>270</sup> Submission 90.

**General Principle 3: Individual value**

4.132 The Public Trustee commented that General Principle 3 is generally consistent with the Convention:<sup>271</sup>

**General Principle 3 — Individual Value:** The existing General Principle 3 is largely reflected in Article 3(a) of the Convention and to the extent that the Article speaks to ‘will and preferences’ Article 12(4).

4.133 Queensland Advocacy Incorporated suggested that General Principle 3 might be amended to read:<sup>272</sup>

An adult’s right to respect for his or her human worth and dignity as an individual must be recognised and given effect to the greatest extent practicable without exposing the adult or their interests to significant risk.

**General Principle 4: Valued role as member of society**

4.134 The Public Trustee commented that General Principle 4 is generally consistent with the Convention, and should be retained:<sup>273</sup>

Clause 4 of the General Principles in Schedule 1 of the *Guardianship and Administration Act 2000* is to a large extent reflected in Article 3(c) of the United Nations Convention and to some extent Article 12(4).

There is value in retaining an expression that adults with a decision making incapacity be supported and encouraged in respect of their value and role as a member of society.

4.135 Queensland Advocacy Incorporated suggested that General Principle 4 might be amended to read:<sup>274</sup>

- (1) An adult’s right to be a valued member of society must be recognised and given effect to the greatest extent practicable without exposing the adult or their interests to significant risk.
- (2) Accordingly an adult must be encouraged and supported to perform social roles valued in society to the greatest extent practicable without exposing the adult or their interests to significant risk.

**General Principle 5: Participation in community life**

4.136 The Public Trustee commented that General Principle 5 is generally consistent with the Convention, but suggested that it was perhaps better expressed in the Convention:<sup>275</sup>

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271 Ibid.

272 Submission 34A.

273 Submission 90.

274 Submission 34A.

275 Submission 90.

**General Principle 5 — Participation in Community Life:** The concepts reflected in General Principle 5 are closely aligned to the existing General Principle 4 and in respect of the Convention are reflected in Article 3 (in large part (c)) and to some extent Article 12(2) and (4).

The concise expressions in the United Nations Convention have merit.

### **General Principle 6: Encouragement of self-reliance**

4.137 The Public Trustee considered that, while the concept found in General Principle 6 is not expressly reflected in the Convention, there was merit in retaining General Principle 6:<sup>276</sup>

Of interest is that the United Nations Convention does not precisely reflect the type of concept spoken to in Clause 6 of Schedule 1 of the *Guardianship and Administration Act 2000* (self reliance and maximisation of physical, social, emotional and intellectual potential).

It might be that General Principle 6 was established as an aspirational objective but nonetheless in practical terms is a matter which is taken into account by the Public Trustee when acting as administrator — and may be a very relevant concept in respect of decision making.

There may be good argument for the retention of a separate principle in respect of self reliance — to some extent Article 12(5) speaks to this issue with respect to rights of persons with disabilities to own and inherit property and control their own financial affairs.

It may also be that achievement of potential and self reliance flow as a result of the application of the provisions of the Convention generally, when particularly ‘support’ is provided (Article 12(3)), and Article 12(4) is observed.

### **The Commission’s view**

4.138 In the Commission’s view, the current General Principles 2 to 6 should be reworded and restructured to better reflect the Convention, and to provide a clearer thematic structure to those principles.

### **New General Principle 2: Same human rights and fundamental freedoms**

4.139 First, the current General Principle 2 should be replaced by a new principle that is based partly on General Principle 2(1) and partly on articles 3 and 4 of the Convention.

4.140 Instead of referring to ‘basic human rights’, as General Principle 2(1) presently does, the new General Principle 2(1) should reflect the language of the opening words of article 4 of the Convention, and provide that:

- (1) The rights 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.

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Ibid.

4.141 It has been observed that General Principle 2(1) presently refers to undefined 'basic rights'.<sup>277</sup> The new General Principle 2(2) should provide guidance in relation to the human rights and fundamental freedoms that are referred to by the new General Principle 2(1). This should be done by express reference in the new General Principle 2(2) to the principles set out in paragraphs (a)–(g) of article 3 of the Convention,<sup>278</sup> and by providing that those principles should inform the way in which an adult's human rights and fundamental freedoms are to be taken into account. The new General Principle 2(2) should therefore provide that:

- (2) 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, include—
  - (a) respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons;
  - (b) non-discrimination;
  - (c) full and effective participation and inclusion in society;
  - (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity;
  - (e) equality of opportunity;
  - (f) accessibility; and
  - (g) equality between men and women.

4.142 In view of these changes, the new General Principle 2 should be entitled 'Same human rights and fundamental freedoms'.

4.143 General Principle 3 (Individual value) presently provides that an adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account. In view of the Commission's recommendation to adopt the language of article 3 of the Convention, it is not necessary to retain the current General Principle 3. Respect for an adult's human worth and dignity is now subsumed by the reference, in paragraph (a) of the new General Principle 2(2), to 'respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons'.

4.144 Nor is it necessary to retain the current General Principle 4(1), which requires an adult's right to be a valued member of society to be recognised and taken into account. That requirement is now subsumed by the references, in paragraphs (b) and (c) of the new General Principle 2(2), to 'full and effective participation and inclusion in society' and 'respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity'.

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<sup>277</sup> See [4.131] above.

<sup>278</sup> Article 3(h) of the Convention applies only in relation to children.

***New General Principle 3: Empowering adult to exercise human rights and fundamental freedoms***

4.145 A common feature of the current General Principles 2(2), 4(2), 5 and 6 is that they all require various matters to be taken into account to empower an adult to exercise his or her human rights and fundamental freedoms. Although the current General Principle 6 is not expressly reflected in the Convention, the Commission considers it desirable for the General Principles to require account to be taken of the importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable.

4.146 The drafting of the General Principles can be considerably simplified by incorporating the current General Principles 2(2), 4(2), 5 and 6 into a single principle, which will become the new General Principle 3.

4.147 The new principle should also incorporate that part of the current General Principle 7(1) which requires an adult's right to participate, to the greatest extent practicable, in the development of policies, programs and services for people with impaired capacity for a matter to be recognised and taken into account. That requirement is not about decision-making for an adult, and should not therefore form part of a principle that is concerned with how decisions concerning an adult are made. By incorporating it as part of the new General Principle 3, it emphasises that the requirement is yet another way in which an adult may be empowered to exercise his or her human rights and fundamental freedoms.

4.148 The new General Principle 3 should be expressed in the following terms:

**3 Empowering adult to exercise human rights and fundamental freedoms**

The importance of the following matters must be taken into account—

- (a) empowering the adult to exercise the adult's human rights and fundamental freedoms;
- (b) encouraging and supporting the adult—
  - (i) to perform social roles valued in society;
  - (ii) to live a life in the general community, and to take part in activities enjoyed by the general community; and
  - (iii) to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable; and
- (c) an adult's right to participate, to the greatest extent practicable, in the development of policies, programs and services for people with impaired capacity for a matter.

## GENERAL PRINCIPLE 7: MAXIMUM PARTICIPATION, MINIMAL LIMITATIONS AND SUBSTITUTED JUDGMENT

### Introduction

4.149 The two main approaches to substitute decision-making, which are reflected to varying degrees in the guardianship legislation of the Australian States and Territories, are the substituted judgment approach and the 'best interests' approach.

### *The substituted judgment approach*

4.150 The substituted judgment approach has been said to accord greater respect for the adult's autonomy than the 'best interests' approach.<sup>279</sup> Under the substituted judgment approach, the decision-maker tries to make the same decision that the adult would make if he or she had capacity.<sup>280</sup> A decision made on this basis should reflect what the adult would have wanted:<sup>281</sup>

This principle allows for individual preferences, even to the extent that what may be regarded as idiosyncratic or eccentric points of view are respected. Substituted judgment is closely linked to the least restrictive option approach in that the substitute decision maker does not impose his or her ideas on the disabled person.

4.151 This approach relies on the decision-maker's understanding of the adult's preferences. These may have been clearly expressed by the adult or the decision-maker may be able to infer them from the adult's actions, beliefs and values.<sup>282</sup>

4.152 However, it may not always be possible to know what the adult would have wanted. The main criticism of the substituted judgment approach has been that it cannot apply when the adult has never had capacity to make his or her own decisions.<sup>283</sup> In those circumstances, it has been suggested that a 'fall-back' standard is required, such as a 'best interests' approach.<sup>284</sup> Where the adult's current views are unknown, the substituted judgment approach has also been criticised as leading decision-makers into 'contortions of logic in trying to determine what the person would have decided had she or he been able to make such a

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279 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 41. See also South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [5.2]. See also the approach endorsed by the Draft Advance Care Directives Framework 2010, which favours substituted judgment over best interests: Clinical, Technical and Ethical Principal Committee, Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives: Consultation Draft 2010* (2010) 29.

280 Eg J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 137.

281 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [2.7].

282 I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 190.

283 Eg Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.25].

284 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 42.

decision'.<sup>285</sup> It has been suggested that this approach leads decision-makers to consider 'recollections of past conversations, scattered remarks and comments' that would otherwise be considered unreliable hearsay.<sup>286</sup> It has also been suggested that:<sup>287</sup>

Since we cannot read the incompetent person's thoughts, memories and emotions, we cannot in reality 'substitute' our decision-making process and our judgment for those of an incompetent person.

### **The best interests approach**

4.153 The best interests approach is often regarded as an alternative to the substituted judgment approach to decision-making. It requires a decision-maker to make the decision that 'provides the maximum anticipated benefit' to the adult.<sup>288</sup>

4.154 This approach has been said to centre on the adult, excluding consideration of other people's interests.<sup>289</sup> It has also been suggested that the best interests approach may be useful if the decision-maker's values 'emphasise enhancement of valued social roles, community inclusion and a concern that the wishes of the person be taken into account'.<sup>290</sup>

4.155 However, the best interests approach has also been criticised because of its reliance on the decision-maker's own values.<sup>291</sup> Another criticism is that the best interests approach, which was developed in the context of child law, carries connotations of paternalism.<sup>292</sup>

### **The law in Queensland**

4.156 In exercising power for a matter, guardians, administrators and attorneys must apply General Principle 7, which includes the principles of decision-making by substituted judgment and least restriction of the adult's rights.<sup>293</sup>

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285 J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 137. See also I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 190.

286 D Mendelson, 'Substituted Consent: From Lunatics to Corpses' (2007) 14 *Journal of Law and Medicine* 449, 457.

287 Ibid 461.

288 I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 189.

289 Ibid.

290 J Fitzgerald, *Include Me In: Disability, Rights & the Law in Queensland* (1994) 138.

291 See eg *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 271 (Brennan J); I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 189–90; Scottish Law Reform Commission, *Incapable Adults*, Report No 151 (1995) [2.50].

292 Eg Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [2.50]; South African Law Commission, *Assisted Decision-Making: Adults With Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [5.2].

293 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7; *Powers of Attorney Act 1998* (Qld) sch 1 s 7. The General Principles are set out at [4.8] above.

4.157 The first part of General Principle 7(1) provides that an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, must be recognised and taken into account.

4.158 The second part of General Principle 7(1) provides that the adult's right to participate, to the greatest extent practicable, in the development of policies, programs and services for people with impaired capacity must be recognised and taken into account.<sup>294</sup> This part of the principle will be more relevant to the statutory substitute decision-makers and to government departments that have policies and programs for people with impaired capacity than to individual guardians, administrators and attorneys. The Commission has recommended earlier in this chapter that this part of General Principle 7(1) should be incorporated as part of the new General Principle 3.<sup>295</sup>

4.159 General Principle 7(2) provides that the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account. A related principle is General Principle 7(3)(a), which provides that 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.

4.160 General Principle 7 contains two elements that require an adult's views and wishes to be taken into account.

4.161 First, General Principle 7(3)(b) provides:

to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account.

4.162 The reference in this principle to 'exercising power for a matter for the adult' is narrower than the reference in General Principle 7(3)(c) and (5) to 'a person or other entity performing a function or exercising a power under this Act'. The use of the narrower expression in General Principle 7(3)(b) suggests that this particular principle applies only where a person or entity makes a substitute decision for an adult — for example, where a guardian or an attorney exercises power for a personal matter for an adult, where an administrator or an attorney exercises power for a financial matter for an adult, or where the Tribunal exercises power for a special health matter for an adult.

4.163 Secondly, General Principle 7(4) provides:

Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act [, or an enduring document,] must take into account what the person or other entity considers would be the adult's views and wishes.

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This part of General Principle 7(1) appears to have been based s 9(2)(d) of the *Disability Services Act 1992* (Qld), now repealed, which provided that people with disabilities have the right to 'participate actively in the decisions that affect their lives, including the development of disability policies, programs and services': see now *Disability Services Act 2006* (Qld) s 19(2)(d).

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See [4.147] above.

4.164 General Principle 7(4) reflects the substituted judgment approach to decision-making.<sup>296</sup> It is relevant where the adult is not able to express his or her views and wishes or where an adult's current views and wishes differ from what they would have been if the adult still had capacity. General Principle 7(4) ensures that substitute decision-makers are not limited to a consideration of views that may be expressed by the adult contemporaneously; instead, '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 must be taken into account.

4.165 The General Principles also provide that views and wishes may be expressed orally, in writing, by conduct or in another way.<sup>297</sup>

4.166 General Principle 7 imposes two limitations on a person or other entity that is performing a function or exercising a power under the Act.

4.167 The first limitation is found in General Principle 7(3)(c). It provides that a person or other entity in performing a function or exercising a power under the Act must do so in the way least restrictive of the adult's rights. Although the Tribunal has a limited role as a substitute decision-maker for an adult, the principle of least restriction of an adult's rights is an important consideration for the Tribunal when exercising other powers under the *Guardianship and Administration Act 2000* (Qld). For example, it requires the Tribunal when appointing a guardian or an administrator to make the appointment only for the period that is necessary and not for a longer period.

4.168 The second limitation is found in General Principle 7(5). The requirements of General Principles 7(1)–(4) are subject to the requirement in General Principle 7(5) that a person or other entity that performs a function or exercises a power under the Act must do so in a way that is 'consistent with the adult's proper care and protection'. While the existing General Principles in Queensland do not adopt the language of 'best interests',<sup>298</sup> General Principle 7(5) reflects the concept of a best interests approach.<sup>299</sup>

4.169 The Tribunal has recognised that the General Principles may conflict and will need to be balanced appropriately according to the particular facts in each case.<sup>300</sup> While the General Principles do not include as obvious a hierarchy of principles as, for example, the *Guardianship and Management of Property Act 1991*

296 See the discussion at [4.150]–[4.152] above.

297 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(6); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(6).

298 By contrast, the Health Care Principle currently incorporates a 'best interests' test: *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)(b)(ii); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)(b)(ii). However, the new Health Care Principle recommended by the Commission no longer contains the reference to an adult's 'best interests'. The guardianship legislation otherwise makes only limited express provision for particular decisions to be made using the 'best interests' approach: see *Guardianship and Administration Act 2000* (Qld) ss 80C(2), 198A; *Powers of Attorney Act 1998* (Qld) s 118(2). In Chapter 17 of this Report, the Commission has recommended that the reference to 'best interests' be omitted from s 118(2) of the *Powers of Attorney Act 1998* (Qld): see Recommendation 17-13.

299 See the Tribunal's comments in *Re JD* [2003] QGAAT 14, [35]; and *Re SD* [2005] QGAAT 71, [39] discussed at [4.170]–[4.171] below.

300 Eg *Re HG* [2006] QGAAT 26, [67].

(ACT), it appears that, where there is a conflict between General Principles, precedence is to be given to General Principle 7(5).

4.170 In *Re JD*,<sup>301</sup> the Tribunal considered a guardian's power to give consent to the detention of an adult at a mental health facility against the adult's wishes.<sup>302</sup> In considering the General Principles (and the Health Care Principle), the Tribunal suggested that the principles 'essentially require that all decisions are made in the adult's best interests and are consistent with the adult's proper care and protection'.<sup>303</sup> The Tribunal considered the tension between taking account of the adult's wishes and making decisions consistent with the adult's care and protection in General Principle 7.<sup>304</sup> It concluded that precedence should be given to the adult's care and protection.<sup>305</sup>

This idea that the decision which is made must be one which is consistent with the adult's proper care and protection clearly envisages that the ultimate decision which must be made is a decision which is objectively in the adult's best interests and not simply the decision which the adult would have made.

4.171 This view was also expressed in *Re SD*.<sup>306</sup>

Although any appointed administrator is required by Section 11 of the *Guardianship and Administration Act 2000* to apply the General Principles, which require that the adult's views and wishes must be taken into account (General Principle 7(4)), these must be taken in the context of a person with impaired capacity and ultimately in accordance with General Principle 7(5), the administrator is required to exercise powers '*in a way consistent with the adult's proper care and protection*'. (emphasis in original)

4.172 As explained earlier, the guardianship legislation also imposes a specific duty on guardians, administrators and attorneys to exercise power for an adult 'honestly and with reasonable diligence to protect the adult's interests'.<sup>307</sup> This duty, at least to the extent it applies to attorneys, appears to have been intended to reflect the standard of responsibility ordinarily expected from a person who acts as another person's agent.<sup>308</sup> Agency is a form of fiduciary relationship.<sup>309</sup> A fiduciary is in a special position of trust and loyalty characterised by an obligation to act in

301 [2003] QGAAT 14.

302 Restrictive practices, including the power to contain an adult, are considered in Chapter 19 of this Report.

303 *Re JD* [2003] QGAAT 14, [22]. A similar view was expressed in *Re MJG* [2004] QGAAT 58, [49].

304 The need to balance these factors was also recognised in *Re SVG* [2002] QGAAT 3, [31]–[33].

305 *Re JD* [2003] QGAAT 14, [35].

306 [2005] QGAAT 71, [39].

307 *Guardianship and Administration Act 2000* (Qld) s 35; *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: *Penalties and Sentences Act 1992* (Qld) s 5 (meaning of 'penalty unit').

308 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.

309 FMB Reynolds, *Bowstead and Reynolds on Agency* (17th ed, 2001) [6-032], [6-034].

the interests of the other party (the 'beneficiary').<sup>310</sup> This means that the fiduciary must not act for his or her own benefit but must act for the benefit of the beneficiary.<sup>311</sup>

4.173 An important consideration is the extent to which the application of the General Principles should permit the interests of an adult to be adversely affected. This is particularly relevant where giving effect to an adult's views and wishes, whether currently or previously expressed, might cause the adult to suffer harm or might result in his or her interests being adversely affected. At present, General Principle 7(5) operates to ensure that any exercise of power under the legislation is 'consistent with the adult's proper care and protection'.

4.174 The current terms of General Principle 7(5) are generally consistent with the requirement in the legislation to exercise power 'honestly and with reasonable diligence to protect the adult's interests'. It is also generally consistent with how other provisions of the legislation deal with the risk of harm to an adult.

4.175 For example, section 129 of the *Guardianship and Administration Act 2000* (Qld) enables the Tribunal to make an interim order if it is satisfied, on reasonable grounds, that there is an immediate risk of harm to the health, welfare or property of an adult, including because of the risk of abuse, exploitation or neglect or, of self-neglect by, the adult.<sup>312</sup>

4.176 Similarly, section 149 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may issue a warrant to enter a place and remove an adult only if the Tribunal is satisfied 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'.<sup>313</sup>

4.177 General Principle 7(5) is, however, open to the criticism that it may allow a substitute decision-maker to place too great an emphasis on the protection of the adult and that it does not sufficiently emphasise other rights and interests of the adult that should be promoted.

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310 PD Finn, *Fiduciary Obligations* (1977) [15], [27]; P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (1996) [1001].

311 PD Finn, *Fiduciary Obligations* (1977) [28].

312 In Chapter 20, the Commission has recommended that s 129(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that, in addition to the other matters listed in s 129(1), the Tribunal must be satisfied that there is evidence capable of showing that the adult has impaired capacity: see Recommendation 20-3 of this Report. With the exception of that recommendation, the Commission has endorsed the grounds for the making of an interim order.

313 In Chapter 20, the Commission has endorsed the current ground for the issuing of an entry and removal warrant, and has recommended that s 149(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to add, as an additional ground for issuing a warrant, that the Tribunal is satisfied that there are reasonable grounds for suspecting that the adult is being unlawfully detained against her or his will: see Recommendation 20-5 of this Report.

## The law in other jurisdictions

4.178 In the other Australian jurisdictions, the legislation requires decision-makers to consider<sup>314</sup> or, wherever possible, to give effect to<sup>315</sup> the adult's views or wishes.

4.179 In the ACT, a staged approach has been established for consideration of the adult's wishes and interests:<sup>316</sup>

- The adult's wishes, as far as they can be ascertained, must be given effect to unless a decision in accordance with the adult's wishes is likely to significantly adversely affect the adult's interests.
- If giving effect to the adult's wishes is likely to significantly adversely affect his or her interests, the decision-maker must give effect to the adult's wishes as far as possible without significantly adversely affecting the adult's interests.
- If the adult's wishes cannot be given effect to at all, the adult's interests must be promoted.

4.180 In South Australia, paramount consideration is to be given to what would, in the opinion of the decision-maker, be the wishes of the adult if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence of the adult's wishes.<sup>317</sup> In addition, the present wishes of the person should, unless it is not reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes.<sup>318</sup>

4.181 In New South Wales, the adult's 'welfare and interests' are to be given 'paramount consideration'.<sup>319</sup> Similarly, the 'primary concern' of the State Administrative Tribunal in Western Australia is the best interests of the adult.<sup>320</sup>

4.182 Some Australian jurisdictions have adopted a combination of a 'best interests' and substituted judgment approach.

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314 *Powers of Attorney Act 2006* (ACT) s 44, sch 1 s 1.6(3), (4); *Guardianship Act 1987* (NSW) s 4(d); *Guardianship and Administration Act 1993* (SA) s 5(a)–(b); *Guardianship and Administration Act 1986* (Vic) ss 28(2)(e), 49(2)(b); *Guardianship and Administration Act 1990* (WA) ss 4(2)(f), 51(2)(e), 70(2)(e).

315 *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a); *Adult Guardianship Act* (NT) s 4(c); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1986* (Vic) s 4(2)(c).

316 *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a)–(c).

317 *Guardianship and Administration Act 1993* (SA) s 5(a).

318 *Guardianship and Administration Act 1993* (SA) s 5(b).

319 *Guardianship Act 1987* (NSW) s 4(a).

320 *Guardianship and Administration Act 1990* (WA) s 4(2)(a).

4.183 In the Northern Territory,<sup>321</sup> Tasmania,<sup>322</sup> Victoria<sup>323</sup> and Western Australia,<sup>324</sup> the legislation first provides that decisions are to be made in the adult's best interests. It then states, without limiting that duty, that a guardian (or where relevant, an administrator) acts in the best interests of an adult if the guardian (or administrator) acts as far as possible in a number of specified ways. These include acting in consultation with the adult and taking into account, as far as possible, the wishes of the adult.<sup>325</sup> In Western Australia, this expressly includes the adult's wishes as gathered from the adult's previous actions.<sup>326</sup> The expression of the requirement in Western Australia is similar to General Principle 7(4) of the Queensland legislation.

## Discussion Paper

4.184 In the Discussion Paper, the Commission outlined the various approaches that apply to decision-making for an adult.

4.185 The Commission considered whether the General Principles should specifically require decision-makers to give effect to the adult's wishes rather than simply take them into account. It suggested that this might help ensure that appropriate regard is given to the adult's autonomy and right to participate in decisions. It was also suggested that this would reflect the provision in article 12 of the United Nations Convention requiring that measures relating to the exercise of legal capacity 'respect the rights, will and preferences of the person'.<sup>327</sup> On the other hand, the Commission acknowledged the potential for such a requirement to make decision-making more difficult if the adult's views were unclear or would put the adult in harm.<sup>328</sup>

4.186 Another issue raised was how the obligation to consider the adult's wishes should relate to the requirement in General Principle 7(5) to make decisions in a way 'consistent with the adult's proper care and protection'.<sup>329</sup> The Commission suggested that it might be appropriate to allow a decision-maker to override the

321 *Adult Guardianship Act* (NT) ss 4(b), 20(1), (2)(e). Section 20 applies only to guardians.

322 *Guardianship and Administration Act 1995* (Tas) ss 6(b), 27(1), (2)(a), 57(1), (2)(b). Section 27 applies to guardians; s 57 applies to administrators.

323 *Guardianship and Administration Act 1986* (Vic) ss 28(1), (2)(e), 49(1), (2)(b). Section 28 applies to guardians; s 47 applies to administrators.

324 *Guardianship and Administration Act 1990* (WA) ss 51(1), (2)(e), 70(1), (2)(e).

325 This approach is also taken in England: *Mental Capacity Act 2005* (Eng) ss 1(5), 4(6). Scotland has adopted a similar approach based on decision-making for the adult's 'benefit': *Adults with Incapacity (Scotland) Act 2000* (Scotland) s 1. This approach specifies positive steps that a decision-maker must take in meeting the obligation to act in the adult's best interests. (This can be contrasted with the obligation of a fiduciary to prefer the beneficiary's interests.)

326 *Guardianship and Administration Act 1990* (WA) ss 51(2)(e), 70(2)(e).

327 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

328 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.63].

329 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(5).

adult's wishes if it is necessary to ensure the adult's interests are protected. On the other hand, it was noted that this could undermine the adult's autonomy. The Commission suggested that a staged approach, similar to the approach under the ACT legislation, may be useful.<sup>330</sup>

4.187 The Commission also suggested that it might be appropriate, for example, to provide specifically for situations in which the adult's views and wishes are not known at all. This could involve nominating a particular principle — such as the adult's care and protection — that is to be applied in those circumstances.<sup>331</sup>

4.188 The Commission also considered whether the General Principles should include a requirement for decision-makers to act in the adult's interests. It noted that such a requirement would be consistent with the specific duty imposed on guardians, administrators and attorneys to act with 'reasonable diligence to protect the adult's interests'. It suggested that it may be useful to clarify that decisions for or about an adult should give precedence to the adult's interests, rather than to the interests of the decision-maker or others, and that this would accord with the provision in article 12 of the Convention requiring measures relating to the exercise of legal capacity to be 'free of conflict of interest'.<sup>332</sup> The Commission also suggested that, as an alternative to a 'best interests' principle, a requirement to act in the adult's interests may also avoid the paternalistic connotations associated with the 'best interests' approach.<sup>333</sup>

4.189 On the other hand, the Commission commented that the incorporation of a General Principle dealing with the adult's interests might be unnecessary,<sup>334</sup> given that guardians, administrators and attorneys are already under a specific duty to protect the adult's interests.<sup>335</sup>

4.190 In the Discussion Paper, the Commission sought submissions on whether the General Principles:<sup>336</sup>

- provide for adequate and appropriate weight to be given to the adult's views and wishes;
- should continue to require that the adult's views and wishes must be taken into account, or whether the General Principles should be changed to require that effect be given to the adult's views and wishes;

330 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.64].

331 Ibid [4.65].

332 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

333 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.69].

334 Ibid [4.70].

335 See [4.172] above.

336 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 54–5, 56, 59.

- should specify whether and, if so, when, the adult's views and wishes can be overridden by other considerations, such as the adult's proper care and protection;
- should specify a principle or principles that must apply if the adult's views and wishes are not known at all;
- should include a new principle requiring decision-makers to act in the adult's interests; or
- should require decision-makers to act in the adult's 'best interests' and, if so, how 'best interests' should be defined.

## Submissions

### *Taking the adult's views and wishes into account*

4.191 Several respondents considered that the General Principles do not give sufficient weight to the adult's views and wishes, and should be changed to require a substitute decision-maker to give effect to the adult's views and wishes.<sup>337</sup>

4.192 The former Public Advocate commented generally in relation to the framework for substitute decision-making:<sup>338</sup>

[Substitute decision-makers] should be provided with a procedure for decision-making, which is mandatory in all circumstances and which is clearly set out. Although General Principle 7 contains information about procedure, it is framed such that various matters, like the adult's views and wishes need only be 'taken into account' and since it is only one of the General Principles, other principles may be given greater weight by an individual decision-maker.

Specifically, it is suggested that unless it is contrary to the interests/care and protection of the adult, the adult's known wishes should be given greater weight than other considerations. The approach of the ACT legislation in this regard is noted and endorsed. The views and ethical framework of the [substitute decision-maker] should not be imposed on the adult over the adult's own views in the absence of compelling reason to displace them, that is, harm would result if the adults wishes were followed.

Broadly, it is suggested that the substituted judgment approach is appropriate as it best respects the adult's right to autonomy, but with some modifications to protect the adult's interests where harm would result from following the wishes and to provide an appropriate procedure when the adult's wishes cannot reasonably and reliably be ascertained. Exceptionally, in circumstances when an adult has never had capacity or their views and wishes regarding this particular decision cannot be ascertained from their previous actions, the best decision in the adult's interests should be objectively ascertained. To ascertain the decision which is most in the adult's 'interests', the non-procedural General Principles should provide the necessary guidance.

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337 Submissions 1A, 72, 91.

338 Submission 91.

The framework for decision-making could usefully prescribe the perspective from which the General Principles for substantive decision-making are to be applied when this step in the process is necessary. In this regard, it is suggested that generally it will be appropriate to apply the principles from the perspective of the adult concerned. The relevance of this submission will depend upon the approach taken to revising the Principles.

The procedural General Principles could also usefully specify how apparent conflicts between the outcomes suggested by the substantive General Principles are to be overcome.

4.193 The former Public Advocate further commented that ‘the Principles should require that the adult’s views and wishes be given effect unless this course would place the adult at significant risk of harm/disadvantage or cannot be implemented’, for example, if the adult has insufficient income and financial resources to achieve the accommodation or lifestyle choice that he or she prefers. In her view, the legislation currently enables a substitute decision-maker to override an adult’s views and wishes too readily:

Vague terminology relating to the ‘adult’s proper care and protection’ is insufficiently precise to be respectful of the adult’s right to self-determination. ... The current wording justifies a [substitute decision-maker] giving greater weight to their own views than the adult’s views about a matter. This is at odds with the purpose of the regime which is concerned with promoting and protecting the rights and interests of the adults, and in particular respecting their autonomy to the greatest possible degree while providing adequate and appropriate support. (note omitted)

4.194 The former Public Advocate supported the staged approach found in the ACT legislation, under which it is only as a last resort that effect is not given to the adult’s wishes:

it is argued that the adult’s views and wishes should only be overridden when there are significant risks to the adult if the wishes were implemented or it is impossible to implement them. ... the staged approach adopted by the ACT legislation appears highly desirable, as a manner of respecting the adult’s wishes as far as possible, if not in totality. It is noteworthy that under that ACT legislation that as a last resort, the adult’s ‘interests’ are to be promoted, as opposed to any paternalistic requirement for the decision to be made in the adult’s ‘best interests.’

4.195 In her view, significant harm or disadvantage to an adult should be defined to include:

Abuse, neglect or exploitation or risk of same;

Likely contact with the criminal justice system;

Deterioration in health status or risk of same;

Endangering self or others;

Becoming destitute;

In respect of complex financial planning decisions, the views are significantly contrary to professional advice;

Becoming homeless;

Being unable to sustain lifestyle (for financial or other reasons).

4.196 The Watchtower Bible and Tract Society of Australia commented that a legislative requirement that effect be given to the views and wishes of an adult (especially in relation to medical treatment) would be consistent with the principles of individual autonomy and self-determination:<sup>339</sup>

The [substituted] judgment approach highlights the importance of the adult's right to make, and participate in, decisions to the greatest extent practicable, which is reflected in General Principle 7. ... We submit that the General Principles should specifically require decision makers to give effect to the adult's wishes rather than simply take them into account.

4.197 Further, the Watchtower Bible and Tract Society of Australia was of the view that it would not be appropriate to allow a substitute decision-maker to override an adult's wishes:<sup>340</sup>

this could lead to an unsatisfactory outcome for the adult and flies in the face of respect for human dignity. It is of the utmost importance that the General Principles provide that an adult be treated with care and dignity according to their own views and wishes and not that their wishes can be overridden by other considerations, such as the views of the decision-maker.

4.198 Alzheimers Australia (Qld) considered that the General Principles should be changed to give appropriate weight to the adult's views and wishes, if they can be ascertained, unless doing so would cause the adult harm.<sup>341</sup>

4.199 However, several other respondents suggested that the General Principles currently give adequate and appropriate weight to an adult's views.<sup>342</sup>

4.200 Disability Services Queensland was strongly of the view that the current regime ensures that the views and wishes of an adult are capable of being taken into account:<sup>343</sup>

it is noted that General Principle 7 (Maximum participation, minimal limitations and substituted judgment) provides guidance that an adult's wishes should be taken into consideration. General Principles 3 (Individual value) and 10 (Appropriate to circumstances) further support General Principle 7 and provide for respect of an adult's human worth and dignity as an individual. Nevertheless, General Principle 7 incorporates a number of sub-principles. A suggestion could be to develop the sub-principles that relate to giving adequate

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339 Submission 72.

340 Submission 93.

341 Submission 9.

342 Submissions 14, 18, 27, 93.

343 Submission 93.

and appropriate weight to an adult's wishes and to draft a stand-alone [General Principle] to enshrine this for clarity.

4.201 Disability Services Queensland stated that the retention of the existing position 'ensures that a person's views and wishes are considered in the context of other matters which might impact on the appropriate decision in any circumstance'. It reiterated its view that the General Principles should 'enunciate the philosophy underlying the guardianship legislation rather than act as a specific or detailed decision-making checklist'.

4.202 Another respondent observed:<sup>344</sup>

[the provisions] are sufficient in their present form to give effect to the adult's views and wishes where this might be known or deduced. To change the principle to require that effect be given to the adult's views and wishes seems to go against the very reason for the general principles and best interest. I see no reason to head down that path.

4.203 The Public Trustee suggested that, in his experience, it would be problematic to require a substitute decision-maker to give effect to an adult's wishes, although the Public Trustee considered that there could be some merit in the ACT approach.<sup>345</sup>

There is often very real conflict in applying the substituted judgment principle where the adult's present views and wishes arguably differ from those which might be arrived at on a substituted judgment basis.

... the application of substituted judgment (sometimes) potentially offends the adult's proper care and protection.

To that extent there quite often can be a tension between the principles reflected in clauses 7(3)(b), 7(4) and 7(5) of the general principles.

An illustration of a practical nature might assist.

Very frequently the Public Trustee is called upon to consider in its role as (financial) administrator whether to commence litigation, or earlier make demand in respect of what generally might be termed financial abuse. On more than one occasion the Public Trustee in that role has been met with a response that the adult would not have litigated against the person concerned (often a child of the adult) under any circumstances.

Currently these types of issues can be adequately worked through in the existing framework of general principles — the answer in part to the type of practical example above being that the incapacity itself provided the opportunity for the financial abuse and therefore it is difficult to countenance that a position could be reached as to what substituted judgement an adult might make.

The Public Trustee sees value in the retention of a principle of substituted judgement but there might be some merit in considering an approach such as the ACT Model.

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344 Submission 27.

345 Submission 90.

There may be difficulty if it were to be mandated that the views of the adult necessarily be given effect to.

4.204 Another respondent considered that, if substitute decision-makers were required to apply additional principles in order to override the adult's views and wishes, it 'could prohibit the commonsense of the decision-maker [from coming] into play'.<sup>346</sup>

4.205 Disability Services Queensland also considered that it would be extremely difficult to set out any specific overriding considerations in the legislation.<sup>347</sup>

4.206 The Public Trustee commented that, in practical terms, General Principle 7(1) requires a substitute decision-maker to consult with the adult in order to understand the adult's preferences in relation to the decision.<sup>348</sup>

4.207 Queensland Alliance suggested that, at least in relation to adults with a mental illness, maximum participation and the wishes of the adult should be given paramount consideration.<sup>349</sup>

### ***Acting in the adult's interests or best interests***

4.208 There was a divergence in the submissions about whether a new general principle should be included in the legislation to require a substitute decision-maker to act either in the adult's 'interests' or, alternatively, in the adult's 'best interests'.

4.209 Several submissions supported the inclusion of a new principle requiring a substitute decision-maker to act in the adult's interests.<sup>350</sup>

4.210 The former Public Advocate supported a proposal for decisions to be made in the adult's interests only in 'circumstances when the adult's wishes cannot be the decisive factor'.<sup>351</sup> She noted, for example, that the legislation would need to provide for the situation where the adult's views were not known and cannot be ascertained:

It ought not be the views of the decision-maker which ultimately guide decision-making — rather, in these circumstances, it should be the adult's interests which guide decision-making. This may or may not accord with the decision-maker's own subjective views about which decision should be taken regarding the matter.

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346 Submission 27.

347 Submission 93.

348 Submission 90.

349 Submission 64.

350 Submissions 1A, 2, 3, 9, 13, 14, 91, 95.

351 Submission 91.

4.211 The Public Trustee considered that, if there was a conflict between the General Principles, priority should be given to the adult's interests:<sup>352</sup>

to the extent necessary priority should be given to the adult's interests — which ought include either as part of the concept of 'interests' or if necessary separately a General Principle compelling decisions which ensure the adult's protection from neglect abuse and exploitation.

4.212 One respondent, who did not support the inclusion of any new principles, nevertheless commented:<sup>353</sup>

if a new principle is sought to be included, acting in the 'adult's interests' is preferable to the 'best interests' approach, which is less focused on the adult and highly subjective ...

4.213 There was less support expressed in the submissions for the inclusion of a new General Principle based on the 'best interests' of the adult, with many respondents arguing strongly against the use of such a principle.<sup>354</sup>

4.214 Some respondents expressed concerns that the inclusion of a 'best interests' principle was paternalistic and risked imposing on the adult the values and beliefs of the substitute decision-maker.<sup>355</sup>

4.215 An advocate for people with disabilities argued that the 'best interests' test 'fails to promote the autonomy of adults, and is often used to deny adults a choice about matters'.<sup>356</sup>

4.216 The former Public Advocate commented:<sup>357</sup>

a paternalistic 'best interests' approach to decision-making is inappropriate and disrespectful of the rights of the adults for whom decisions are made. It allows irrelevant and subjective decision-making by substitute decision-makers according to their own values rather than the values and interests of the adults concerned. ... 'Best interests' has particular legal connotations and developed historically in the context of family/child law or welfare law. It is arguably inappropriate to equate decision-making for adults with decision-making for children, and adults with [impaired decision-making capacity] are arguably no longer regarded in the paternalistic manner that the welfare jurisdiction historically placed them, and specifically which the guardianship regime moved away from. Even if there is legislative modification, common and legal notions of best interests are likely to influence the way in which 'best interests' decision-making occurs by [substitute decision-makers]. It is noteworthy that despite the current [General Principles] not referring to a 'best interests' application, the

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352 Submission 90.

353 Submission 72.

354 Submissions 11, 20A, 56, 67, 72, 91; Forums C1, C3.

355 Submissions 11, 72, 91. See also Submission 20A.

356 Forum C3.

357 Submission 91.

Tribunal has referred to the Principles requiring decision-making in a person's best interests.

4.217 One respondent noted that a best interests requirement 'may serve to entrench further a belief that the professional people in one's life know best ... especially for people lacking appropriate support systems from family, community or external advocacy'.<sup>358</sup>

4.218 Another respondent considered that the use of 'best interests' as a concept in substitute decision-making would lead to less accountability of decision-makers, with a decision capable of being justified simply on the basis the decision was in the 'best interests' of the adult.<sup>359</sup>

4.219 However, a number of respondents supported the inclusion of a requirement to act in the adult's best interests.<sup>360</sup>

4.220 Queensland Advocacy Incorporated commented that General Principle 7(5) appears to constitute a best interests qualification, although it does not use those exact words. It suggested that the idea of acting in a person's best interests also appears to find qualified support in the United Nations Convention:<sup>361</sup>

Article 12(4) of the [Convention] requires participating states to ensure that all 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'.

Article 11 of the CRPD requires states to take all necessary measures to 'ensure the protection and safety of persons with disabilities in situations of risk ...'.

4.221 Queensland Advocacy Incorporated stated that 'best interests' is an objective standard:

acting in an adult's best interests is not to be confused with what is subjectively considered to be the right or proper thing. A decision based on the arbitrary values and impressions of the decision maker is not one made in the adult's best interests however well meaning. Too easily that can be a decision made in the decision-maker's own interests, whether it is described as being made in the adult's best interests or as being 'consistent with the adult's proper care and protection'.

Best interests is an objective standard.

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358 Submission 67.

359 Submission 11.

360 Submissions 1, 13, 15, 27, 90; Forum C8.

361 Submission 34A.

4.222 It therefore suggested that the General Principles should include a principle of best interest, which should read:

Any function or power performed under this Act must be done in the best interest of the person with impaired decision-making capacity.

4.223 Queensland Advocacy Incorporated also suggested that the legislation should define what is meant by acting in an adult's best interest:

The definition of what is considered to be in the best interest of the person should be included in the main body of the Act as the framework to clarify the practice in support of the principle of best interest:

A person will generally act in the best interest of the person when:

- the General Principles of the Act are applied;
- the Convention on the Rights of the Person with Disabilities is upheld; and
- the person or entity acts on behalf of the adult in the following ways:
  - with faithful partiality;
  - with minimal conflict of interest;
  - with primary concern for meeting the person's fundamental needs;
  - with emphasis and vigour;
  - with protection from neglect, abuse or exploitation;
  - with promotion and defence of their well being, welfare and justice;
  - with views of the person and/or people close to the person taken into account;
  - with all circumstances considered; and
  - with mindfulness of the vulnerability of the person and the need to do no harm.

4.224 It suggested that these principles should apply to both guardians and administrators.

4.225 The Public Trustee strongly supported the inclusion of a principle to the effect that decisions need to be made in an adult's best interests.<sup>362</sup>

The unfortunate experience of the Public Trustee is that as administrator there has been referred to him many hundreds of cases of financial abuse of adults with impaired capacity — often by carers or members of the adult's family. For that reason the Public Trustee does see good reason to have incorporated a 'best interests principle'.

4.226 Disability Services Queensland questioned whether 'there is much difference between acting in an adult's interest and acting in their best interests. Both would seem to carry a duty of care'.<sup>363</sup>

4.227 Several respondents addressed the issue of whether and, if so, how the term 'best interests' should be defined if it was included in the General Principles.<sup>364</sup>

4.228 Some submissions considered that best interests should not be defined as it needed to be applied flexibly, on a case by case basis.<sup>365</sup>

4.229 One respondent argued it was inappropriate to attempt to define best interests as it 'was impossible to legislate common sense'.<sup>366</sup>

4.230 Another respondent suggested best interests could 'probably be defined or inferred from any previously known views of the adult, and through consultation with his or her support network and/or carers'.<sup>367</sup>

4.231 However, other respondents, including Alzheimer's Australia (Qld) and Disability Services Queensland, did not consider it appropriate for any of the General Principles to be given express priority over another.<sup>368</sup>

#### ***Other comments on General Principle 7***

4.232 The Public Trustee commented that the second part of General Principle 7(1), which refers to an adult's right to participate in the development of policies, programs and services for people with impaired capacity, to be 'a little elusive in terms of practical application'.<sup>369</sup>

4.233 Disability Services Queensland suggested that General Principle 7(3)(c) be amended to refer to the adult's rights *and opportunities*.<sup>370</sup>

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363 Submission 93.

364 Submissions 9, 14, 27, 90, 91, 93, 162.

365 Submissions 68, 93.

366 Submission 27.

367 Submission 9.

368 Submissions 9, 14, 27, 93.

369 Submission 90.

370 Submission 93.

General Principle 7(3)(c) could be slightly amended by inserting ‘opportunities’ after ‘the adult’s rights’. The amended General Principle 7(3)(c) would then read:

So, for example — 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 and opportunities.

This would reflect section 19(3)(b) of the [*Disability Services Act 2006* (Qld)].

*Opportunities* and *rights* are different and distinct and it is important to acknowledge the former as well as the latter. By doing so, recognition is given to a person’s rights (which are existing) as well as the opportunities (not yet existing but which may arise in the future). (emphasis in original)

4.234 The Public Trustee also commented on General Principle 7(3)(c), suggesting that it should be separated as a stand-alone principle. He also queried how this principle is intended to be applied:<sup>371</sup>

does 3(c) apprehend that the decision itself be arrived at in a way which is least restrictive or should the decision result in a state of affairs which are least restrictive?

The Public Trustee’s approach to date has been to ensure as administrator for adults that both the decision making process and the decision that is arrived at are approached in a way which is least restrictive.

## The Commission’s view

### ***New General Principles 7 and 8 — majority view***<sup>372</sup>

#### *New General Principle 7: Performance of functions or powers*

4.235 As noted earlier in this chapter, the current General Principle 7 imposes two limitations on a person or other entity that is performing a function or exercising a power under the Act:

- General Principle 7(3)(c) requires the function to be performed, or the power to be exercised, in the way least restrictive of the adult’s rights; and
- General Principle 7(5) requires the function to be performed, or the power to be exercised, in a way consistent with the adult’s proper care and protection.

4.236 Because General Principle 7(5) is introduced by the word ‘however’, its function within the General Principles as presently drafted makes it the paramount principle. Although the application of other principles might support a particular decision, the decision that must ultimately be made is one that is consistent with

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<sup>371</sup> Submission 90.

<sup>372</sup> This is the view of Justice Atkinson, Mr Bond SC, Mr Herd and Ms Treston. The minority view of Associate Professor White is set out below commencing at [4.258].

the adult's proper care and protection. This effect of General Principle 7(5) has been criticised in the submissions as allowing an adult's views and wishes to be too readily overridden. The Commission agrees with that criticism. The Commission is also concerned that General Principle 7(5) is expressed in paternalistic language that is not appropriate to adults with impaired capacity.

4.237 A majority of the Commission is of the view that there should be a new General Principle 7,<sup>373</sup> which should provide for the way in which functions and powers under the Act are to be performed and exercised. The new principle should incorporate the existing General Principle 7(3)(c), as well as a new statement that replaces the current General Principle 7(5). However, the new General Principle 7 should not give a preference to either part of the principle. Further, because the Commission has earlier recommended that the *Guardianship and Administration Act 2000* (Qld) should require a person making a decision for an adult on an informal basis to apply the General Principles, that requirement should also be reflected in the new General Principle 7 that is included in the *Guardianship and Administration Act 2000* (Qld).<sup>374</sup>

4.238 The part of the new General Principle 7 that replaces the current General Principle 7(5) should be expressed in positive language that reflects the nature of the guardianship system. As explained in the Commission's 2007 report on confidentiality, the primary focus of the guardianship system is on promoting and safeguarding the rights and interests of adults with impaired capacity.<sup>375</sup> In the context of the General Principles, the Commission considers that both aspects of the new principle should also refer to an adult's 'opportunities'.<sup>376</sup>

4.239 The new General Principle 7 should therefore be expressed in the following terms:

**7 Performance of functions or powers**

A person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>377</sup> must do so—

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
- (b) in the way least restrictive of the adult's rights, interests and opportunities.

373 Later in this chapter, the Commission has recommended that the current General Principles 8, 9 and 11 be relocated as new General Principles 4, 5 and 6 respectively.

374 The reference to a person making a decision for an adult on an informal basis is not required in the General Principles that are included in the *Powers of Attorney Act 1998* (Qld).

375 See Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [3.58]–[3.80].

376 See the suggestion by Disability Services Queensland at [4.233] above in relation to General Principle 7(3)(c).

377 The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

4.240 The difference between the new and the old principles is not simply that the new General Principle 7 uses more contemporary language — ‘safeguards’ rather than ‘protects’. The fundamental difference is a shift in what is required to be safeguarded or protected. Under the current General Principle 7(5), it is the adult who is to be protected. Under the new General Principle 7, it is the adult’s rights, interests and opportunities that are to be promoted and safeguarded. The reference to an adult’s ‘rights, interests and opportunities’ necessarily takes into account the principles set out in the new General Principle 2(2). This gives the new General Principle 7 a strong human rights focus, and breaks completely with the ‘best interests’ approach reflected in the current General Principle 7(5).

*New General Principle 8: Structured decision-making*

4.241 A majority of the Commission is of the view that it is more likely that substitute decision-makers will apply the General Principles if the principles set out a logical and comprehensible structure in relation to decision-making. Accordingly, the General Principles should include a new General Principle 8 that provides a clear narrative for decision-making. The new principle should incorporate those parts of the current General Principle 7 that deal directly with decision-making. The balance of the current General Principle 7, which deals with an adult’s participation in decision-making, should form a new General Principle 9. The separation of these factors will provide two simpler principles, and will give more meaningful guidance to substitute decision-makers and to other persons or entities exercising power under the legislation or making decisions on an informal basis for adults with impaired capacity.

4.242 The new General Principle 8 should provide for a staged approach to decision-making and should state expressly that, in applying General Principle 7, a relevant person or entity must adopt the approach set out in the principle. This is not to give a preference to any particular step in the process, but to ensure that the person or entity takes *all* the relevant factors into account.

4.243 The first matter to be recognised and taken into account under the new General Principle 8 should be the importance of preserving, to the greatest extent practicable, an adult’s right to make his or her own decisions. This is currently General Principle 7(2). However, the significance of this principle in preserving an adult’s autonomy to the maximum extent possible requires that it be elevated within the new General Principle 8.

4.244 The second matter to be recognised and taken into account should be the importance of using the principle of substituted judgment (currently General Principle 7(4)). However, to assist people to understand what is meant by the principle of substituted judgment, the new General Principle 8(3) should refer to ‘views and wishes expressed when the adult had capacity’, rather than to ‘the adult’s previously expressed views and wishes’ (which is the wording currently used in General Principle 7(4)).

4.245 The third matter to be recognised and taken into account should be any other views and wishes expressed by the adult. Although this is similar to the

current requirement in General Principle 7(3)(b), the reference to ‘*any other* views and wishes expressed by the adult’ will ensure that this principle applies to both:

- views and wishes currently expressed by an adult with impaired capacity; and
- views and wishes expressed previously by an adult when he or she had impaired capacity.

4.246 The flexibility of this requirement is important in ensuring that appropriate account can be taken of the views and wishes of an adult who has never had capacity and who may no longer be capable of expressing his or her views and wishes. As the principle of substituted judgment will not apply to such an adult, it is important that the third consideration is not confined to an adult’s current views and wishes. It may also apply where an adult who has previously had, but no longer has, capacity expresses views and wishes that may not be the same as views and wishes expressed while the adult had capacity.

4.247 The fourth matter to be recognised and taken into account should be any other consideration that the General Principles require the person or other entity to recognise and take into account. This requirement is intended to serve as a reminder that *all* of the considerations arising under the General Principles must be taken into account. This recognises that, while an adult’s views and wishes are extremely important, they will not necessarily be the sole consideration. For example, an adult, while he or she had capacity, may have been vulnerable to being exploited financially. Although that may have been the adult’s pattern of decision-making and would be still if the adult had capacity, other relevant factors for a person or entity exercising power or making a decision for the adult will be the principles in the new General Principle 2(2) and the considerations arising under the new General Principle 7.

4.248 Finally, the new General Principle 8 should state that, once the person or other entity has recognised and taken into account the matters mentioned in these four steps, the person or entity may perform the function, exercise the power, or make the decision.

4.249 In light of these matters, the new General Principle 8 should be expressed in the following terms:

#### **8 Structured decision-making**

- (1) In applying General Principle 7, a person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>378</sup> must adopt the following approach.
- (2) First, the person or other entity must recognise and take into account the importance of preserving, to the greatest extent practicable, an adult’s right to make his or her own decisions.

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The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words ‘or a person in making a decision for an adult on an informal basis’ and insert the words in square brackets.

- (3) Second, the person or other entity must use the principle of substituted judgment, so that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views and wishes would be.
- (4) Third, the person or other entity must recognise and take into account any other views and wishes expressed by the adult.
- (5) Fourth, the person or other entity must recognise and take into account any other consideration that the General Principles require the person or other entity to recognise and take into account.
- (6) Fifth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (5), the person or other entity may perform the function, exercise the power, or make the decision.

4.250 The members comprising the majority of the Commission have given careful consideration to the relationship between subsections (3), (4) and (5) of the new General Principle 8 and, in particular, to the issues raised about those matters by Associate Professor White in his minority view about the new General Principles 7 and 8. The members of the majority are strongly of the view that the requirement in the new General Principle 8 should be to recognise and take into account all three factors, but that the principle should not provide, as suggested by Associate Professor White in his General Principle 7,<sup>379</sup> that the person or entity in exercising a power for a matter for an adult must take as the basis of its consideration the importance of using the principle of substituted judgment.

4.251 The majority disagrees with the approach taken in Associate Professor White's minority view for three main reasons.

4.252 First, the majority disagrees with the fact that, in the minority view, General Principle 7 elevates the principle of substituted judgment above the requirement to take into account any other views and wishes expressed by the adult. The majority also notes that the minority view defines the principle of substituted judgment in General Principle 7(3)(a) to mean that power should be exercised in a way that *gives effect* to what the adult's views and wishes would be if the adult had capacity.<sup>380</sup>

4.253 The majority considers that decision-making is too nuanced to provide, in effect, that the principle of substituted judgment should be given greater consideration than other views and wishes expressed by the adult. Given the disparate types of decisions to which the General Principles apply, the majority is strongly of the view that the new General Principle 8 should require both types of views and wishes to be taken into account, but without giving a preference to the principle of substituted judgment. For some decisions, views and wishes expressed by the adult while he or she had capacity will undoubtedly carry more

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379 General Principle 7 of the minority is set out at [4.261] below.

380 Cf the minority's General Principle 8(2)(a), which uses a different definition of 'substituted judgment'.

weight than views and wishes expressed while the adult has impaired capacity. For other decisions, however, and in particular decisions relating to the adult's lifestyle, more recently expressed views and wishes may carry more weight, even though they have been expressed while the adult has impaired capacity.

4.254 By framing the General Principles in a way that requires greater consideration to be given to the principle of substituted judgment than to other views and wishes of the adult, the minority recommendation could in fact operate to reduce an adult's autonomy, rather than enhance it. The majority view is designed to enhance the dignity and autonomy of the adult.

4.255 The majority also considers that subsections (3) to (5) of its new General Principle 8 are more consistent than the minority view with the duty of guardians and administrators under section 35 of the *Guardianship and Administration Act 2000* (Qld) and with the duty of attorneys under section 66 of the *Powers of Attorney Act 1998* (Qld).<sup>381</sup>

4.256 Second, the majority considers that the way in which the minority's General Principle 7 gives precedence to the principle of substituted judgment does not assist substitute decision-makers to resolve how account is to be taken of the adult's other views and wishes if those views and wishes conflict with the application of the principle of substituted judgment. General Principle 7(3) of the minority view requires a person or other entity to take as the basis of its consideration the importance of using the principle of substituted judgment and also to take into account any other views and wishes expressed by the adult. Although it is clear that, in the minority view, the principle of substituted judgment is to be the primary consideration, the minority view does not articulate the circumstances in which the principle of substituted judgment should cease to be the primary consideration — that is, when it should be displaced. The majority considers that this creates an unresolvable tension in the minority General Principle 7. This problem does not arise under the majority's General Principle 8, as it does not give a preference to the principle of substituted judgment.

4.257 Third, the majority considers that the structure of its new General Principle 8 will be of greater assistance to substitute decision-makers than the approach outlined in the minority view of Associate Professor White. The minority view sets out different approaches for making substitute decisions and for exercising other power under the legislation. The majority considers that the subtlety in the difference between the two approaches is likely to be confusing for lay decision-makers. In contrast, because the majority view does not elevate the principle of substituted judgment above the requirement to take into account any other views and wishes expressed by the adult, it has been possible for the new General Principle 8 recommended by the majority to provide a single and straightforward approach that can be applied by all persons and entities, regardless of whether they are exercising power for a matter for an adult (that is, making a substitute decision about a personal or financial matter) or exercising another power under the legislation (for example, making an appointment of a guardian or an administrator).

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These duties are explained at [4.2] above.

**New General Principles 7 and 8 — minority view**

4.258 Associate Professor White agrees with much of the approach taken by the majority in relation to the new General Principles 7 and 8, including on the basic issue of the need for reform. In particular, he agrees with the reframing of what is presently General Principle 7(5) to focus on promoting and safeguarding an adult's rights, interests and opportunities. Associate Professor White has a different view, however, as to how some aspects of substitute decision-making should be approached.

4.259 Traditionally, there have been two major approaches to substitute decision-making: the best interests test and the substituted judgment test.<sup>382</sup> However, increasing weight has also been given to a third approach, namely giving respect to the views and wishes of the adult with impaired capacity.<sup>383</sup> These three approaches are reflected in the current General Principles and also, to some extent, in the majority's new General Principle 7 and 8. The new General Principle 7(a) requires that a person or other entity in performing a function or exercising a power 'must do so in a way that promotes and safeguards the adult's rights, interests and opportunities'. Associate Professor White considers that this principle includes the safeguarding element of the best interests approach, although the proposed principle is wider in scope and better reflects the overall objectives of the guardianship legislation. The new General Principle 8(3) requires a decision-maker to use the principle of substituted judgment and to recognise and take into account what the views and wishes of the adult would be based on the views and wishes expressed by the adult when he or she had capacity. The new General Principle 8(4) also requires the views and wishes expressed by an adult when he or she had impaired capacity to be recognised and taken into account.

4.260 How these decision-making standards interact in the General Principles reflects the way in which the guardianship legislation seeks to balance autonomy and the safeguarding element of guardianship law. Autonomy is reflected in the substituted judgment approach which seeks to make the decision the adult would have if he or she had capacity. In this context, autonomy can also be considered to include respect for the views and wishes expressed by an adult while he or she has impaired capacity.<sup>384</sup> While the reform recommended by the majority shifts the balance more towards autonomy than is presently the case, Associate Professor White considers that the policy position presented below gives greater recognition to autonomy.

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382 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 41–3.

383 For example, United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4) and, in particular, the reference to respecting the 'rights, will and preferences of the person'. See also J Herring, 'Entering the Fog: On the Borderlines of Mental Capacity' (2008) *Indiana Law Journal* 1619.

384 Although it is noted that there are different views on what is meant by 'autonomy'. Herring does not consider giving respect to the views and wishes of the adult to be required by autonomy but rather by other considerations such as the right to dignity and liberty: J Herring, 'Entering the Fog: On the Borderlines of Mental Capacity' (2008) *Indiana Law Journal* 1619, 1631–6.

*Proposed changes to General Principles 7 and 8*

4.261 There are many ways in which this preferred policy position could be implemented. For the purposes of this Report, it is considered that this position is best explained by working with and altering the model proposed by the majority. On that basis, Associate Professor White considers that the new General Principles 7 and 8 should be:

**7 Performance of functions or powers**

- (1) A person or other entity in exercising a power for a matter for an adult under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>385</sup> must do so—
  - (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) in the way least restrictive of the adult's rights, interests and opportunities.
- (2) In applying General Principle 7(1) in exercising a power for a matter for an adult under this Act, or in making a decision for an adult on an informal basis, [or an enduring document,]<sup>386</sup> a person or other entity must recognise an adult's right to make his or her own decision if the adult is able to exercise, or be supported to exercise, his or her capacity in relation to the decision.
- (3) When an adult is not able to make his or her own decision in relation to the matter, in applying General Principle 7(1) in exercising a power for a matter for an adult under this Act, or in making a decision for an adult on an informal basis, [or an enduring document,]<sup>387</sup> a person or other entity must—
  - (a) take as the basis of its consideration the importance of using the principle of substituted judgment, which requires that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must give effect to what the person or other entity considers the adult's views and wishes would be; and
  - (b) recognise and take into account any other views and wishes expressed by the adult.

**8 Performance of functions or other powers**

- (1) A person or other entity in performing a function or exercising a power under this Act other than a power mentioned in General Principle 7 must do so—

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385 The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

386 Ibid.

387 Ibid.

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) in the way least restrictive of the adult's rights, interests and opportunities.
- (2) In applying General Principle 8(1) in performing a function or exercising a power under this Act other than a power mentioned in General Principle 7, a person or other entity must—
  - (a) use the principle of substituted judgment, so that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views and wishes would be; and
  - (b) recognise and take into account any other views and wishes expressed by the adult.

4.262 The major changes proposed by Associate Professor White to the General Principles 7 and 8 recommended by the majority are:

- strengthening recognition of an adult's right to make his or her own decisions where he or she has capacity to do so;
- requiring a substitute decision-maker to take as the basis of its consideration the importance of using the principle of substituted judgment where an adult cannot make his or her own decisions;
- relocating references to the adult's right to make his or her own decision, the principle of substituted judgment, and the views and wishes of adults with impaired capacity from the majority's General Principle 8(2), (3) and (4) to General Principles 7(2), 7(3) and 8(2); and
- adding a new General Principle so that substitute decision-making and other decisions under the guardianship legislation can be dealt with in separate General Principles.

*Strengthening recognition of an adult's right to make his or her own decisions*

4.263 As part of respect for autonomy, an adult should be able to make decisions where he or she has capacity to do so. The majority recognises this in General Principle 8(2) in requiring that, as the first consideration, a decision-maker must recognise and take into account the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions.

4.264 Associate Professor White considers that recognition of this right is strengthened by the proposed General Principle 7 in two ways. The first is that General Principle 7(2) requires a substitute decision-maker to recognise an adult's right to make his or her own decisions, rather than only recognise and take into account the importance of preserving that right to the greatest extent practicable. The second is that General Principle 7(3), which sets out other criteria for decision-

making, expressly applies only to those decisions that the adult is *not* able to make himself or herself. The effect of these changes is that they make clear that, where an adult is able to exercise capacity for a matter, decision-making should occur in accordance with that exercise of capacity, rather than the adult's decision being one of a number of considerations to take into account.

*Substituted judgment as the basis for consideration where an adult cannot make his or her own decision*

4.265 Where an adult is not able, and not able to be supported, to make his or her own decisions, it is necessary that other criteria guide decision-making. As noted above, the majority's General Principle 7 and 8 establish criteria and a decision-making process that give greater weight to autonomy than is presently the case. However, Associate Professor White considers that the proposed General Principle 7(a) of the majority constrains decision-making so that it *must* be exercised 'in a way that promotes and safeguards the adult's rights, interests and opportunities'. By contrast, the proposed General Principle 8(3) and (4) only requires that substituted judgment and the adult's views and wishes expressed when he or she had impaired capacity, as well as other factors, be *taken into account*.

4.266 Associate Professor White considers that greater weight will be given to autonomy if substitute decision-makers are required to take the principle of substituted judgment as their starting point when making decisions. A substitute decision-maker should seek to make the decision that the adult would have made if he or she had capacity at the time when the decision needs to be made based on the previous views, wishes and conduct of the adult when he or she had capacity. This requirement to take substituted judgment as the starting point is given effect to in General Principle 7(3)(a) by requiring substitute decision-makers to take as the basis of their consideration the importance of using the principle of substituted judgment.<sup>388</sup> This concept could also be given effect to by requiring substitute decision-makers to give primary consideration to the principle.

4.267 Applying the principle of substituted judgment will not always be possible and this is recognised in General Principle 7(3)(a) by the words: 'if it is reasonably practicable to work this out from the views and wishes expressed by the adult when he or she had capacity'. First, a substitute decision-maker may not be able to determine with sufficient confidence what the adult would have decided. In which case, having considered the principle of substituted judgment but found it to be not applicable, a substitute decision-maker would rely on the other guidance provided by General Principle 7, including taking into account the views and wishes of the adult with impaired capacity, and the other General Principles. Secondly, many adults with impaired capacity have never had capacity and so the principle of substituted judgment cannot be applied. Again, a substitute decision-maker would need to apply the General Principles including taking into account the views and wishes of the adult with impaired capacity. Nevertheless, where substituted judgment can be applied, the importance of using this principle should be the basis of consideration for a substitute decision-maker.

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This approach is based on s 104 of the *Guardianship and Administration Act 2000* (Qld).

4.268 Associate Professor White does not consider that substituted judgment should be the only criterion which should guide substitute decision-makers. There may be circumstances where the other rights, interests and opportunities of an adult warrant not deciding as the adult would have. This could arise, for example, where an adult with impaired capacity expresses strongly held views contrary to their previously stated wishes.<sup>389</sup> The way in which a decision-maker may seek to balance these issues will depend on a range of factors. They would include the nature of the matter to be decided, the consequences that may flow from making a particular decision, the nature and type of evidence that is being relied upon in applying the substituted judgment principle and the strength of the views and wishes being expressed by the adult with impaired capacity. However, in balancing these factors under the minority view, substitute decision-makers are given guidance as to how they should strike the balance between autonomy and the safeguarding element of guardianship law.

4.269 Accordingly, Associate Professor White considers that substitute decision-makers must take as the basis of their consideration the importance of using the principle of substituted judgment, but that this principle is not determinative. This approach recognises the importance of the safeguarding element of guardianship law and autonomy (the notion of autonomy here is that which is represented by the views and wishes of an adult with impaired capacity) in that they may ultimately trump autonomy as represented by substituted judgment (that is, the autonomy of the adult when he or she had capacity). But Associate Professor White considers that this approach shifts that balance more towards autonomy in its latter sense by nominating substituted judgment as the basis for consideration by a substitute decision-maker.

4.270 Associate Professor White notes the observation by the majority that the minority approach creates a tension for decision-makers. However, he considers that a tension arises regardless of whether one factor is given greater weight than others. The nature of decision-making involves weighing various factors which can conflict and this occurs even where those factors are assigned the same importance.

*Relocation of references to the adult's right to make his or her own decision, substituted judgment and views and wishes of adults with impaired capacity*

4.271 Associate Professor White considers that the references to the adult's right to make his or her own decisions, the principle of substituted judgment and the views and wishes of adults with impaired capacity in the majority's General Principle 8(2), (3) and (4) should be relocated to General Principle 7(2) and (3).

4.272 In his view, this will give greater weight to autonomy in two ways. The first is that locating together the three approaches to substitute decision-making used when an adult has impaired capacity (promoting and safeguarding rights, interests and opportunities; applying the principle of substituted judgment; and taking into

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It is noted though, that the proper application of the substituted judgment approach does not require views and wishes expressed when the adult had capacity to be binding or frozen in time. An adult with capacity notionally making a decision about himself or herself at a time when he or she lacks capacity would undoubtedly have regard to his or her presently expressed views and wishes.

account the adult's views and wishes expressed when he or she has impaired capacity) will ensure that decision-makers give adequate consideration to each of them. On the majority view, decision-makers must act in accordance with General Principle 7(a) in promoting and safeguarding the adult's rights, interests and opportunities, and then later in a subsequent General Principle (General Principle 8(3) and (4)) decision-makers must take into account substituted judgment and the adult's views and wishes expressed when he or she had impaired capacity. These latter two considerations reflect different aspects of autonomy. This relocation of all three approaches together ensures they are all considered by decision-makers and that undue weight is not given to the General Principle 7(a).

4.273 The second albeit related benefit of the proposed relocation is that it strengthens the role played by the adult's right to make his or her own decisions, the principle of substituted judgment and the views and wishes of adults with impaired capacity in determining how an adult's rights, interests and opportunities are promoted and safeguarded. This relocation adds weight to the requirement of both the majority and minority views that these factors need to be considered 'in applying' the relevant part of General Principle 7. Associate Professor White also considers that conceptualising those factors as part of promoting and safeguarding an adult's rights, interests and opportunities means that the minority view sits comfortably with the duty of guardians and administrators under section 35 of the *Guardianship and Administration Act 2000* (Qld) and with the duty of attorneys under section 66 of the *Powers of Attorney Act 1998* (Qld).<sup>390</sup>

4.274 Accordingly, this relocation makes clear to a substitute decision-maker that an adult's rights, interests and opportunities are promoted and safeguarded best by respecting the right of an adult to make his or her own decision where he or she has capacity to do so. It also requires that using the principle of substituted judgment be considered as part of promoting and safeguarding an adult's rights, interests and opportunities. This is an express recognition that applying this principle is part of achieving those goals. This is a deliberate step away from the paternalistic application of the best interests test which looks only at objective factors and instead recognises that giving effect to what the adult would have done is part of promoting and safeguarding an adult's rights, interests and opportunities. The same point can be made in relation to the way in which a decision-maker is required to take into account the views and wishes expressed by an adult when he or she had impaired capacity as part of General Principle 7(1). This recognises the important role of the adult in determining, even when he or she has impaired capacity, how best to advance his or her own rights, interests and opportunities and so promotes the autonomy of the adult.

#### *Separate General Principles for different types of decision-making*

4.275 Associate Professor White considers that substitute decision-making is different from performing functions and exercising other powers under the guardianship legislation. Substitute decision-making involves decisions of the type that an adult is entitled to make for himself or herself if he or she had capacity. On the other hand, performing functions and exercising other powers under the

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These duties are explained at [4.2] above.

guardianship legislation involves making decisions that an adult with capacity is not able to make for himself or herself.

4.276 Accordingly, given the different nature of these two types of decision-making, Associate Professor White considers that there should be two similar but separate General Principles: one that deals with substitute decision-making (proposed General Principle 7) and another that deals with the performance of functions and the exercise of other powers (proposed General Principle 8). The minority view set out above has largely focused on substitute decision-making. The proposed General Principle 8 will differ from General Principle 7 in two main ways.

4.277 The first is that General Principle 7(2), which recognises an adult's right to make his or her own decisions if the adult is able to exercise, or be supported to exercise, his or her capacity, is not replicated in General Principle 8. The decisions to which General Principle 8 applies are not ones that an adult with capacity is able to make in relation to himself or herself. Accordingly, there is no need to recognise such a right in General Principle 8.

4.278 The second difference in General Principle 8 is the way in which the principle of substituted judgment is to be used. This principle is designed for substitute decision-making where it seeks to make the decision the adult would have if he or she had capacity. This approach sits less comfortably with decision-making under functions and other powers that do not involve substitute decision-making. Accordingly, the principle of substituted judgment will not be basis for consideration in General Principle 8. It will, however, be taken into account by a decision-maker as it is appropriate to consider what the adult would have wanted even when making these other types of decisions. For example, when appointing a guardian, it is appropriate that the Tribunal consider who the adult would have wanted to be appointed.

4.279 Associate Professor White also considers that separate principles for these two different types of decision-making will assist with the General Principles' clarity. For substitute decision-makers, it will be clear which principle they are to apply. While some of the statutory guardianship bodies will be required to use different principles depending whether they are acting as a substitute decision-maker or performing functions or exercising other powers, their familiarity with the legislation will mean they are able to do this.

#### ***New General Principle 9: Maximising an adult's participation in decision-making***

4.280 The Commission is of the unanimous view that those parts of the current General Principle 7 that deal with an adult's participation in decision-making should form a new General Principle 9.

4.281 The new General Principle 9 should incorporate the first part of the current General Principle 7(1), which requires that an adult's right to participate, to the

greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.<sup>391</sup>

4.282 It should also incorporate the other parts of the current General Principle 7 that flow from the adult's right to participate — namely, the matters currently mentioned in General Principle 7(3)(a), (b) and (6). However, the requirement in the current General Principle 7(3)(a) to give an adult any necessary support and access to information to enable the adult to participate in decisions should be extended so that it also requires this support and information to be given to enable the adult to *make* decisions.

4.283 In light of these matters, the new General Principle 9 should be expressed in the following terms:

**9 Maximising an adult's participation in decision-making**

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
- (2) An adult must be given any necessary support, and access to information, to enable the adult to make or participate in decisions affecting the adult's life.
- (3) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, or in making a decision for an adult on an informal basis,<sup>392</sup> must seek the adult's views and wishes.
- (4) An adult's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

## **GENERAL PRINCIPLE 8: MAINTENANCE OF EXISTING SUPPORTIVE RELATIONSHIPS**

### **The law in Queensland**

4.284 General Principle 8 of the guardianship legislation provides that the 'importance of maintaining the adult's existing supportive relationships must be taken into account'.<sup>393</sup> In *Re CRS*,<sup>394</sup> the Tribunal suggested that this principle is 'one of the most important General Principles specified in the Act'.<sup>395</sup>

<sup>391</sup> The second part of the current General Principle 7(1) has been incorporated as the new General Principle 3(c).

<sup>392</sup> The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or in making a decision for an adult on an informal basis'.

<sup>393</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 8; *Powers of Attorney Act 1998* (Qld) sch 1 s 8.

<sup>394</sup> [2006] QGAAT 57.

<sup>395</sup> *Ibid* [90].

4.285 The guardianship legislation also provides that, if there are two or more guardians, administrators or attorneys for an adult, they 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'.<sup>396</sup> If an adult has an administrator for financial decisions but personal decisions are being made informally, as is often the case, these provisions do not require the administrator to consult with the persons who are making personal decisions for the adult.

4.286 Further, the guardianship legislation does not specifically require substitute decision-makers to consult with members of the adult's family or support network.

### The law in other jurisdictions

4.287 In contrast to the position in Queensland, the guardianship legislation in some jurisdictions includes a specific requirement for substitute decision-makers to consult with other persons.

4.288 The *Guardianship and Management of Property Act 1991* (ACT) provides that a person exercising a function under the Act (the 'decision-makers') must, before making a decision, consult with each carer of the protected person.<sup>397</sup> However, the legislation also provides that the decision-maker must not consult with a carer if the consultation would, in the decision-maker's opinion, adversely affect the protected person's interests.<sup>398</sup>

4.289 The *Powers of Attorney Act 2006* (ACT) includes a different requirement for an attorney under an enduring power of attorney. General Principle 1.1 provides:

#### 1.1 Access to family members and relatives

- (1) An individual's wish and need to have access to family members and relatives, and for them to have access to the individual, must be recognised and taken into account.
- (2) An individual's wish to involve family members and relatives in decisions affecting the individual's life, property, health and finance must be recognised and taken into account.

4.290 An obligation to consult is included in the general principles of the guardianship legislation in Scotland. Under the *Adults with Incapacity (Scotland) Act 2000* (Scotland), account is to be taken, in so far as it is reasonable and practicable to do so, of the views of:<sup>399</sup>

<sup>396</sup> *Guardianship and Administration Act 2000* (Qld) s 40; *Powers of Attorney Act 1998* (Qld) s 79.

<sup>397</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(3).

<sup>398</sup> *Guardianship and Management of Property Act 1991* (ACT) s 4(4).

<sup>399</sup> *Adults with Incapacity (Scotland) Act 2000* (Scotland) s 1(4)(b)–(d). Under s 1(4)(c)(ii), the decision-maker is also to consult with any person whom the sheriff has directed to be consulted.

- the nearest relative of the adult;
- the primary carer of the adult;
- any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and
- any person who appears to have an interest in the adult's welfare or in the proposed intervention, if the person's views have been made known.

4.291 The legislation in England also provides for consultation in determining what is in the adult's best interests.<sup>400</sup>

### Discussion Paper

4.292 In the Discussion Paper, the Commission commented that consultation with members of the adult's support network or the adult's carers may provide valuable information and perspectives to help with decision-making for the adult. The Commission observed, for example, that consultation might help a decision-maker to ascertain the adult's views and wishes or to consider the impact of decisions on the adult's family members or carers.<sup>401</sup>

4.293 The Commission suggested that consultation might also take into account the significant role that the adult's support network or the adult's carers may play in the adult's life. It noted, in particular, that the primary responsibility for assistance and support for an adult often rests with his or her family and that, in many situations, the views of the adult's family may beneficially inform the decision-making process. The Commission recognised, however, that this might not always be the case, particularly where the adult and his or her family do not have a close relationship.<sup>402</sup>

4.294 The Commission suggested that it was difficult to see how a substitute decision-maker could, in practice, apply General Principle 8 without consulting with the adult's family and support network.<sup>403</sup>

4.295 It also suggested that the inclusion in the General Principles of a requirement for decision-makers to consult with the adult's carers would also be consistent with the Queensland Government's *Carer Recognition Policy*. It noted, in that regard, that that policy provides a set of key principles for adoption by

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400 *Mental Capacity Act 2005* (Eng) s 4(7). The decision-maker is to consult with anyone who is engaged in caring for the adult or is interested in his or her welfare, anyone named by the adult as someone to be consulted on the matter, an attorney under a 'lasting power of attorney' granted by the adult and any 'deputy' appointed by the court for the adult under that section.

401 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.85].

402 *Ibid* [4.86].

403 *Ibid* [4.84].

Queensland Government departments and agencies, which recognise the important role of carers.<sup>404</sup>

4.296 Depending on how the requirement was expressed, the Commission suggested that a requirement in the General Principles to take into account the views of other people could undermine respect for the adult's autonomy. Similarly, it observed that a requirement to take account of the impact of decisions on members of the adult's family, for example, might inappropriately shift emphasis away from the adult's views and interests.<sup>405</sup>

4.297 The Commission also suggested that it might be more appropriate for a requirement in relation to consultation to be dealt with as a specific duty or obligation that applies to certain decision-makers or in particular situations.<sup>406</sup>

4.298 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>407</sup>

- Should the General Principles require consultation with any one or more of the following:
  - (a) members of the adult's family;
  - (b) members of the adult's support network (ie members of the adult's family and close friends of the adult);
  - (c) the adult's primary carer/s;
  - (d) an attorney (under an enduring power of attorney), a guardian or an administrator for the adult;
  - (e) any person who appears to have an interest in the adult's welfare or in the proposed decision;
  - (f) a person with whom the adult resides; or
  - (g) any other person?
- If so, in what circumstances should the requirement to consult apply (for example, should it apply only when substitute decisions are being made, should it also apply to Tribunal determinations, or should it apply only in certain circumstances, such as when determining what the adult's views and wishes would be)?

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404 Ibid [4.87], referring to Queensland Government, *Carer Recognition Policy* (February 2007) 3.

405 Ibid [4.88].

406 Ibid [4.55].

407 Ibid 61–2.

- If consultation is required, should that requirement be subject to any exceptions (for example, if consultation would adversely affect the adult's interests)?

## Submissions

### **General Principle 8**

4.299 The Public Trustee considered that there was merit in retaining General Principle 8, although he referred to the tension that can arise when it is necessary, as administrator, to take action against a member of the adult's support network who has financially abused the adult:<sup>408</sup>

There is some merit in retention of a principle which speaks to the maintenance of the adult's existing supportive relationships. In practical terms it is to this general principle that administrators refer in respect of a need to consult with family and carers.

The general principle however is narrower in purport requiring only that in decision making there is a need to maintain those relationships.

There is some contention on occasion in respect of reconciling this general principle with others — particularly where, for example, as administrator the Public Trustee agitates for a person with a disability in a claim under Part 4 of the *Succession Act 1981* (family provisions claim) which has at its heart the capacity to disturb existing supportive relationships. Clearer is of course the tension that might arise when allegations are made and investigated by an administrator as to financial abuse at the hands of the adult's existing supportive network (or at least one member of that network).

Apart from the call for full and effective participation and inclusion in society and respect for the individual and the individual's autonomy and dignity (Article 3 General Principles (a) and (c)) the Convention is relatively silent in respect of an analogous principle.

4.300 The Endeavour Foundation considered that the expression 'existing supportive relationships', which is used in General Principle 8, is too vague and generalised to be useful. It suggested that the General Principles should define who is to be considered as falling within that expression and who should be excluded from consideration.<sup>409</sup>

4.301 Queensland Advocacy Incorporated commented that General Principle 8 needs to be strengthened:<sup>410</sup>

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408 Submission 90.

409 Submission 69.

410 Submission 162.

This principle should be strengthened and clarified to demonstrate a hierarchy of authority, similar to that of the health attorney in the *Power of Attorney Act*. This would outline the difference between family relationships, support networks and friends, and formalised paid care/service provider relationships. The hierarchy of authority should descend as follows:

A person over the age of 18 who is:

- A family member or other unpaid person with whom the adult with impaired capacity is living;
- A family member who knows the adult intimately and is, or has been, involved in the physical and emotional support of the person on a daily basis;
- An extended family member, social support network member, or close friend who knows the person well and who is not paid to be in the person's life; and
- A service provider or other person in a formalised paid care relationship with the person. People in this role have authority from their paid connection to provide information and advice through their knowledge of the person in that role and are not eligible as guardians of administrators.

### ***A separate requirement to consult***

4.302 There was overwhelming support in the submissions for the inclusion in the General Principles of a requirement for consultation by a substitute decision-maker.<sup>411</sup>

4.303 Queensland Advocacy Incorporated observed:<sup>412</sup>

family, friends, informal carers and other individuals important to an adult may constitute the only sources of information needed to make proper decisions for an adult ...

4.304 Queensland Advocacy Incorporated commented that General Principle 8 should be elevated to General Principle 4.

4.305 Although most of the respondents did not specify the precise categories of people with whom a substitute decision-maker should be required to consult, there was clear support for wide-ranging consultation.<sup>413</sup>

4.306 Several respondents supported mandatory consultation with a range of different people, including family members,<sup>414</sup> friends<sup>415</sup> and carers.<sup>416</sup> Alzheimers Australia (Qld) suggested that this should be required 'whenever practicable'.<sup>417</sup>

<sup>411</sup> Submissions 1A, 2, 6, 9, 11A, 13, 14, 18, 27, 34A, 40, 41, 43, 48, 49, 50, 54, 55, 59, 61, 71, 77A, 83, 84, 89, 99A, 100A; Forums C2, C3, C5, C7, C8.

<sup>412</sup> Submission 34A.

<sup>413</sup> Submissions 18, 40, 41, 48, 49, 59, 61, 77A, 83, 84, 89, 99A, 100A.

4.307 An attendee at a community forum referred to the benefits of a diversity of views and to the promotion of inclusion rather than exclusion.<sup>418</sup>

4.308 Carers Queensland considered that ‘the need to maintain family relationships is of such importance that it should be identified as a principle in its own right’. It explained:<sup>419</sup>

The rationale for the inclusion of consultation with the family is not to shift emphasis away from the adult but, on the contrary, to better understand the adult, ascertain their interests and consider the full impact that decisions will have for the adult. Such consultation will not necessarily detract from the adult’s views and interests. Consultation will ensure that the decisions reached are better informed by the adult’s views and are more able to protect the adult’s interests, where necessary. Of course such a principle does need to be balanced with the adult’s privacy and other interests. However we consider that there should be a bias towards the inclusion of family in the decision-making and that family should be excluded by exception and justified.

4.309 Additionally, Carers Queensland stated that mandating consultation with carers would be consistent with the *Carers (Recognition) Act 2008* (Qld) and with the Queensland Government’s *Carer Recognition Policy*, and would recognise carers’ ‘unique knowledge and skills’.

4.310 Disability Services Queensland also favoured the inclusion of a requirement to consult with carers, but considered that its inclusion in the General Principles ‘should not undermine respect for the adult’s autonomy and the emphasis should still be on the adult’s views and interests’.<sup>420</sup>

4.311 While Queensland Advocacy Incorporated supported a requirement for decision-makers to consult with family and an adult’s informal support network, it noted in its submission that:<sup>421</sup>

A requirement to consult does not constitute a requirement to follow opinions or advice arising from the consultation.

4.312 The former Public Advocate considered that ‘consultation with the adult and the adult’s support network is appropriately required by the Principles as part of the decision-making process’. However, she expressed some concerns about

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414 Submissions 2, 6, 9, 11, 13, 14, 24, 27, 34A, 43, 71.

415 Submissions 6, 9, 13, 14, 24, 27, 34A, 43.

416 Submissions 6, 9, 13, 14, 24, 34A, 71, 93.

417 Submission 9.

418 Forum C5.

419 Submission 71.

420 Submission 93.

421 Submission 34A.

particularising the categories of people with whom a substitute decision-maker must consult:<sup>422</sup>

The members of the support network will vary from person to person. Sometimes, they will be family members and sometimes not. Some adults will have no supportive family. Some family members will be very involved with the adult, and others have infrequent and peripheral involvement in an adult's life. Family members with only minimal involvement in a person's life are realistically not part of the network and if they are not, there seems to be no justifiable basis for disclosing details about the adult's private personal circumstances, as would be necessary to properly consult. This would appear to improperly interfere with the adult's privacy and/or confidentiality. Sometimes the network will include carers. Not all adults will have a carer.

4.313 The former Public Advocate suggested that a requirement to consult with the members of the adult's support network, together with some examples of those who will fall within this group would be more appropriate than a requirement to consult with all members of specific classes of persons. In her view, a requirement to consult with 'any person who appears to have an interest in the adult's welfare or in the proposed decision' could be very onerous as this would be a very broad group. Similarly, it would not always be appropriate to require consultation with a person with whom the adult resides 'since the adult may share accommodation with people who are essentially "flatmates" in a group home situation'.

4.314 However, the former Public Advocate considered that consultation with other substitute decision-makers should be mandatory 'since decisions taken by an administrator may affect a guardian's/informal personal decision-maker's deliberations and vice versa'.<sup>423</sup>

4.315 Several respondents argued against including a requirement for consultation in the General Principles.<sup>424</sup>

4.316 The Public Trustee stated that it was not appropriate for 'specific and narrow obligations' in respect of consultation to be legislated. He explained:<sup>425</sup>

There are two essential reasons for this position.

First, it is not possible in the Public Trustee's view to properly approach decision making ... *without* consultation. ...

In short to properly gauge the adult's views and wishes, to understand what type of substitute decision might be made, to advance the care and protection of an adult and to maintain the supportive relationships it is necessary in many circumstances to consult widely and in particular with carers and family. A specific obligation to consult is unnecessary.

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422 Submission 91.

423 Ibid. The consultation requirement in s 40 of the *Guardianship and Administration Act 2000* (Qld) does not extend to informal decision-makers.

424 Submissions 64, 72, 90.

425 Submission 90.

This approach speaks to the *purpose* for which consultation might be obliged — in the Public Trustee’s view consultation should be directed at properly applying the remainder of the general principles rather than necessarily to gauge the views of carers or family for its own sake.

Second, administratively an obligation to consult on each decision which an administrator is called upon to make would prove burdensome and indeed expensive. Many decisions are made which are orthodox and routine in nature which likely would not benefit from extensive consultation. Many decisions however necessarily demand consultation for the reasons discussed above.

In a similar vein any requirement to consult must yield to the particular circumstances of the matter at hand — urgency and decisions where the subject of the consultation is conflicted (financial abuse for example) being two obvious illustrations. (emphasis in original)

4.317 Another respondent noted that family members ‘can sometimes be the least suitable persons ... to be consulted with in the course of a guardian’s decision-making process’.<sup>426</sup>

4.318 Only a few submissions specifically addressed the issue of when an obligation to consult should apply.

4.319 Two respondents stated that the obligation should apply generally.<sup>427</sup> Disability Services Queensland was of the view that a general obligation for a substitute decision-maker to consult would be ‘consistent with the operation of the other General Principles and avoid the application becoming a “check list” process’.<sup>428</sup>

4.320 There was some support for the suggestion that an obligation to consult should apply in circumstances where a substitute decision-maker is trying to ascertain the views and wishes of an adult.<sup>429</sup>

4.321 Carers Queensland commented:<sup>430</sup>

In practice, understanding the adult’s views and wishes relies on a deep understanding of the adult. Some decision-makers will not necessarily have this understanding when they come to the role — for example, a guardian from the Office of the Adult Guardian. To acquire such understanding would very likely require discussion with the adult and consultation with those who know the person well ie likely the family and carer.

4.322 Carers Queensland also explained why the inclusion of such a principle was desirable:

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426 Submission 64.

427 Submissions 6, 93.

428 Submission 93.

429 Submissions 13, 14.

430 Submission 71.

There is a need to extend the requirement to consult to informal decision makers. The distinction between personal, financial and health matters is somewhat artificial as each type of 'matter' often has implications for the other facets of life. For example, decisions over where and with whom to live have obvious financial implications. This reality needs to be reflected in the Act through having the different decision-makers, whether they are formally appointed or not, involved and consulted in all decisions. Currently though, 'informal' decision-makers are not afforded the same level of involvement as those that are 'formally' appointed. Attorneys, Guardians and Administrators are required to consult with other Attorneys, Guardians or Administrators but this requirement is not extended to informal decision-makers though they may be making exactly the same sorts of decisions under 'informal' arrangements. This seems to not recognise or properly validate the important role of family and friends in acting with or for the person when they do not have a 'formal' appointment.

4.323 The former Public Advocate expressed the view that:<sup>431</sup>

consultation should generally occur regarding significant (as opposed to minor day-to-day) decisions, as part of the process of ascertaining the adult's views and wishes, but also, as part of determining what options may be available and other information relevant to them.

4.324 One respondent considered that consultation should be required only when 'the adult is truly incapacitated, in my view, not of sound mind'.<sup>432</sup>

4.325 Another respondent was of the view that it was appropriate for consultation to commence when an application for care for an adult, or an assessment of the adult, was made.<sup>433</sup>

4.326 Some respondents who supported the inclusion in the General Principles of a general obligation to consult nevertheless considered that there may be circumstances where such an obligation should not apply. Examples included circumstances where consultation would adversely affect the adult's interests, subject the adult to undue influence, or result in stress for an adult.<sup>434</sup>

4.327 An attendee at a community forum noted that any requirement to consult 'would need to be qualified, because, in a particular case, the effect of the requirement could be to require consultation with a person who was the adult's abuser'.<sup>435</sup>

4.328 Disability Services Queensland agreed that there may be times when consultation is inappropriate. However, it considered that, if the requirement to

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431 Submission 91.

432 Submission 1A.

433 Submission 14.

434 Submissions 9, 14; Forums C3, C5.

435 Forum C3.

consult was framed in general terms, 'it need not apply if it was not appropriate to consult for any reason'.<sup>436</sup>

4.329 The former Public Advocate, who submitted that an exception to an obligation to consult should apply if the interests of an adult may be adversely affected, emphasised that:<sup>437</sup>

care must be taken that the exception is not sufficiently broad as to allow a [substitute decision-maker] to legitimately not consult a member of the support network for irrelevant reasons.

### The Commission's view

4.330 The current General Principle 8 emphasises the importance of maintaining an adult's existing supportive relationships. As such, it is an expression of an adult's human rights. For this reason, the Commission is of the view that this principle should be relocated within the General Principles to become the new General Principle 4.

4.331 Although there was strong support in the submissions for requiring substitute decision-makers to consult with various people, the Commission does not consider it practicable for the General Principles to impose a mandatory requirement to that effect. Consultation may not be necessary in all cases to maintain an adult's existing supportive relationships. Further, it would be difficult to specify the persons who should be consulted in a way that did not result in a list that was either very specific, and therefore onerous for the substitute decision-maker, or relatively flexible, which may not have the outcome sought by the submissions on this issue.

4.332 However, the Commission recognises that, in many cases, consultation with a person in a supportive relationship with an adult may be necessary in order to maintain that relationship. For example, a decision about where an adult is to live could have an impact on the adult's relationship with other people if the new accommodation is in a location that would make it difficult for those people to visit the adult. To draw attention to the role that consultation may play in maintaining an adult's existing supportive relationships, the new General Principle 4 should state, by way of example, that this may involve consulting with persons who have an existing supportive relationship with the adult or with the adult's informal decision-makers.

4.333 The new General Principle 4 should be expressed in the following terms:

#### **4 Maintenance of adult's existing supportive relationships**

- (1) The importance of maintaining an adult's existing supportive relationships must be taken into account.

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436 Submission 93.

437 Submission 91.

- (2) So, for example, maintaining an adult's existing supportive relationships may involve consultation with either or both of the following:
- (a) persons who have an existing supportive relationship with the adult;
  - (b) members of the adult's support network who are making decisions for the adult on an informal basis.

4.334 In the Commission's view, the expression of the principle in this form should encourage substitute decision-makers to engage in consultation where that is important to maintaining the adult's existing supportive relationships. There may, however, sometimes be a tension between this principle and the new General Principle 6, which requires an adult's privacy to be respected and taken into account.<sup>438</sup> Both General Principles will need to be balanced having regard to the other General Principles, including the principles listed in the new General Principle 2.

## GENERAL PRINCIPLE 9: MAINTENANCE OF ENVIRONMENT AND VALUES

### The law in Queensland

4.335 General Principle 9 requires the importance of an adult's cultural and linguistic environment and set of values (including any religious beliefs) to be taken into account.<sup>439</sup> It includes specific requirements where the adult is a member of an Aboriginal community or a Torres Strait Islander, including a requirement to take into account Aboriginal tradition or Island custom.

### The law in other jurisdictions

4.336 In the ACT, the *Powers of Attorney Act 2006* (ACT) contains a General Principle in virtually identical terms to General Principle 9 of the Queensland legislation.<sup>440</sup>

### Discussion Paper

4.337 In the Discussion Paper, the Commission sought submissions on whether any of the existing General Principles should be reworded or changed in some way.<sup>441</sup>

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438 See [4.358]–[4.364] below.

439 *Guardianship and Administration Act 2000* (Qld) sch 1 s 9; *Powers of Attorney Act 1998* (Qld) sch 1 s 9.

440 *Powers of Attorney Act 2006* (ACT) sch 1 s 1.9.

441 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 52.

## Submissions

4.338 The Public Trustee commented that there was merit in retaining a principle to the effect of General Principle 9, although he suggested that the principle might be able to be expressed more simply:<sup>442</sup>

**General Principle 9 — Maintenance of Environment and Values:** There may be some value in retaining a particular principle relating to maintaining an adult's cultural and linguistic environment but the Convention does not specifically refer to such a requirement.

Arguably this principle is one of those which might benefit from the type of simplicity and conformance contemplated by the Commission in Part 4.50 of the discussion paper<sup>443</sup> — and otherwise might be embraced by Article 3(a) and (d). (note added)

## The Commission's view

4.339 The current General Principle 9 emphasises the importance of maintaining an adult's cultural and linguistic environment, as well as the adult's set of values, including any religious beliefs. As such, this principle is an expression of an adult's human rights, and should be relocated within the General Principles to become the new General Principle 5. The heading of this principle should also be changed to 'Maintenance of adult's cultural and linguistic environment and values', which will better reflect the content of this principle.

4.340 The Commission otherwise considers that this principle is appropriate, and should be retained in its current terms.

## GENERAL PRINCIPLE 10: APPROPRIATE TO CIRCUMSTANCES

### The law in Queensland

4.341 General Principle 10 provides that guardians and administrators should exercise power 'in a way that is appropriate to the adult's characteristics and needs'. Arguably, this could include consideration of the adult's lifestyle and social needs by an administrator, and consideration of the adult's financial circumstances by a guardian.

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442 Submission 90.

443 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.50] read in part:

The Commission's preliminary view is that the General Principles should reflect the United Nations Convention and that any revisions to the General Principles should be guided by the objectives of simplicity and conformance to contemporary, internationally agreed principles.

4.342 In addition, General Principles 6 and 9 require the importance of 'encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential', and of maintaining the adult's cultural and linguistic environment, to be taken into account.

## Discussion Paper

4.343 In the Discussion Paper, the Commission raised as an issue for consideration whether adequate provision is made in the General Principles for decision-makers to consider the adult's lifestyle and social needs when making financial decisions for the adult.<sup>444</sup> It suggested that it might be important for a financial decision-maker to consider the impact of such decisions on the adult's lifestyle choices. The Commission referred, by way of example, to the fact that decisions about the payment of debts or continuing investments may have an impact on the adult's day-to-day spending on social events or activities. The Commission suggested that it might be appropriate to reflect this consideration in the General Principles.

4.344 The Commission also raised, as a related issue, whether the General Principles should provide for decision-makers to take the adult's financial situation into account when making decisions about an adult's personal matters. For example, decisions about where an adult should live may have detrimental financial implications for the adult.

4.345 A further issue raised in the Discussion Paper was whether it would be more appropriate for General Principle 10, which applies only to the exercise of power by an attorney, guardian or administrator,<sup>445</sup> to be moved from the General Principles and included, instead, with the other specific duties of attorneys, guardians and administrators. Alternatively, it noted that it might be appropriate to extend the application of this principle to all persons who are required to apply the General Principles.<sup>446</sup>

4.346 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>447</sup>

- Should the General Principles clarify that decisions about financial matters must include consideration of the adult's lifestyle and social needs?
- Should the General Principles clarify that decisions about personal matters must include consideration of the adult's financial circumstances or needs?

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444 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.108].

445 *Guardianship and Administration Act 2000* (Qld) sch 1 s 10; *Powers of Attorney Act 1998* (Qld) sch 1 s 10.

446 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.53].

447 *Ibid* 68.

- If the General Principles are to require consideration of these matters, should this be done by adding an example to General Principle 10, which currently provides that guardians and administrators should exercise power in a way that is appropriate to the adult's characteristics or needs, or in some other way?

## Submissions

4.347 A number of submissions were of the view that the General Principles should clarify that decisions about financial matters should include a consideration of the adult's lifestyle and social needs and, similarly, that decisions about personal matters should include a consideration of the adult's financial circumstances.<sup>448</sup>

4.348 The former Public Advocate noted that it is often the case that financial decisions and personal decisions cannot be appropriately made independently of each other, and supported changing the legislation to reflect this fact:<sup>449</sup>

decisions taken by an administrator may affect a guardian's/ informal personal decision-maker's deliberations and vice versa. For example, there is little point in a guardian deciding that an adult will live alone in a house which costs \$500 per week to rent with 24 hour support provided by a private service provider at a cost of \$1200 per week if the adult's only income and resources are a disability support pension of \$520 per fortnight including rent assistance.

4.349 Queensland Advocacy Incorporated proposed a new approach to 'create clearer and more manageable decision-making roles'. It explained:<sup>450</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 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.

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.

4.350 However, other respondents argued against the need to amend the General Principles to address this issue.<sup>451</sup>

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448 Submissions 1, 9, 13, 14, 91.

449 Submission 92.

450 Submission 162.

451 Submissions 27, 93.

4.351 The Public Trustee commented.<sup>452</sup>

The Public Trustee does not see a necessity for the General Principles to expressly state that financial matters must include considerations of the adult's lifestyle and social needs nor the reverse — decisions in terms of personal matters should include considerations of financial circumstances.

The Public Trustee adopts this view because it is not possible for an administrator to appropriately attend to the task and duties required of an administrator as the General Principles are currently drawn *without* a consideration of lifestyle and social needs — nor could a guardian make decisions in respect of personal matters without considering the financial issues that attend.

The scheme of the current General Principles and indeed the United Nations Convention if reflected as the General Principles demand a consideration of needs and lifestyles.

...

The Public Trustee plans for those whom the Public Trustee is appointed as administrator (on at least an annual basis) taking into account quite expressly the lifestyle and needs of the adults.

The Public Trustee's experience with the Adult Guardian, is that she is not only conscious but make decisions in respect of personal matters cognisant and in light of financial matters.

4.352 However, the Public Trustee acknowledged that 'administrators and guardians who do not have the experience and resources available to professional or "institutional" administrators or guardians may benefit from having the need to consider personal and financial matters made clearer'.

4.353 Disability Services Queensland considered that General Principles 6 (Encouragement of self reliance) and 10 (Appropriateness to circumstances) were sufficient to allow a substitute decision-maker to consider the adult's lifestyle and social needs when making financial decisions. It considered that 'the existing flexibility of the General Principles would provide more scope for their application in different circumstances'.<sup>453</sup>

4.354 Alzheimers Australia (Qld) suggested that General Principle 10 should be located in the body of the guardianship legislation together with the specific duties of attorneys, guardians and administrators.<sup>454</sup>

### The Commission's view

4.355 In the Commission's view, General Principle 10, in requiring a guardian, administrator or attorney to exercise power for a matter in a way that is appropriate

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452 Submission 90.

453 Submission 93.

454 Submission 9.

to the adult's characteristics and needs, does not add to the other General Principles.

4.356 As explained earlier in this chapter, guardians, administrators and attorneys are required by the legislation to exercise power honestly and with reasonable diligence to protect the adult's interests.<sup>455</sup> In addition, a number of the revised General Principles require various aspects of an adult's characteristics and needs to be taken into account either directly or indirectly:

- the new General Principle 2(2)(c) refers to the principle of full and effective participation and inclusion in society;
- the new General Principle 3(b)(iii) (previously General Principle 6) refers to the importance of encouraging and supporting the adult to achieve his or her maximum physical, social, emotional and intellectual potential;
- the new General Principle 4 (previously General Principle 8) refers to the importance of maintaining an adult's existing supportive relationships;
- the new General Principle 5 (previously General Principle 9) refers to the importance of maintaining an adult's cultural and linguistic environment and set of values (including any religious beliefs); and
- the new General Principle 7(a) recommended by a majority of the Commission (new General Principles 7(1)(a) and 8(1)(a) recommended by a minority of the Commission) requires a function to be performed, or a power to be exercised, in a way that promotes and safeguards the adult's rights, interests and opportunities.

4.357 In view of the inclusion of these specific matters, the current General Principle 10 is unnecessary, and should be omitted from the General Principles.

## **GENERAL PRINCIPLE 11: CONFIDENTIALITY**

### **The law in Queensland**

4.358 General Principle 11 provides that an adult's right to confidentiality of information about the adult must be recognised and taken into account.

4.359 Guardians and administrators are subject to the specific prohibition in section 249A of the *Guardianship and Administration Act 2000* (Qld) not to use confidential information gained because of being a relevant person, or because of an opportunity given by being a relevant person, other than as provided by section 249 of the Act.

4.360 General Principle 11 is consistent with article 22 of the United Nations Convention, which provides that persons with disabilities shall not be subjected to

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*Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

arbitrary or unlawful interference with their privacy, and that States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

## Submissions

4.361 None of the submissions commented directly on General Principle 11.

## The Commission's view

4.362 General Principle 11 currently provides that an adult's right to confidentiality of information about the adult must be recognised and taken into account. As such, this principle is an expression of an adult's human rights (in particular, an adult's right to dignity). The Commission is therefore of the view that this principle should be relocated within the General Principles to become the new General Principle 6.

4.363 In addition, this principle should be reworded in the following way to better reflect article 22 of the Convention (Respect for privacy):<sup>456</sup>

### 6 Respect for privacy

An adult's privacy must be respected and taken into account.

4.364 The wider reference to an adult's privacy would include confidential information about the adult, as well as other aspects of the adult's privacy. The principle is not, however, expressed as an absolute right, and the application of other principles, for example, the new General Principle 4, could require information about the adult to be disclosed to other people.

## THE ADULT'S INFORMAL ARRANGEMENTS

### The law in Queensland

4.365 The *Guardianship and Administration Act 2000* (Qld) 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>457</sup>

4.366 The existence and operation of informal decision-making arrangements for an adult is also relevant to the Tribunal's power to appoint a guardian or an administrator for an adult. Section 12 of the Act provides that the Tribunal may appoint a guardian or an administrator if it is satisfied that:<sup>458</sup>

<sup>456</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 22 is set out at [3.13] above.

<sup>457</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

<sup>458</sup> *Guardianship and Administration Act 2000* (Qld) s 12(1).

- 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.

4.367 If the adult's informal decision-making arrangements are meeting the adult's needs and protecting the adult's interests, the Tribunal will not have the power to appoint a guardian or an administrator.

4.368 In exercising the power to make an appointment, the Tribunal must also apply the General Principles.<sup>459</sup> Although the principles do not specifically refer to existing informal decision-making arrangements for the adult, they do provide that the importance of maintaining the adult's 'existing supportive relationships' must be taken into account.<sup>460</sup> The legislation does not define the expression 'existing supportive relationships'. However, it would appear wide enough to include the adult's relationships with people who are involved in informal decision-making for the adult.

### The law in other jurisdictions

4.369 In South Australia, the *Guardianship and Administration Act 1993* (SA) provides that, when the Guardianship Board makes or affirms a guardianship or administration order, consideration must be given to 'the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements'.<sup>461</sup>

### Discussion Paper

4.370 In the Discussion Paper, the Commission suggested that a specific requirement to take into account the importance of the adult's existing informal decision-making arrangements under the General Principles may help ensure that the appointment of guardians and administrators is made only when it is necessary. Such a requirement may, alternatively, be too specific for inclusion in the General Principles.<sup>462</sup>

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<sup>459</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1).

<sup>460</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 8.

<sup>461</sup> *Guardianship and Administration Act 1993* (SA) s 5(c), which is set out at [4.28] above.

<sup>462</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.92]. Such a requirement could be relevant where a guardian, administrator or attorney has a limited appointment and decisions about other matters are being made informally.

4.371 However, the Commission also noted that it may be unnecessary to refer specifically to informal decision-making arrangements if a ‘supportive relationship’ includes a relationship involving informal decision-making for the adult.<sup>463</sup>

4.372 The Commission sought submissions on the following questions:<sup>464</sup>

- Should the General Principles include a requirement to consider the adult’s existing informal decision-making arrangements?
- If so, should this requirement apply generally or only in certain situations, for example, when the Tribunal is considering the appointment or continued appointment of a guardian or an administrator?
- Should the General Principles clarify what is meant by ‘existing supporting relationships’?

## Submissions

4.373 Nearly all of the respondents who addressed this issue supported the inclusion of a requirement in the General Principles to consider the adult’s existing informal decision-making arrangements.<sup>465</sup> Most respondents were also of the view that this requirement should be one of general application.<sup>466</sup>

4.374 However, the Public Trustee observed that an adult’s informal decision-making arrangements are already considered, at least by the Tribunal, and that a discrete General Principle was unnecessary.<sup>467</sup>

It is the Public Trustee’s experience that the Guardianship and Administration Tribunal in applying its mind to appointments at least of administrators will consider any informal decision making arrangements — or in particular the individuals involved in supporting an adult by way of informal decision making processes when determining appointments under Chapter 3 of the *Guardianship and Administration Act 2000*. Such an approach goes to the ‘need’ for an appointment ...

Certainly those informal decision makers who provide an indication that they are prepared to be appointed administrators are carefully considered by the Tribunal as to their appropriateness (Section 15 *Guardianship and Administration Act 2000*) but the reality is that many informal decision makers prefer not to be appointed to the role of administrator.

4.375 The Public Trustee submitted that, if such a principle were to be included, it should be confined to appointments.

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463 Ibid [4.93].

464 Ibid 63.

465 Submissions 1A, 9, 13, 27, 91, 93.

466 Submissions 1A, 9, 13, 91, 93. Submission 14 suggested the application of the principle should be confined to ‘certain situations’.

467 Submission 90.

4.376 A number of respondents considered that it would be desirable to clarify what is meant by the term ‘existing supportive relationships’, as used in General Principle 8.<sup>468</sup>

4.377 The former Public Advocate commented:<sup>469</sup>

Consistency of terminology use would be appropriate and the use of terminology in the Principles should be consistent with terminology elsewhere in the legislation. The importance of maintaining existing supportive relationships remains a significant issue. Clarification should be provided regarding what this means. For example, when making accommodation decisions, it may involve preferring an option which keeps the adult in the vicinity of the support network. Reference to the adult’s ‘support network’, as suggested, appears reasonable.

4.378 Queensland Advocacy Incorporated suggested the definition of an ‘existing support network’ could be expanded to include:<sup>470</sup>

members of the adult’s family and close friends of the adult, who know the person well and whose freely given relationships have persisted over time despite any difficulties faced.

4.379 It suggested that this addition would ‘help to prevent the appearance of someone in the person’s life who claims relationship, but who has limited connection or knowledge of the person’.

4.380 The respondents were also generally of the view that the term ‘adult’s support network’ should be included in the General Principle.<sup>471</sup>

4.381 The Public Trustee was of the view that an advantage of such an amendment was that it would be ‘unnecessary to refer specifically to informal decision making arrangements if by extension the definition of support network is extended to include such decision making arrangements’.<sup>472</sup>

4.382 Disability Services Queensland considered that an inference of an adult’s ‘support network’ can be deduced from ‘existing supportive relationships’, and favoured the use of examples to clarify the meaning of the current terminology.<sup>473</sup>

### The Commission’s view

4.383 In the Commission’s view, it is not necessary for the General Principles to include a requirement to consider the adult’s existing informal decision-making arrangements.

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468 Submissions 1A, 9, 13, 14, 90, 91; Forums C1, C3.

469 Submission 91.

470 Submission 162.

471 Submissions 9, 90, 91.

472 Submission 90.

473 Submission 93.

4.384 Those arrangements must necessarily be considered by the Tribunal when appointing a guardian or an administrator under section 12 of the *Guardianship and Administration Act 2000* (Qld). Although the *Guardianship and Administration Act 1993* (SA) requires the Guardianship Board to consider these arrangements when it makes or affirms a guardianship or an administration order, the provisions of that Act dealing with the Board's power to appoint a guardian or an administrator do not require the Board to be satisfied of the matters set out in section 12(1)(c) of the *Guardianship and Administration Act 2000* (Qld).<sup>474</sup>

4.385 To the extent that consideration of an adult's existing informal decision-making arrangements may be relevant to the maintenance of an adult's existing supportive relationships, the new General Principle 4(2) specifically refers to the fact that the application of General Principle 4(1) may involve consultation with members of the adult's support network who are making decisions for the adult on an informal basis.

## PROTECTION FROM NEGLECT, EXPLOITATION AND ABUSE

### The law in Queensland

4.386 The *Guardianship and Administration Act 2000* (Qld) includes several substantive provisions dealing with the protection of adults from neglect, exploitation and abuse.

4.387 For example, one of the Adult Guardian's functions is 'protecting adults who have impaired capacity for a matter from neglect, exploitation or abuse'.<sup>475</sup> The Adult Guardian is given power to investigate complaints or allegations that an adult 'is being or has been neglected, exploited or abused'<sup>476</sup> and may apply to the Tribunal for a warrant to remove an adult in such situations.<sup>477</sup> If there is an immediate risk of harm to an adult because of abuse, exploitation or neglect, the Tribunal is also empowered to make an interim order.<sup>478</sup>

4.388 Although attorneys, guardians and administrators are not under a specific duty to protect the adult from neglect, abuse or exploitation, they are required to exercise their powers with 'reasonable diligence to protect the adult's interests'.<sup>479</sup>

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474 See *Guardianship and Administration Act 1993* (SA) ss 5(c), 29(1), 35(1).

475 *Guardianship and Administration Act 2000* (Qld) s 174(2)(a). The functions and powers of the Adult Guardian are considered in Chapter 23 of this Report.

476 *Guardianship and Administration Act 2000* (Qld) s 180(a).

477 *Guardianship and Administration Act 2000* (Qld) s 197. The Tribunal has power to issue such a warrant under *Guardianship and Administration Act 2000* (Qld) s 149(1). This power is considered in Chapter 20 of this Report.

478 *Guardianship and Administration Act 2000* (Qld) s 129(1).

479 *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

4.389 Further, General Principle 7(5) provides that a person or other entity performing a function or exercising a power under the guardianship legislation must do so ‘in a way consistent with the adult’s proper care and protection’.<sup>480</sup>

### The law in other jurisdictions

4.390 In New South Wales, one of the principles that must be observed by a person exercising functions under the act is that the adult ‘should be protected from neglect, abuse and exploitation’.<sup>481</sup>

4.391 In Victoria, the legislation provides that a guardian must act in the best interests of the adult, and provides that a guardian acts in the best interests of the adult if, among other matters, the guardian acts, as far as possible, in such a way as to protect the adult from neglect, abuse or exploitation.<sup>482</sup>

4.392 In Western Australia the same requirement applies to both guardians and administrators.<sup>483</sup>

### Discussion Paper

4.393 In the Discussion Paper, the Commission considered whether the General Principles should refer to the need to protect an adult from neglect, exploitation and abuse. The Commission observed that article 16 of the Convention provides for the protection of people with disabilities from exploitation and abuse.<sup>484</sup>

4.394 The Commission set out the arguments for and against the inclusion of a specific principle referring to this requirement. On the one hand, it suggested that it might help to clarify a person’s obligations if a reference to the adult’s need for protection from neglect, exploitation or abuse were included in the General Principles. On the other hand, the Commission noted that the inclusion of such a principle might not be necessary given the terms of General Principle 7(5).<sup>485</sup>

4.395 Alternatively, the Commission suggested that it might be desirable to clarify that the reference to ‘proper care and protection’ includes protection from neglect, exploitation or abuse.<sup>486</sup>

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480 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(5).

481 *Guardianship Act 1987* (NSW) s 4(g). Section 4 is set out at [4.24] above.

482 *Guardianship and Administration Act 1986* (Vic) s 28(1), (2)(d). Section 28 is set out at [4.35] above.

483 *Guardianship and Administration Act 1990* (WA) ss 51(1), (2)(d), 70(1), (2)(d). An administrator is to protect the adult from ‘financial’ neglect, abuse or exploitation. Sections 51 and 70 are set out at [4.39]–[4.40] above.

484 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.94].

485 *Ibid* [4.99].

486 *Ibid*.

4.396 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>487</sup>

- Should the General Principles refer to the adult's protection from neglect, abuse or exploitation?
- If so, should the General Principles refer to the adult's protection from neglect, abuse or exploitation:
  - (a) as an additional stand-alone principle;
  - (b) as part of another principle and, if so, which principle; or
  - (c) in another way?

### Submissions

4.397 All of the respondents who addressed this issue were of the view that it is desirable for the General Principles to incorporate a reference to the adult's protection from neglect, abuse or exploitation.<sup>488</sup> A number of these respondents favoured the inclusion of a new, stand-alone principle.<sup>489</sup>

4.398 Queensland Advocacy Incorporated and the Council on the Ageing (Queensland) noted that the inclusion of protections against exploitation, violence and abuse, would be consistent with article 16 of the Convention.<sup>490</sup>

4.399 The former Public Advocate commented that decisions should not place the adult at risk of neglect, exploitation or abuse. This was considered to be consistent with the Convention, in particular, articles 14 to 17, which provide broadly for protections from practices that might result in neglect, exploitation or abuse. However, she suggested that the application of the principle would need to be clarified so that the principle was not used to undermine the principle of substituted judgment. The former Public Advocate observed:<sup>491</sup>

There is merit in providing for a separate principle which refers to protection of adults with impaired decision-making capacity from abuse, neglect or exploitation. However, unless there is some clarification about how this is to be applied, it may be used as a basis to justify departing from decision-making which respects the views and wishes of an adult in circumstances that are not objectively justifiable.

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487 Ibid 65.

488 Submissions 1A, 9, 13, 14, 19, 27, 34A, 60, 90, 91.

489 Submissions 14, 90, 91, 93.

490 Submissions 34A, 60.

491 Submission 91.

#### 4.400 Disability Services Queensland commented:<sup>492</sup>

Whenever there is a person exercising control on behalf of another's affairs, there is always the risk of abuse or neglect. It is submitted that there should be a declaration of safeguards and protection against abuse, neglect or exploitation in the General Principles and a further examination of actual mechanisms to achieve this within the guardianship legislation.

#### 4.401 The Public Trustee considered that the inclusion of a principle recognising the importance of protecting the adult from abuse, neglect and exploitation would assist in preventing widespread financial abuse of adults:<sup>493</sup>

the Public Trustee's experience as an administrator includes the management of many hundreds of files where there has been financial abuse of adults with impaired capacity.

For that reason (that is the apparent extent of neglect abuse and exploitation) the Public Trustee is of the view that a discrete general principle should be included in that respect.

#### 4.402 One respondent suggested that the requirement to protect an adult from neglect, exploitation or abuse, could be incorporated into either General Principle 2 (Same human rights) or 7 (Maximum participation, minimal limitations and substituted judgment).<sup>494</sup>

#### 4.403 Queensland Advocacy Incorporated suggested that, if the principle was not included as a stand-alone principle, it might be incorporated into General Principle 7(5), which requires action to be consistent with an adult's care and protection.<sup>495</sup>

A simple redefinition could produce the necessary effect. An additional clause might read, 'Proper care and protection includes protecting an adult from neglect, abuse and exploitation'.

### The Commission's view

4.404 The guardianship legislation already requires guardians, administrators and attorneys to exercise power honestly and with reasonable diligence to protect the adult's interests.<sup>496</sup> In addition, the majority's new General Principle 7(a) and the minority's new General Principles 7(1)(a) and 8(1)(a) require a person or other entity in performing a function or exercising a power under the legislation (or an enduring document) to do so in a way that promotes and safeguards the adult's rights, interests and opportunities.

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<sup>492</sup> Submission 93.

<sup>493</sup> Submission 90.

<sup>494</sup> Submission 9.

<sup>495</sup> Submission 34A.

<sup>496</sup> *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

4.405 In view of these requirements, the Commission does not consider that the General Principles should be amended to include a specific principle that refers to the importance of protecting the adult from neglect, abuse or exploitation. Such a principle would simply duplicate the existing requirements.

## ADVOCACY

### Introduction

4.406 Some adults with impaired decision-making capacity may need assistance to exercise their rights and obtain suitable services. It has been suggested that ‘attention to such matters by someone who acts as a personal advocate for the individual may make a profound difference to the individual’s quality of life’.<sup>497</sup>

### The law in Queensland

4.407 The existing General Principles do not specifically require decision-makers to advocate for the adult. However, General Principle 2(2) provides that ‘the importance of empowering an adult to exercise the adult’s basic human rights’ must be recognised and taken into account.<sup>498</sup>

4.408 General Principle 7(1) and (2) also provide that, to the greatest extent practicable, an adult’s right to participate in decisions affecting the adult’s life must be recognised and taken into account, and the importance of preserving the adult’s right to make his or her own decisions must be taken into account.<sup>499</sup> This includes the provision of ‘necessary support, and access to information’ to enable the adult to participate in decisions.<sup>500</sup>

4.409 In addition, attorneys, guardians and administrators are required, under their specific duties, to act with ‘reasonable diligence to protect the adult’s interests’.<sup>501</sup>

4.410 The guardianship legislation also provides for individual advocacy for adults through the functions of the community visitors<sup>502</sup> and the Adult Guardian.<sup>503</sup> The Act also provides for systemic advocacy for adults.<sup>504</sup>

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497 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 16.

498 *Guardianship and Administration Act 2000* (Qld) sch 1 s 2(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 2(2).

499 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(1)–(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(1)–(2).

500 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(a); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(a).

501 *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

502 Community visitors’ functions include, for example, inquiring and reporting on the adequacy of services and information: *Guardianship and Administration Act 2000* (Qld) s 224(2)(a), (b), (d). The functions and powers of community visitors are considered in Chapter 26 of this Report.

## The law in other jurisdictions

4.411 In Victoria, the *Guardianship and Administration Act 1986* (Vic) provides that a guardian must act in the best interests of the adult, and provides that a guardian acts in the best interests of the adult if, among other matters, the guardian acts, as far as possible, ‘as an advocate’ for the adult.<sup>505</sup>

4.412 The same requirement applies to guardians in the Northern Territory<sup>506</sup> and Tasmania,<sup>507</sup> and to both guardians and administrators in Western Australia.<sup>508</sup>

## Discussion Paper

4.413 In the Discussion Paper, the Commission considered whether the General Principles should require a guardian to act as an advocate for the adult.<sup>509</sup>

4.414 The Commission noted that a specific requirement in the General Principles for an adult’s substitute decision-maker to advocate for the adult might help promote the adult’s rights and interests. For example, it might require a substitute decision-maker to advocate for the appropriate implementation of particular decisions. On the other hand, the Commission considered that the imposition of an advocacy requirement could inappropriately extend the role of a substitute decision-maker beyond making substitute decisions. This could cause conflict, for example, where members of the adult’s support network might be better placed to undertake a personal advocacy role.<sup>510</sup>

4.415 The Commission further suggested that, given the existing individual advocacy functions of the community visitors and the Adult Guardian, it might also be unnecessary to incorporate a specific requirement of advocacy in the General Principles.<sup>511</sup>

4.416 Another issue raised by the Commission was how ‘advocacy’ should be defined if it were to be included in the General Principles. The Commission noted

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503 One of the Adult Guardian’s functions is to seek help for an adult from, for example, government departments, institutions, welfare organisations or service providers: *Guardianship and Administration Act 2000* (Qld) s 174(2)(g). The functions and powers of the Adult Guardian are considered in Chapter 23 of this Report.

504 This function is currently provided through the Public Advocate: *Guardianship and Administration Act 2000* (Qld) s 209. However, as explained in Chapter 24, the Government has announced its intention to transfer this function to the Adult Guardian.

505 *Guardianship and Administration Act 1986* (Vic) s 28(1), (2)(a). Section 28 is set out at [4.35] above.

506 *Adult Guardianship Act* (NT) s 20(1), (2)(a).

507 *Guardianship and Administration Act 1995* (Tas) s 27(1), (2)(b).

508 *Guardianship and Administration Act 1990* (WA) ss 51(1), (2)(a), 70(1), (2)(a).

509 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.100].

510 *Ibid* [4.105].

511 *Ibid* [4.106].

that different people may have a different understanding of what advocacy requires.<sup>512</sup> For example, individual advocacy may involve the active promotion of the fundamental interests and needs of the individual. It may be described as ‘speaking out’ or ‘standing by’ the individual.<sup>513</sup> On the other hand, advocacy could mean acting in the person’s best interests.<sup>514</sup>

4.417 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>515</sup>

- Should the General Principles include a principle requiring a substitute decision-maker to act as the adult’s advocate?
- If so, should the principle be limited to attorneys, guardians and administrators?
- If a principle of advocacy is included in the General Principles, how should ‘advocacy’ be defined?

## Submissions

4.418 A number of respondents were opposed to the inclusion in the General Principles of a requirement for a substitute decision-maker to act as the adult’s advocate.<sup>516</sup>

4.419 The Public Trustee, although acknowledging the importance of the role of advocacy, did not support any proposal requiring a substitute decision-maker to act as an adult’s advocate:<sup>517</sup>

The Public Trustee would be concerned that advocacy is a concept that may lend itself to interpretation — that is it may inappropriately extend the role of the substitute decision maker beyond making substitute decisions.

4.420 Another respondent commented that ‘not everyone is cut out to be an advocate’, and stated that advocacy should be undertaken by a relation or a member of the adult’s support network on a voluntarily basis.<sup>518</sup>

4.421 Disability Services Queensland considered that General Principles 2 (Same human rights) and 7 (Maximum participation, minimal limitations and

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512 Ibid [4.107].

513 R Phillips, *Older Residents and the Law* (1996) [2.2.1].

514 C Ronalds, *Residents’ Rights in Nursing Homes and Hostels: Final Report* (1989) 6, quoted in R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 16.

515 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 66–7.

516 Submissions 27, 90, 93.

517 Submission 90.

518 Submission 27.

substituted judgment) contemplated that a decision-maker could advocate for the adult. It considered it 'debatable whether this should be enunciated further'.<sup>519</sup>

4.422 The former Public Advocate referred to the importance of advocacy, but commented on the potential difficulties of a legislative requirement to advocate on behalf of an adult with impaired capacity:<sup>520</sup>

This is a complicated issue. There are different types and models of advocacy, including legal and social advocacy.

It is undoubtedly the case that statutory decision-makers may, and do usefully, advocate on behalf of the adults for whom they are appointed as decision-makers in order to expand the range of options that may be available for them regarding a matter in respect of which a decision is to be made. However, whether there should be a *requirement* for them to do so, and if so, how and about what they should be required to advocate need careful consideration. Some statutory decision-makers will not have advocacy skills. How can any person be made to advocate for another?

Advocacy may be desirable in many different circumstances. The need for advocacy may arise in circumstances independent of the need for any decision to be made, and for issues for which there is no decision-maker appointed. It is a fundamentally different role from that of the statutory decision-makers. Sometimes, a personal advocate may be appropriate in order for the adult's views and wishes to be fully ascertained for consideration by statutory decision-makers. The statutory decision-makers may not have the skills needed to communicate effectively with the person in order to fully support the adult and draw out the information. For example, a guardian in the Office of the Adult Guardian who has no professional qualifications in occupational therapy and barely knows a person who can only communicate through a medium other than speech might struggle. (emphasis in original)

4.423 She concluded:

As a preliminary view regarding this complex issue, it is suggested that if such a provision is to form part of the General Principles, it should be limited, such that a statutory decision-maker may advocate to third parties to endeavour to expand the range of possible options regarding matters about which decisions are required and for which the statutory decision-maker is appointed without conflict of interest and in a manner which advances the human rights of the adult.

4.424 However, some respondents supported the inclusion of a mandatory advocacy role.<sup>521</sup> The Council on the Ageing (Queensland), for example, argued that:<sup>522</sup>

The General Principles must require substitute decision-makers to advocate for the interests of the impaired person. Attention to such matters by someone

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519 Submission 93.

520 Submission 91.

521 Submissions 9, 13, 14, 60; Forum C4.

522 Submission 60.

who acts as a personal advocate for the individual may make a profound difference to the individual's quality of life. Similar to the fiduciary duties of lawyers to their clients, an advocate (guardian) would be required to ignore their own personal interests where they may conflict with the interests of the person subject to the guardianship powers allocated.

4.425 Another respondent supported the inclusion of advocacy as part of a substitute decision-maker's role only where no-one else was available.<sup>523</sup>

### The Commission's view

4.426 The new General Principle 3 provides that the importance of certain matters must be taken into account: empowering the adult to exercise the adult's human rights and fundamental freedoms; encouraging and supporting the adult in various specified ways; and the adult's right to participate in the development of policies, programs and services for people with impaired capacity.

4.427 In some respects, the matters referred to in that principle could be achieved by advocating for the adult. The role of a substitute decision-maker may, at times, include aspects of advocacy. However, the Commission considers that the General Principles should not impose a positive duty to advocate for an adult.

## COMPLIANCE AND ENFORCEMENT

### The law in Queensland

4.428 The guardianship legislation does not make specific provision about what may happen if a person fails to apply the General Principles. It does not, for example, provide that failure to apply the principles is an offence. In practical terms, the real sanction for non-compliance by a guardian, an administrator or an attorney is their removal. 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 otherwise contravened the *Guardianship and Administration Act 2000* (Qld).<sup>524</sup>

4.429 Whether there has been non-compliance with a particular General Principle will depend on the manner in which the principle is expressed. General Principles 2 to 6, which are expressions of human rights principles, require that various matters 'must be recognised and taken into account' or 'must be taken into account'.

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<sup>523</sup> Submission 13.

<sup>524</sup> *Guardianship and Administration Act 2000* (Qld) s 31(4). See eg *Re SD* [2005] QGAAT 71, [39], [44] where the Tribunal revoked the administrator's appointment, in part, because of its view that the administrator had not properly complied with General Principles.

4.430 In contrast, a number of elements of General Principle 7 (Maximum participation, minimal limitations and substituted judgment) require that various matters must be recognised and taken into account, or that the adult's views must be sought and taken into account, *to the greatest extent practicable*.

### The law in other jurisdictions

4.431 In the ACT and Western Australia, the principles need only be complied with as far as, or to the maximum extent, possible.<sup>525</sup>

4.432 In Western Australia, a guardian's obligation to act in the adult's best interests is also 'subject to any direction' of the Tribunal.<sup>526</sup>

### Discussion Paper

4.433 In the Discussion Paper, the Commission considered whether it might assist decision-makers to provide that the principles need only be complied with as far as, or to the maximum extent, possible. This would especially be the case in situations where some of the General Principles are not relevant to a particular decision<sup>527</sup> or where a decision needs to be made urgently and there is insufficient time to consider each of the principles fully. On the other hand, the Commission suggested that such a provision could lead some decision-makers to give the General Principles little or no consideration.<sup>528</sup>

4.434 The Commission also considered whether the legislation should provide for the enforceability of a person's obligation to apply the General Principles, suggesting that the requirement to apply the General Principles may seem to lose its importance without specific provision for its enforcement.<sup>529</sup>

4.435 On the other hand, the Commission stated that it may be unnecessary for the guardianship legislation to make specific provision about a person's failure to apply the General Principles because of existing complaint and review mechanisms.<sup>530</sup> The Commission also noted that there might be some practical

525 *Powers of Attorney Act 2006* (ACT) s 44; *Guardianship and Administration Act 1990* (WA) ss 51(2), 70(2).

526 *Guardianship and Administration Act 1990* (WA) s 51(1).

527 See eg M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 182–3.

528 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.117].

529 *Ibid* [4.118].

530 Tribunal decisions can be appealed, depending on the constitution of the Tribunal that made the decision, to either QCAT or the Supreme Court. Appeals are considered in Chapter 22 of this Report. Complaints about 'inappropriate or inadequate decision-making arrangements' for an adult can be investigated by the Adult Guardian; and applications for review of an appointment or for orders, directions or recommendations can be made to the Tribunal or the Supreme Court: *Powers of Attorney Act 1998* (Qld) s 110(1); *Guardianship and Administration Act 2000* (Qld) ss 164, 180(b), 82(1)(c), (d), 115(1). Internal complaints processes are also available for decisions of the Adult Guardian and the Public Trustee. These complaints processes are considered in Chapters 23 and 25 of this Report.

difficulties in attempting to enforce the application of what are flexible and subjective principles.<sup>531</sup>

4.436 The Commission sought submissions on the following questions:<sup>532</sup>

- To what extent, if any, are there difficulties in complying with or applying the existing General Principles?
- Should people be required to ‘comply with’ or ‘apply’ the General Principles:
  - (a) in all circumstances;
  - (b) only as far as, or to the maximum extent, possible; or
  - (c) in some other way?
- Should there be specific provision for what may happen if a person fails to comply with or apply the General Principles?

## Submissions

4.437 The Public Trustee noted generally that any difficulty faced in the application of the General Principles was a reflection of the difficult task faced by substitute decision-makers in carrying out their duties.<sup>533</sup>

4.438 One respondent observed that it was difficult to comply with the General Principles because they are not widely publicised and are not generally known about by people.<sup>534</sup>

4.439 Legal Aid Queensland considered that there was particular difficulty in ensuring compliance with General Principle 7.<sup>535</sup>

4.440 One respondent suggested that there is little or no guidance as to how the General Principles should be used in deliberations by substitute decision-makers.<sup>536</sup>

4.441 The former Public Advocate suggested that it is currently difficult for substitute decision-makers to apply or comply with the General Principles as they do not contain sufficiently detailed guidance on how they are to be applied or complied with. For that reason, she favoured amending the General Principles to

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531 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.122].

532 Ibid 70.

533 Submission 90.

534 Submission 9.

535 Submission 63.

536 Submission 69.

provide more detailed guidance in relation to decision-making.<sup>537</sup> In her view proper decision-making should be ensured through positive support rather than through punitive measures. In addition to amending the General Principles as suggested, another mechanism for ensuring greater compliance with the General Principles is the provision of greater assistance to decision-makers:

An agency could be given clear responsibility (and resources) for guardianship capacity building within the community and providing significant support and assistance to lay decision-makers. It could also be a resource for members of the public, and government and non-government agencies seeking to understand their responsibilities under the regime for people who seek their services. This would be expected to have significant financial implications. There are many thousands of people acting as [substitute decision-makers] whether formally appointed or acting informally who may be expected to seek assistance from time to time. Given the potential for much greater engagement of the community generally with the guardianship regime as the population ages and the public interact with it increasingly, this would be expected to have long term benefits. With substantial support for lay persons in [substitute decision-making] roles, the numbers of statutory officer appointments may decrease or at least, not increase as much as might otherwise have been anticipated. Clearly, when there are family members and/or close friends able and willing to take on the role, this is a preferable option. They know the adult well and will usually be in regular contact with the adult. Imposition of a stranger into the adult's life as [substitute decision-maker] should occur relatively rarely. (notes omitted)

4.442 The former Public Advocate also addressed the issue of whether it should be an offence to fail to comply with the General Principles. She considered that the creation of an offence could be justified, although the legislation would need to include an excuse for a substitute decision-maker who was acting in accordance with a direction of the Tribunal:

some difficulty may be encountered in discovering when a breach of the obligation [to apply the General Principles] has occurred ... However, the potential for imposition of an offence for failure to comply may serve to reinforce the importance of application/compliance for both lay decision-makers and professional decision-makers. Accordingly, it could be justified.

An excuse should be available in circumstances when the Tribunal has directed the decision-maker to exercise their power in a particular manner and when it is impossible for the [substitute decision-maker] to apply/comply with the Principles.

4.443 However, the parent of an adult with impaired capacity was strongly opposed to the imposition of a penalty for the failure to apply the General Principles.<sup>538</sup>

I am disturbed that there is any suggestion of enforcement and penalty. Like the Act this is a legal and overbearing approach to what is really a social and human issue. It is not a legal issue and this point has been made repeatedly. ... I am totally opposed to any suggestions of this nature and would suggest

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537 Submission 91.

538 Submission 27.

that there would properly be a hue and cry, should this matter be seriously considered.

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

4.444 Given the role of the General Principles in providing broad guidance to substitute decision-makers and other entities exercising power under the guardianship legislation or under an enduring document, or making decisions for an adult on an informal basis, the Commission considers it more appropriate for the legislation to require relevant persons and entities to apply, as distinct from comply with, the General Principles.

4.445 Section 11 of the *Guardianship and Administration Act 2000* (Qld) currently requires various persons and entities to apply the General Principles. However, section 76 of the *Powers of Attorney Act 1998* (Qld) currently requires the General Principles to be complied with by a person or other entity who performs a function or exercises a power under that Act or under an enduring document. Accordingly, section 76 should be amended to provide that the General Principles must be applied by such a person or other entity.

4.446 Neither the *Guardianship and Administration Act 2000* (Qld) nor the *Powers of Attorney Act 1998* (Qld) places any qualification on the requirement to apply the General Principles. However, a number of specific General Principles provide that certain matters must be recognised or taken into account 'to the greatest extent practicable'. Given these qualifications, the Commission does not consider it necessary to provide for any further limitation on the requirement to apply the General Principles.

4.447 Finally, it would not be appropriate for the guardianship legislation to be amended to create an offence of failing to apply the General Principles. The very nature of the General Principles is to provide broad guidance in terms of the matters that must be taken into account in performing a function or exercising a power under the legislation or under an enduring document. At times, this may involve a degree of tension between different principles. Where, however, there is a clear failure by a guardian, administrator or attorney to apply the General Principles, the real sanction, as explained earlier, is the removal of that substitute decision-maker.

## **LOCATION OF THE PRINCIPLES**

### **The law in Queensland**

4.448 The obligation to apply or comply with the General Principles is found in several sections of the guardianship legislation — sections 11 and 34 of the *Guardianship and Administration Act 2000* (Qld) and section 76 of the *Powers of Attorney Act 1998* (Qld).

4.449 The General Principles are themselves set out in the first schedule of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). As such, the principles form part of the legislation.<sup>539</sup>

## Discussion Paper

4.450 In the Discussion Paper, the Commission raised as an issue whether the General Principles should be set out in another part of the legislation to give them greater prominence.<sup>540</sup> The Commission sought submissions on this issue.<sup>541</sup>

## Submissions

4.451 The majority of respondents who addressed this issue supported relocating the General Principles,<sup>542</sup> with many respondents suggesting a more prominent location, closer to the front of the legislation.<sup>543</sup>

4.452 Some respondents considered that the current location of the General Principles in a schedule to the Act diminished their importance.<sup>544</sup> Queensland Advocacy Incorporated argued strongly for their relocation directly after section 11 of the Act:<sup>545</sup>

When the guardianship legislation was debated in parliament the General Principles were described as its 'philosophical cornerstone'. Given this recognition, the inclusion of the General Principles in a schedule at the back of the GAA is incongruous. Schedules tend to be forgotten. Their contents can also be viewed as secondary and less binding than specific legislative provisions. The General Principles should be relocated to the body of the GAA. This will help to elevate their status and invigorate their effect. It will give them extra gravity. It will give them the weight they should have. It will impress upon the relevant people that the General Principles must be applied rather than regarded. (note omitted)

4.453 Although the former Public Advocate considered it convenient to have the General Principles located in a schedule, she suggested that their location had led people to 'question their status'. She suggested that:<sup>546</sup>

to avoid any confusion, a preamble in Schedule 1 could reiterate the obligation to apply them. Although this may not be good legislation drafting practice, it would be useful to the non-lawyer readers of this particular legislation.

539 *Acts Interpretation Act 1954* (Qld) s 14(5).

540 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.125].

541 *Ibid* 72.

542 Submissions 15, 19, 20A, 34A, 50, 53, 56, 63, 64, 67, 69, 73, 81, 90.

543 Submissions 20A, 34A, 50, 53, 56, 64, 67, 69.

544 Submissions 53, 63.

545 Submission 34A.

546 Submission 91.

4.454 Disability Services Queensland also considered it appropriate for the General Principles to remain in a schedule, but conceded that ‘location in the first part of the legislation may better signify their importance’.<sup>547</sup>

4.455 Only two respondents specifically supported the current location of the General Principles.<sup>548</sup>

4.456 The Public Trustee stated that, while he did not have a preference for the location of the General Principles, the presumption of capacity (General Principle 1) might ‘be moved to the body of the legislation and be expressed to apply (at least) to Part 1 of Chapter 3 — the Appointment of Guardians and Administrators’.<sup>549</sup>

### The Commission’s view

4.457 Although the *Guardianship and Administration Act 2000* (Qld) first refers to the General Principles in section 11, the first substantive reference to the General Principles in the *Powers of Attorney Act 1998* (Qld) does not appear until section 76 of that Act. Accordingly, it would not necessarily give the General Principles greater prominence for them to be set out where they are first mentioned, at least so far as the *Powers of Attorney Act 1998* (Qld) is concerned.

4.458 Moreover, a number of provisions of the *Guardianship and Administration Act 2000* (Qld) provide for the application of the General Principles — sections 11, 15(1)(a), 34(1), 74(4), 80ZS(2)(a) and (3)(a) and 174(3). In view of the multiple references to the General Principles, the Commission considers it convenient for them to be located in schedule 1 of the Act rather than, for example, after section 11.

4.459 The Commission is therefore of the view that it is appropriate for the General Principles to remain in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and schedule 1 of the *Powers of Attorney Act 1998* (Qld).

## NEW PRINCIPLES

### Discussion Paper

4.460 In the Discussion Paper, the Commission sought submissions on whether any new principles should be added to the General Principles.<sup>550</sup>

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547 Submission 93.

548 Submissions 9, 52.

549 Submission 90.

550 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 52.

## Submissions

### *Restrictive practices*

4.461 Disability Services Queensland referred to the enactment of the restrictive practices legislation in 2008<sup>551</sup> — Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld). It noted that:<sup>552</sup>

Presently, there is a reference to the restriction of an adult's rights in General Principle 7(3)(c). Given the significance and importance of the amendments to the [*Guardianship and Administration Act 2000* (Qld)], it is raised for consideration that a General Principle should be drafted to reflect and encompass the purpose and application of restrictive practices in the context of the guardianship legislation. In relation to this, consideration might be given to the purposes set out in section 123A of the DSA.

4.462 It noted that section 123A of the *Disability Services Act 2006* (Qld) provides as follows:

The purpose of this part is to protect the rights of adults with an intellectual or cognitive disability by regulating the use of restrictive practices by funded service providers in relation to those adults in a way that—

- (a) Has regard to the human rights of those adults; and
- (b) Safeguards them and others from harm; and
- (c) Maximises the opportunity for positive outcomes and aims to reduce or eliminate the need for use of the restrictive practices; and
- (d) Ensures transparency and accountability in the use of the restrictive practices.

### ***Right to make decisions with which others may not agree***

4.463 Legal Aid Queensland considered that it would be appropriate to include in the General Principles the statement currently located in section 5(b) of the Act:<sup>553</sup>

#### **5 Acknowledgements**

This Act acknowledges the following—

...

- (b) the right to make decisions includes the right to make decisions with which others may not agree;

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551 The restrictive practices legislation is considered in Chapter 19 of this Report.

552 Submission 93.

553 Submission 63.

## The Commission's view

### *Restrictive practices*

4.464 In view of the changes to the General Principles recommended earlier in this chapter, the Commission does not consider it necessary to include a new General Principle in the terms suggested by Disability Services Queensland.<sup>554</sup> Those matters are generally provided for by the new General Principles 7 and 8 (and the minority's General Principles 7 and 8).

### *Right to make decisions with which others may not agree*

4.465 In the Commission's view, the acknowledgment in section 5(b) of the *Guardianship and Administration Act 2000* (Qld) should not be incorporated as a specific General Principle. Its inclusion in section 5(b) is sufficient. Further, in the context in which the General Principles are applied, the inclusion of such an acknowledgment could be misunderstood as creating a right that conflicts with the power that the Tribunal has conferred on an adult's guardian or administrator, or with the power that is exercisable by an attorney under an enduring document.

## RECOMMENDATIONS

### *Redrafting of the General Principles*

**4-1** The General Principles should be redrafted to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*, to provide a more logical structure, and to avoid duplication within the General Principles.

### *Application to informal decision-makers*

**4-2** Section 11 of the *Guardianship and Administration Act 2000* (Qld) should be amended by:

- (a) including a new subsection (3) to the effect that a person making a decision for an adult on an informal basis must apply the General Principles; and
- (b) renumbering the current subsection (3) as subsection (4).

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See [4.461]–[4.462] above.

### ***Redrafted General Principles***

#### **4-3 General Principles 1 to 6 should be expressed in the following terms:**

##### **1 Presumption of capacity**

**An adult is presumed to have capacity for a matter.**

*Note*

See sections [*provisions that give effect to Recommendations 7-2, 7-3 and 15-2*] of this Act [*the Guardianship and Administration Act 2000 (Qld)*].

##### **2 Same human rights and fundamental freedoms**

**(1) The rights 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.**

**(2) 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, include—**

- (a) respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons;**
- (b) non-discrimination;**
- (c) full and effective participation and inclusion in society;**
- (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity;**
- (e) equality of opportunity;**
- (f) accessibility; and**
- (g) equality between men and women.**

##### **3 Empowering adult to exercise human rights and fundamental freedoms**

**The importance of the following matters must be taken into account—**

- (a) empowering the adult to exercise the adult's human rights and fundamental freedoms;**
- (b) encouraging and supporting the adult—**
  - (i) to perform social roles valued in society;**

- (ii) to live a life in the general community, and to take part in activities enjoyed by the general community; and
  - (iii) to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable; and
- (c) the adult's right to participate, to the greatest extent practicable, in the development of policies, programs and services for people with impaired capacity for a matter.

**4 Maintenance of adult's existing supportive relationships**

- (1) The importance of maintaining an adult's existing supportive relationships must be taken into account.
- (2) So, for example, maintaining an adult's existing supportive relationships may involve consultation with either or both of the following—
  - (a) persons who have an existing supportive relationship with the adult;
  - (b) members of the adult's support network who are making decisions for the adult on an informal basis.

**5 Maintenance of adult's cultural and linguistic environment and values**

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

*Editor's notes—*

- 1 *Aboriginal tradition* means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954*, section 36.
- 2 *Island custom*, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to the particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954* (Qld), section 36.

**6 Respect for privacy**

An adult's privacy must be respected and taken into account.

**4-4 A majority of the Commission recommends that General Principles 7 and 8 should be expressed in the following terms:**

**7 Performance of functions or powers**

A person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,] must do so—<sup>555</sup>

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
- (b) in the way least restrictive of the adult's rights, interests and opportunities.

**8 Structured decision-making**

- (1) In applying General Principle 7, a person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>556</sup> must adopt the following approach.
- (2) First, the person or other entity must recognise and take into account the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions.
- (3) Second, the person or other entity must use the principle of substituted judgment, so that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views and wishes would be.
- (4) Third, the person or other entity must recognise and take into account any other views and wishes expressed by the adult.

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The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

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The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

- (5) Fourth, the person or other entity must recognise and take into account any other consideration that the General Principles require the person or other entity to recognise and take into account.
- (6) Fifth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (5), the person or other entity may perform the function, exercise the power, or make the decision.

4-5 A minority of the Commission recommends that General Principles 7 and 8 should be expressed in the following terms:

7 Performance of functions or powers

- (1) A person or other entity in exercising a power for a matter for an adult under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>557</sup> must do so—
  - (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) in the way least restrictive of the adult's rights, interests and opportunities.
- (2) In applying General Principle 7(1) in exercising a power for a matter for an adult under this Act, or in making a decision for an adult on an informal basis, [or an enduring document,]<sup>558</sup> a person or other entity must recognise an adult's right to make his or her own decision if the adult is able to exercise, or be supported to exercise, his or her capacity in relation to the decision.
- (3) When an adult is not able to make his or her own decision in relation to the matter, in applying General Principle 7(1) in exercising a power for a matter for an adult under this Act, or in making a decision for an adult on an informal basis, [or an enduring document,]<sup>559</sup> a person or other entity must—

<sup>557</sup> The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

<sup>558</sup> Ibid.

<sup>559</sup> Ibid.

- (a) take as the basis of its consideration the importance of using the principle of substituted judgment, which requires that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must give effect to what the person or other entity considers the adult's views and wishes would be; and
- (b) recognise and take into account any other views and wishes expressed by the adult.

**8 Performance of functions or other powers**

- (1) A person or other entity in performing a function or exercising a power under this Act other than a power mentioned in General Principle 7 must do so—
  - (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) in the way least restrictive of the adult's rights, interests and opportunities.
- (2) In applying General Principle 8(1) in performing a function or exercising a power under this Act other than a power mentioned in General Principle 7, a person or other entity must—
  - (a) use the principle of substituted judgment, so that if, from the adult's views and wishes expressed when the adult had capacity, it is reasonably practicable to work out what the adult's views and wishes would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views and wishes would be; and
  - (b) recognise and take into account any other views and wishes expressed by the adult.

**4-6 General Principle 9 should be expressed in the following terms:**

**9 Maximising an adult's participation in decision-making**

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
- (2) An adult must be given any necessary support, and access to information, to enable the adult to make or participate in decisions affecting the adult's life.

- (3) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, or in making a decision for an adult on an informal basis,<sup>560</sup> must seek the adult's views and wishes.
- (4) An adult's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

#### ***Compliance and enforcement***

- 4-7 Section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the General Principles must be applied, rather than complied with, by a person or other entity who performs a function or exercises a power under that Act or under an enduring document.
- 4-8 Neither the *Guardianship and Administration Act 2000* (Qld) nor the *Powers of Attorney Act 1998* (Qld) should be amended to create an offence of failing to apply the General Principles.

#### ***Location of the General Principles***

- 4-9 The General Principles should continue to be located in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and schedule 1 of the *Powers of Attorney Act 1998* (Qld).

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The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or in making a decision for an adult on an informal basis'.



# Chapter 5

## The Health Care Principle

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## INTRODUCTION

5.1 The Commission's terms of reference require it to review the 'law relating to 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).<sup>561</sup> The Commission is specifically required to have regard to, among other things, 'the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or well-being, or that is in their best interests'.

5.2 The two duties that are common to all guardians, attorneys and statutory health attorneys who exercise power for a health matter under the guardianship legislation are:<sup>562</sup>

- to exercise power honestly and with reasonable diligence to protect the adult's interests;<sup>563</sup> and
- to apply, or comply with, the Health Care Principle (and the General Principles).<sup>564</sup>

5.3 These duties are fundamental to the exercise of a substitute decision-maker's power to make decisions about a health matter for an adult with impaired capacity.

5.4 However, the requirement to apply, or comply with, the Health Care Principle is not confined to substitute decision-makers. The *Guardianship and Administration Act 2000* (Qld) provides that a person or other entity who performs a function or exercises a power under that Act for a health matter or special health matter in relation to an adult with impaired capacity must apply the Health Care Principle (and the General Principles).<sup>565</sup> Similarly, the *Powers of Attorney Act 1998* (Qld) provides that, for a health matter, the Health Care Principle (and the General Principles) must be complied with by 'a person or other entity who performs a function or exercises a power under the Act, or an enduring

<sup>561</sup> The terms of reference are set out in Appendix 1.

<sup>562</sup> Further, a guardian who is appointed by the Tribunal under s 74(1) to consent to the continuation of special health care or the carrying out of special health care similar to the special health care to which the Tribunal has consented must, in deciding whether to consent, apply the General Principles (and the Health Care Principle): *Guardianship and Administration Act 2000* (Qld) s 74(4).

<sup>563</sup> *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

<sup>564</sup> *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34; *Powers of Attorney Act 1998* (Qld) s 76.

<sup>565</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1).

document,<sup>566</sup> for a matter in relation to an adult who has impaired capacity'.<sup>567</sup> As a result, the requirement to apply, or comply with, the Health Care Principle also applies to the Tribunal and the Supreme Court<sup>568</sup> when those bodies exercise jurisdiction under the guardianship legislation in relation to a health matter or special health matter.

5.5 In addition, the *Guardianship and Administration Act 2000* (Qld) requires a person or other entity who is authorised to make a decision for an adult about 'prescribed special health care' to apply the Health Care Principle (and the General Principles).<sup>569</sup> The Act also requires the Adult Guardian to apply the Health Care Principle (and the General Principles) in the performance and exercise of his or her functions and powers.<sup>570</sup>

5.6 The Tribunal is specifically required, when it is deciding whether a person is appropriate for appointment as a guardian for a health matter, to consider the Health Care Principle 'and whether the person is likely to apply it'.<sup>571</sup>

5.7 If a guardian, attorney or statutory health attorney makes a decision about a health matter that is contrary to the Health Care Principle, the Adult Guardian is empowered to exercise power for the health matter.<sup>572</sup>

5.8 This chapter considers the role and content of the Health Care Principle in Queensland, and outlines the position in the other Australian jurisdictions. The Commission's review of the Health Care Principle takes into account the different contexts in which various persons and entities are required to apply, or comply with, the Health Care Principle. It also takes into account:

- the recommendations in Chapter 4 of this Report in relation to the redrafting of the General Principles; and
- the various recommendations made in this Report in relation to substantive provisions of the legislation dealing with health care, for instance, the recommendation to clarify that nothing in the *Guardianship and*

566 An enduring document means an enduring power of attorney or an advance health directive: *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'enduring document'); *Powers of Attorney Act 1998* (Qld) s 28.

567 *Powers of Attorney Act 1998* (Qld) s 76.

568 *VJC v NSC* [2005] QSC 68, [16] (Wilson J).

569 *Guardianship and Administration Act 2000* (Qld) s 11(2). 'Prescribed special health care' means health care prescribed under a regulation: *Guardianship and Administration Act 2000* (Qld) sch 2 s 17. To date, no such regulation has been made.

570 *Guardianship and Administration Act 2000* (Qld) s 174(3). In Chapter 23, the Commission has recommended that s 174(3) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, in performing a function or exercising a power, the Adult Guardian must apply the General Principles and, for a health matter, the Health Care Principle: see Recommendation 23-2 of this Report.

571 *Guardianship and Administration Act 2000* (Qld) s 15(1)(b).

572 *Guardianship and Administration Act 2000* (Qld) s 43(1). In Chapter 23, the Commission has recommended that s 43(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to refer in paragraph (a) to a refusal that is contrary to the General Principles or the Health Care Principle and in paragraph (b) to a decision that is contrary to the General Principles or the Health Care Principle: Recommendation 23-4.

*Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter.<sup>573</sup>

5.9 The Commission's review of the Health Care Principle has also been informed by the objective of ensuring that the Health Care Principle is as consistent as possible with the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>574</sup>

## THE HEALTH CARE PRINCIPLE UNDER THE GUARDIANSHIP LEGISLATION

### Content of the Health Care Principle

5.10 Both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) include a Health Care Principle. It is found in section 12 of the first schedule of each Act. The two Health Care Principles are virtually identical, except that the Health Care Principle in the *Powers of Attorney Act 1998* (Qld) refers to an attorney rather than to a guardian, the Adult Guardian or the Tribunal. Further, it does not include a provision to the effect of section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld).<sup>575</sup>

5.11 The Health Care Principle, as set out in the *Guardianship and Administration Act 2000* (Qld), provides:

#### 12 Health care principle

- (1) The **health care principle** means power for a health matter, or special health matter, for an adult should be exercised by a guardian, the adult guardian, the tribunal, or for a matter relating to prescribed special health care, another entity—
- (a) in the way least restrictive of the adult's rights; and
  - (b) only if the exercise of power—
    - (i) is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
    - (ii) is, in all the circumstances, in the adult's best interests.

*Example of exercising power in the way least restrictive of the adult's rights—*

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

573 See Recommendations 9-26 to 9-28 of this Report.

574 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006.

575 See [5.14] below.

- (2) In deciding whether the exercise of a power is appropriate, the guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable—
- (a) seek the adult's views and wishes and take them into account; and
  - (b) take the information given by the adult's health provider into account.

*Editor's note—*

See section 76 (Health providers to give information).

- (3) The adult's views and wishes may be expressed—
- (a) orally; or
  - (b) in writing, for example, in an advance health directive; or
  - (c) in another way, including, for example, by conduct.
- (4) The health care principle does not affect any right an adult has to refuse health care.
- (5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account—
- (a) a guardian appointed by the tribunal for the adult;
  - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
  - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

5.12 The Health Care Principle sets out the way in which power for a health matter or special health matter 'should' be exercised.<sup>576</sup> It provides that power should be exercised 'in the way least restrictive of the adult's rights'. It then provides that power should be exercised only if either:<sup>577</sup>

- it is necessary and appropriate to maintain or promote the adult's health or well-being; *or*
- it is, in all the circumstances, in the adult's best interests.

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See also the general explanation of the Health Care Principle in *Re HG* [2006] QGAAT 26, [83], [88].

577

*Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1).

5.13 The Health Care Principle also provides that the adult's views and wishes, and information given by the adult's health provider,<sup>578</sup> must be taken into account when deciding whether the exercise of power is appropriate.<sup>579</sup>

5.14 Section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) imposes a specific requirement in relation to consultation when the Tribunal or another entity is deciding whether to consent to special health care.<sup>580</sup> This provision is not duplicated in the *Powers of Attorney Act 1998* (Qld) as attorneys under enduring documents and statutory health attorneys do not have any power to consent to special health care.<sup>581</sup>

## History and amendments

5.15 In its original 1996 Report, this Commission recommended the inclusion of a Health Care Principle to provide that a health care decision should be made for an adult with impaired capacity only if the decision is appropriate to promote and maintain the person's health and well-being.<sup>582</sup>

5.16 The inclusion of the additional requirement to exercise power in the way least restrictive of the adult's rights reflected the requirement that applied at that time under the *Intellectually Disabled Citizens Act 1985* (Qld), under which a 'legal friend' could give substituted consent to medical treatment for particular persons.<sup>583</sup>

5.17 In 2002, when the *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) commenced, significant changes were made to how the legislation dealt with the withholding and withdrawal of life-sustaining measures.

578 On request, a health provider who is treating, or has treated, the adult must give information about the adult's condition and health care to the adult's statutory health attorney, attorney under an enduring power of attorney or guardian, or to the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 76.

579 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(2).

580 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(5).

581 See *Powers of Attorney Act 1998* (Qld) ss 32(1)(a), 35(1)(c), 62(1).

582 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, 359. The draft provision recommended by the Commission in vol 2 of that Report read as follows:

**144 Health Care Principle**

- (1) A health care or special health care decision for an adult should be made only if the decision is appropriate to promote and maintain the adult's health and well-being. This principle is the 'health care principle'.
- (2) In deciding whether a decision is appropriate, the tribunal or relevant person must, to the greatest extent practicable—
  - (a) seek the adult's views and wishes and take them into account; and
  - (b) take the information given by the adult's health care provider to the person or tribunal into account.
- (3) Views and wishes may be expressed orally, in writing or in another way, for example, by conduct. (note omitted)

583 *Intellectually Disabled Citizens Act 1985* (Qld) reprint 2B, s 26(5A). That section provided that, in giving consent, 'the legal friend must ensure that, as far as possible, the consent is for the least restrictive option available, after taking into consideration the health, wellbeing and expressed wishes of the assisted citizen'.

5.18 Before the commencement of these amendments, ‘special life-sustaining measures’ had been a category of special health care, which meant that such a measure could be withheld or withdrawn from an adult only in accordance with a direction given by the adult in an advance health directive<sup>584</sup> or, if there was no such direction, with the consent of the Tribunal.<sup>585</sup>

5.19 The *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) Act:<sup>586</sup>

- omitted ‘special life-sustaining measures’ from the definition of special health care (and omitted the definition of the term ‘special life-sustaining measure’ from schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld));
- inserted a new definition of ‘life-sustaining measure’ in section 5A of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld);
- amended section 5 of the definition of ‘health care’ in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) by inserting a new section 5(2), which provides that health care includes withholding or withdrawal of a life-sustaining measure for an adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice; and
- inserted a new section 66A of the *Guardianship and Administration Act 2000* (Qld), imposing limitations on the operation of a consent to the withholding or withdrawal of a life-sustaining measure.

5.20 The amendments to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) had the effect that the withholding or withdrawal of a life-sustaining measure became a health matter, and that a decision to withhold or withdraw a life-sustaining measure could therefore be made by an adult’s guardian, attorney or statutory health attorney.

5.21 As part of those amendments, the Health Care Principle was also amended. Relevantly, the amendments inserted section 12(1)(b)(ii) as a second basis on which health care decisions could be made — that is, that the exercise of power ‘is, in all the circumstances, in the adult’s best interests’.<sup>587</sup> This addition

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584 *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

585 *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1).

586 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 10, 17, 18, 21, 29, 30, 33.

587 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 16, 28.

appears to have been intended to provide a basis for decisions that might not otherwise be justified:<sup>588</sup>

the reason for that paragraph being added is that obviously there are some circumstances in which we cannot talk of someone's health and well-being being enhanced. If there is nothing that can be done for a person who is about to die, then the option of doing something to enhance their health and well-being obviously does not arise. There has to be some other way of describing how it can be appropriate to, say, not conduct intrusive surgery or conduct CPR in a way that might end up breaking a person's ribs, if they are elderly and frail. Not undertaking intrusive intervention at a time when it would be futile and unlikely to have any effective benefit to the person is what I think would be regarded as in their best interest. That is why 'best interest' needed to be added.

5.22 The *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) also amended section 61 of the *Guardianship and Administration Act 2000* (Qld) to reflect the additional basis of best interests for health care decision-making.<sup>589</sup> The Explanatory Notes for the amending Act explain that.<sup>590</sup>

This amendment acknowledges that it may be in the adult's interest to have health care for a reason other than for promoting and maintaining the adult's health or well-being (the previous wording). For example, it may be in the adult's interests for the natural processes of dying not to be interfered with by the futile administration of artificial measures.

## MAKING HEALTH CARE DECISIONS

### Common law

5.23 At common law, medical treatment ordinarily requires patient consent.<sup>591</sup> A 'competent' patient may refuse consent. This is based on the principles of self-determination and autonomy.<sup>592</sup> Treatment decisions for a patient who does not have capacity to consent to treatment, or to refuse treatment, are to be made in accordance with the patient's 'best interests'.<sup>593</sup>

588 See the Second Reading debate of the Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 2001, 4336 (Rod Welford, Attorney-General and Minister for Justice).

589 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) s 5.

590 Explanatory Notes, Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld) 6. See also at 9, 11.

591 Eg, *Airedale NHS Trust v Bland* [1993] AC 789, 891 (Lord Mustill); *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 232–4 (Mason CJ, Dawson, Toohey and Gaudron JJ). In Queensland, see also *Criminal Code* (Qld) ss 245 (Definition of *assault*), 246 (*Assaults unlawful*), 282 (*Surgical operations*), 282A (*Palliative care*).

592 Eg, *Re B* [2002] 2 All ER 449, [16]–[21] (Dame Butler-Sloss P).

593 Eg, *Re F* [1990] 2 AC 1; *Re T* [1993] Fam 95, 102–3 (Lord Donaldson MR). This also applies to the withholding or withdrawal of treatment: *Airedale NHS Trust v Bland* [1993] AC 789, 872 (Lord Goff), 883 (Lord Browne-Wilkinson). However, if a valid anticipatory directive has been given by the adult, treatment decisions are to be made in accordance with the directive: *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

## Guardianship legislation

5.24 In Queensland, consent to health care for adults with impaired capacity is governed by the guardianship legislation.

5.25 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) provide a framework for decision-making by and for adults with impaired capacity about health matters and special health matters.

5.26 Generally, for health care for an adult with impaired capacity to be lawful, consent to the health care must be given the *Guardianship and Administration Act 2000* (Qld) or another Act or the health care must be authorised by the Supreme Court.<sup>594</sup> These matters are specifically dealt with in Chapter 5 of the *Guardianship and Administration Act 2000* (Qld). Section 61 of that Act sets out the purpose of Chapter 5 of the Act:

### 61 Purpose to achieve balance for health care

This chapter seeks to strike a balance between—

- (a) ensuring an adult is not deprived of necessary health care only because the adult has impaired capacity for a health matter or special health matter; and
- (b) ensuring health care given to the adult is only—
  - (i) health care that is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
  - (ii) health care that is, in all the circumstances, in the adult's best interests.

*Editor's note—*

See also section 11 (Principles for adults with impaired capacity).

## **Adults whose health care decisions are subject to the application of the Health Care Principle**

5.27 As explained earlier, the requirement to apply, or comply with, the Health Care Principle applies to a person or other entity performing a function or exercising a power in relation to a health matter or special health matter. It also applies specifically to guardians and attorneys exercising power for a health matter.

5.28 Sections 65 and 66 of the *Guardianship and Administration Act 2000* (Qld) set out an order of priority for dealing with special health matters and health matters. The effect of that priority is that, if an adult, while he or she had capacity, made an advance health directive giving a direction about the matter, the matter

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*Guardianship and Administration Act 2000* (Qld) s 79. Some health care may be carried out without consent: *Guardianship and Administration Act 2000* (Qld) ss 63 (Urgent health care), 63A (Life-sustaining measures in acute emergency), 64 (Minor, uncontroversial health care).

may only be dealt with under that direction.<sup>595</sup> In that circumstance, neither a substitute decision-maker nor the Tribunal has any power to make a health care decision for the adult about the matter, and the Health Care Principle has no application.

5.29 Sometimes, a person may not have made an advance health directive under the *Powers of Attorney Act 1998* (Qld) but may nevertheless have made a decision, while he or she had capacity, to consent to particular health care or, more likely, to refuse particular health care, in advance of the need for that health care arising and, therefore, in advance of the person's consent being sought. There are a number of terms, such as 'common law directive', 'advance directive' and 'advance care directive', that are used for convenience to refer to a decision about health care that is made more remotely in time from when the need for the decision arises than is usually the case.<sup>596</sup> The effectiveness of an 'advance directive' depends on whether it meets the ordinary requirements of the common law about what constitutes an effective consent or refusal.<sup>597</sup>

5.30 In Chapter 9 of this Report, the Commission has outlined the uncertainty that currently exists as to whether advance directives are still effective in Queensland. In view of that uncertainty, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to provide that nothing in those Acts affects the operation at common law of an adult's consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the matter.<sup>598</sup> The effect of the Commission's recommendations is to clarify that, if an adult has made an advance directive that would be effective at common law, the adult's directive has effect, and neither a substitute decision-maker nor the Tribunal will have any power to make a health care decision for the adult that overrides the adult's directive.

5.31 As a result, the adults whose health care decisions are subject to the application of the Health Care Principle are those adults who:

- have not made an advance health directive under the *Powers of Attorney Act 1998* (Qld) giving a direction about the matter; and
- have not given an 'advance directive', that is recognised at common law, consenting to or refusing the health care.

595 *Guardianship and Administration Act 2000* (Qld) ss 65(1)–(2), 66(1)–(2).

596 These terms are also used to distinguish an advance decision whose effectiveness is determined by the common law from an advance decision whose effectiveness has a statutory basis — such as an advance health directive made under the *Powers of Attorney Act 1998* (Qld).

597 *Airedale NHS Trust v Bland* [1993] AC 789, 864 (Lord Goff).

598 See Recommendations 9-26 to 9-28 of this Report.

**Health matters**

5.32 A health matter is a matter relating to the ‘health care’, other than special health care, of an adult.<sup>599</sup> Health care is defined in the following terms:<sup>600</sup>

**5 Health care**

- (1) **Health care**, of an adult, is care or treatment of, or a service or a procedure for, the adult—
- (a) to diagnose, maintain, or treat the adult’s physical or mental condition; and
  - (b) carried out by, or under the direction or supervision of, a health provider.<sup>601</sup>
- (2) **Health care**, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.
- (3) **Health care**, of an adult, does not include—
- (a) first aid treatment; or
  - (b) a non-intrusive examination made for diagnostic purposes; or
  - (c) the administration of a pharmaceutical drug if—
    - (i) a prescription is not needed to obtain the drug; and
    - (ii) the drug is normally self-administered; and
    - (iii) the administration is for a recommended purpose and at a recommended dosage level.

*Example of paragraph (b)—*

a visual examination of an adult’s mouth, throat, nasal cavity, eyes or ears

5.33 Section 66 of the *Guardianship and Administration Act 2000* (Qld) sets out the order of priority for dealing with health matters.

5.34 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.<sup>602</sup>

<sup>599</sup> *Guardianship and Administration Act 2000* (Qld) sch 2 s 4; *Powers of Attorney Act 1998* (Qld) sch 2 s 4.

<sup>600</sup> *Guardianship and Administration Act 2000* (Qld) sch 2 s 5; *Powers of Attorney Act 1998* (Qld) sch 2 s 5.

<sup>601</sup> A ‘health provider’ is defined as a person who provides health care, or special health care, in the practice of a profession or the ordinary course of business, such as a dentist: *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) sch 3.

<sup>602</sup> *Guardianship and Administration Act 2000* (Qld) s 66(1)–(2). Advance health directives are considered in Chapter 9 of this Report.

5.35 If there is no advance health directive giving a relevant direction, decisions about a health matter are to be made by the first of the following:<sup>603</sup>

- a guardian appointed by the Tribunal for the matter;<sup>604</sup>
- an attorney for the matter appointed by the adult under an enduring document;
- the adult's statutory health attorney (being, in order of priority, the adult's spouse, carer, close friend or relation, or the Adult Guardian).<sup>605</sup>

### **Special health matters**

5.36 A 'special health matter' is one relating to the adult's special health care.<sup>606</sup> 'Special health care' is defined as health care of the following types:<sup>607</sup>

- (a) removal of tissue from the adult while alive for donation to someone else;

*Note—*

For the situation after the adult has died, see the *Transplantation and Anatomy Act 1979*, particularly section 22.

- (b) sterilisation of the adult;
- (c) termination of a pregnancy of the adult;
- (d) participation by the adult in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the adult;
- (f) prescribed special health care of the adult.<sup>608</sup> (note added)

5.37 Section 65 of the *Guardianship and Administration Act 2000* (Qld) sets out the order of priority for dealing with special health matters.

5.38 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.<sup>609</sup>

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603 *Guardianship and Administration Act 2000* (Qld) s 66(3)–(5). Note also s 78 (Offence to exercise power for adult if no right to do so).

604 Or in accordance with an order made by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 66(3).

605 *Powers of Attorney Act 1998* (Qld) s 63.

606 *Guardianship and Administration Act 2000* (Qld) sch 2 s 6; *Powers of Attorney Act 1998* (Qld) sch 2 s 6.

607 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7; *Powers of Attorney Act 1998* (Qld) sch 2 s 7.

608 To date, no other special health care has been prescribed.

609 *Guardianship and Administration Act 2000* (Qld) s 65(1)–(2).

5.39 If there is no advance health directive giving a relevant direction, consent to special health care may generally be given only by the Tribunal.<sup>610</sup>

### **Limitations on making health decisions for an adult**

5.40 The *Guardianship and Administration Act 2000* (Qld) places a number of limitations on the exercise of power for an adult's health matters and special health matters. For example, section 67(1) provides that the exercise of power for a health matter or a special health matter is generally ineffective if the health provider knows, or ought reasonably to know, that the adult objects to the health care.

5.41 In order for a substitute decision-maker's consent, or the Tribunal's consent, to override an adult's objection to health care, the test in section 67(2) must be satisfied. That test will be satisfied if:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

5.42 In Chapter 12, the Commission has generally endorsed the approach taken in section 67, although it has recommended some changes to the current effect of an adult's objection.

5.43 For example, it has recommended that, if the Tribunal is satisfied that an adult's objection is, or will be made, because of an adult's lack of understanding of the nature of, or reason for, the treatment, the Tribunal should be able to authorise a guardian, attorney or statutory health attorney to override the adult's objection even though the adult has more than a minimal understanding of what the health care involves and why the health care is required.<sup>611</sup>

5.44 The Commission has also recommended that the basis under section 67 for overriding an adult's objection to health care is not appropriate where the health care to which the adult objects is the withholding or withdrawal of a life-sustaining measure. Accordingly, it has recommended that section 67 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, for the purpose of that section, 'health care' does not include the withholding or withdrawal of a life-sustaining measure.<sup>612</sup> Instead, it has recommended a new provision under which, if a health provider knows, or ought reasonably to know, that an adult objects to the withholding or withdrawal of a life-sustaining measure, only the Adult Guardian is

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610 Unless another entity is authorised to deal with the matter: *Guardianship and Administration Act 2000* (Qld) s 65. Note that the Tribunal cannot give consent to electroconvulsive therapy or psychosurgery: *Guardianship and Administration Act 2000* (Qld) s 68(1).

611 See Recommendation 12-1 of this Report.

612 See Recommendation 11-9 of this Report.

able to override the adult's objection and provide an effective consent to the withholding or withdrawal of the measure.<sup>613</sup>

5.45 The *Guardianship and Administration Act 2000* (Qld) also imposes limitations on the circumstances in which consent to the withholding or withdrawal of a life-sustaining measure may operate,<sup>614</sup> and on when the Tribunal may give consent to special health care.<sup>615</sup>

## THE LAW IN OTHER JURISDICTIONS

5.46 The guardianship legislation in the other Australian jurisdictions also makes provision for the way in which substitute health care decisions are to be made for an adult with impaired capacity.

### Australian Capital Territory

5.47 In the ACT, attorneys under an enduring power of attorney are required to apply a set of General Principles.<sup>616</sup> One of those principles is in terms very similar to Queensland's Health Care Principle. It provides:<sup>617</sup>

#### 1.11 Health care

- (1) An individual is entitled to have decisions about health care matters made by an attorney—
  - (a) in the way least restrictive of the individual's rights and freedom of action; and
  - (b) only if the exercise of power—
    - (i) is, in the attorney's opinion, necessary and appropriate to maintain or promote the individual's health and wellbeing; or
    - (ii) is, in all the circumstances, in the individual's best interests.
- (2) An individual's wishes in relation to health care matters, and any information provided by the individual's health care provider, must be taken into account when an attorney decides what is appropriate in the exercise of power for a health care matter.

<sup>613</sup> See Recommendation 11-10 of this Report.

<sup>614</sup> *Guardianship and Administration Act 2000* (Qld) s 66A. In Chapter 9 of this Report, a majority of the Commission has recommended that s 66A be omitted: see Recommendation 11-4(a) of this Report.

<sup>615</sup> *Guardianship and Administration Act 2000* (Qld) ss 69 (Donation of tissue), 70 (Sterilisation), 71 (Termination of pregnancy), 72 (Special medical research or experimental health care), 73 (Prescribed special health care).

<sup>616</sup> *Powers of Attorney Act 2006* (ACT) s 44.

<sup>617</sup> *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11.

## New South Wales

5.48 In New South Wales, section 40(3) of the *Guardianship Act 1987* (NSW) provides that a substitute decision-maker must have regard to the following matters when considering whether to consent to medical or dental treatment for an adult:

- (a) the views (if any of the patient);
- (b) the matters referred to in subsection (2); and
- (c) the objects of this Part.

5.49 The matters referred to in section 40(2) are:

- (a) the grounds on which it is alleged that the patient is a patient to whom this Part applies,
- (b) the particular condition of the patient that requires treatment,
- (c) the alternative courses of treatment that are available in relation to that condition,
- (d) the general nature and effect of each of those courses of treatment,
- (e) the nature and degree of the significant risks (if any) associated with each of those courses of treatment, and
- (f) the reasons for which it is proposed that any particular course of treatment should be carried out.

5.50 When the Tribunal is considering whether to consent to medical or dental treatment on an adult, it must have regard to:<sup>618</sup>

- (a) the views (if any) of:
  - (i) the patient,
  - (ii) the person who is proposing that medical or dental treatment be carried out on the patient,
  - (iii) any persons responsible for the patient, and
- (b) the matters referred to in section 42(2),<sup>619</sup> and
- (c) the objects of this Part. (note added)

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618 *Guardianship Act 1987* (NSW) 44(2).

619 The matters listed in s 42(2) of the *Guardianship Act 1987* (NSW) are identical to those listed in s 40(2), which are set out at [5.49] above.

5.51 The objects of part 5, to which substitute decision-makers and the Tribunal must have regard, are:<sup>620</sup>

- (a) to ensure that people are not deprived of necessary medical or dental treatment merely because they lack the capacity to consent to the carrying out of such treatment, and
- (b) to ensure that any medical or dental treatment that is carried out on such people is carried out for the purpose of promoting and maintaining their health and well-being.

### Other jurisdictions: best interests

5.52 In the other Australian jurisdictions, the legislation specifies that particular substitute health care decisions are to be made in accordance with the adult's best interests.<sup>621</sup> In Tasmania and Victoria, the legislation also specifies a list of factors to be considered by a substitute decision-maker in determining the adult's best interests.<sup>622</sup>

5.53 For example, section 43(2) of the *Guardianship and Administration Act 1995* (Tas) provides:

- (2) For the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the person responsible include—
  - (a) the wishes of that person, so far as they can be ascertained; and
  - (b) the consequences to that person if the proposed treatment is not carried out; and
  - (c) any alternative treatment available to that person; and
  - (d) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment; and
  - (e) that the treatment is to be carried out only to promote and maintain the health and well-being of that person; and
  - (f) any other matters prescribed by the regulations.

620 *Guardianship Act 1987* (NSW) s 32.

621 *Adult Guardianship Act* (NT) ss 17(2)(d), 21(8); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8); *Guardianship and Administration Act 1995* (Tas) ss 43(1)(b), 45(1)(c); *Guardianship and Administration Act 1986* (Vic) s 42H(2); *Guardianship and Administration Act 1990* (WA) s 63(1). See also *Guardianship and Management of Property Act 1991* (ACT) s 70(1)(c).

622 *Guardianship and Administration Act 1995* (Tas) ss 43(2), 45(2); *Guardianship and Administration Act 1986* (Vic) s 38(1).

5.54 Section 45(2) of the *Guardianship and Administration Act 1995* (Tas), which sets out the matters to be taken into account by the Guardianship Board, includes similar factors, as well as the following additional factor:<sup>623</sup>

- (d) whether the proposed treatment can be postponed on the ground that better treatment may become available and whether that person is likely to become capable of consenting to the treatment.

5.55 The Victorian legislation includes a provision in similar terms to section 43(2) of the *Guardianship and Administration Act 1995* (Tas). It additionally provides for the person responsible to take into account the wishes of any nearest relative or other family members of the adult.<sup>624</sup>

5.56 The guardianship legislation in the ACT also includes a similar list of factors for the Tribunal to consider when deciding whether particular treatment is in the adult's best interests.<sup>625</sup>

## THRESHOLD ISSUES

5.57 A threshold issue to consider is what role the Health Care Principle should have in the guardianship legislation.

5.58 When the Powers of Attorney Bill 1997 (Qld) was introduced into Parliament, the Health Care Principle was described, together with the General Principles, as the 'philosophical cornerstone' of the legislation.<sup>626</sup> The Explanatory Notes to the Bill explained that:<sup>627</sup>

These principles are directed to the way in which decisions in health matters and special health matters should be made by an attorney and others. They include provisions from existing legislation—*that power should be exercised in the way which is least restrictive of the adult's rights* and reflect internationally recognized concepts. (emphasis in original)

5.59 As noted above, the inclusion of the Health Care Principle in the guardianship legislation gave effect to a recommendation of this Commission in its original 1996 Report.<sup>628</sup> This was intended to strike a balance between the need to ensure that adults who are unable to make their own health care decisions do not miss out on necessary treatment, and the need to protect such adults against

623 *Guardianship and Administration Act 1995* (Tas) s 45(2)(d).

624 *Guardianship and Administration Act 1986* (Vic) s 38(1). However, if the adult is likely to be capable of giving consent within a reasonable time and objects to a relative or other family member being involved in such decisions, the relative or family member is taken not to be the nearest relative or family member of the adult: s 38(2).

625 *Guardianship and Management of Property Act 1991* (ACT) s 70(3).

626 See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3690 (Denver Beanland, Attorney-General and Minister for Justice).

627 Explanatory Notes, Powers of Attorney Bill 1997 (Qld) 37.

628 See [5.15] above.

unnecessary or inappropriate treatment. The Commission considered that the legislation should specify criteria for the exercise of authority to make substituted health care decisions for an adult.<sup>629</sup>

5.60 In the Discussion Paper, the Commission sought submissions on what role and purpose the Health Care Principle should have in the guardianship legislation.<sup>630</sup>

### Consistency with the United Nations Convention

5.61 As noted in Chapter 3, the United Nations *Convention on the Rights of Persons with Disabilities* is the most recent international statement of the human rights of people with disabilities, including people with mental or intellectual disabilities.<sup>631</sup> The Convention is based on a number of principles, including 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.<sup>632</sup>

5.62 Article 12 of the Convention 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.

5.63 The Convention also provides, among other things, that every human being has the inherent right to life, and that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.<sup>633</sup>

### Discussion Paper

5.64 In the Discussion Paper, the Commission considered whether the Health Care Principle should reflect the principles of the Convention dealing with the exercise of a person's legal capacity. The Commission's preliminary view was that

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629 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Draft Report (1995) [9.7.2].

630 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 87.

631 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006. The Convention entered into force on 3 May 2008. Australia has ratified the Convention.

632 See United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 3, which is set out at [3.10] of this Report.

633 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, arts 10 (Right to life), 25 (Health). Article 25(d) provides that health professionals are to provide care of the same quality to persons with disabilities as others, including on the basis of free and informed consent. Article 25(f) provides for the prevention of discriminatory denial of health care or health services or food and fluids on the basis of disability.

any revision of the Health Care Principle should be guided by the objective of consistency with the Convention.<sup>634</sup>

5.65 In the Discussion Paper, the Commission sought submissions on whether the Health Care Principle should be consistent with the principles of the Convention dealing with the exercise of a person's legal capacity.<sup>635</sup>

## The degree of specificity

### *Discussion Paper*

5.66 In the Discussion Paper, the Commission considered whether the Health Care Principle should provide specific and detailed criteria for substitute health decisions, or whether it should instead provide a general statement about the way in which such decisions should be made. The Commission noted that this would influence choices about what the Health Care Principle should contain and how it should be applied.<sup>636</sup>

5.67 The Commission commented that specific criteria might provide greater certainty for substitute decision-makers. It acknowledged, however, that it might be difficult to adequately specify in advance all the considerations that may be relevant in a particular situation. It suggested that this could lead to greater confusion for individual decision-makers.<sup>637</sup> The Commission also queried whether it might be more difficult for individual decision-makers to remember and use a detailed list of considerations rather than a general statement or broad principle.<sup>638</sup>

5.68 Alternatively, the Commission considered whether it might be more appropriate to keep the Health Care Principle general, rather than giving detailed guidance for particular decisions. It suggested that it might be easier for decision-makers to keep in mind and adhere to a statement of the overall philosophy or spirit intended by the legislation for substitute health decisions, than to apply a detailed set of criteria each time a decision is to be made. The Commission acknowledged, however, that this flexibility could allow decision-makers to rely on inappropriate considerations, such as their personal beliefs, when making decisions about an adult's health care.

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634 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 85.

635 Ibid 87.

636 Ibid [5.42].

637 Ibid [5.43]. The Commission referred, by way of example, to the criticism that the Health Care Principle, together with the General Principles, presently provides insufficient guidance for specific decisions: M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166.

638 Ibid [5.43].

5.69 In the Discussion Paper, the Commission sought submissions on whether the Health Care Principle be expressed in general terms or more specifically to provide detailed guidance about health care and special health care decisions.<sup>639</sup>

### Relationship with the General Principles

5.70 When exercising power for a health matter or special health matter, a person or other entity must apply not only the Health Care Principle, but also the General Principles.<sup>640</sup>

### Discussion Paper

5.71 In the Discussion Paper, the Commission considered how the Health Care Principle should relate to the General Principles.

5.72 The Commission observed that there is some overlap between aspects of the Health Care Principle and some of the General Principles.<sup>641</sup> It referred, by way of example, to the fact that both the Health Care Principle and the General Principles provide for the exercise of power in the way least restrictive of the adult's rights<sup>642</sup> and for the adult's views and wishes to be sought and taken into account.<sup>643</sup>

5.73 The Commission raised as an issue whether there is a need for a separate Health Care Principle, or whether it could be incorporated into the General Principles.<sup>644</sup> On the one hand, it suggested that incorporating the Health Care Principle into the General Principles might lessen any confusion that arises from the overlap between those provisions. The Commission acknowledged, however, that it might be appropriate to give separate attention to the manner in which health decisions should be made given that they are of a highly personal nature and may sometimes involve significant conflict and emotion.<sup>645</sup>

5.74 The Commission also referred to suggestion that, depending on the circumstances, some of the General Principles may not be relevant to particular

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639 Ibid 87.

640 *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34; *Powers of Attorney Act 1998* (Qld) s 76.

641 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.47].

642 *Guardianship and Administration Act 2000* (Qld) sch 1 ss 7(3)(c), 12(1)(a); *Powers of Attorney Act 1998* (Qld) sch 1 ss 7(3)(c), 12(1)(a).

643 *Guardianship and Administration Act 2000* (Qld) sch 1 ss 7(3)(b), 12(2)(a); *Powers of Attorney Act 1998* (Qld) sch 1 ss 7(3)(b), 12(2)(a).

644 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.48].

645 Ibid [5.49].

health care decisions.<sup>646</sup> It noted that, at present, the legislation does not specify what is to happen if this occurs. It raised as a further issue whether the General Principles should continue to apply to health decisions in addition to the Health Care Principle.<sup>647</sup> The Commission considered that an alternative approach might be to provide that the General Principles need be applied only as far as, or to the maximum extent, possible.

5.75 The Commission also noted that there may be a conflict between an aspect of the Health Care Principle and one or more of the General Principles, suggesting that the 'best interests' test in the Health Care Principle could conflict with the substituted judgment approach set out in the General Principles.<sup>648</sup> The Commission referred to the suggestion that this could lead to uncertainty about which principles are to be applied to health decisions:<sup>649</sup>

For example, there may be clear and undisputed evidence that an adult would not have wanted to be kept alive by artificial means but, in the circumstances of the case, continued treatment was regarded as being in the adult's best interests. A conflict of principles can arise because GP7(4) requires the tribunal to consider the principle of substituted judgment while HCP12(1)(b)(ii) refers to the adult's best interests. The legislation does not provide guidance as to which of the Principles should have priority in determining the appropriate decision. This may raise difficulties because it means that the tribunal must make a value judgment about which Principle to give priority to in a particular situation.

5.76 The Commission noted that, at present, the legislation does not specify what is to happen if such a conflict arises. It sought submissions on the following questions:<sup>650</sup>

646 Ibid [5.50], referring to M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 173; B White and L Willmott, 'Will You Do As I Ask? Compliance with Instructions About Health Care in Queensland' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 77, 82.

The Tribunal has emphasised different aspects of the General Principles in cases dealing with health decisions depending on the facts of each case. See, eg, *Re JD* [2003] QGAAT 14, [22]; *Re IHE* [2001] QGAAT 2, [56]. The Tribunal's failure to clearly enunciate the reasons for emphasising some aspects of the General Principles without reference to others has been criticised: M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 175–7.

647 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.50]. The Commission referred at n 394 to B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 68, where this suggestion was made in the specific context of decisions to withdraw or withhold life-sustaining measures.

648 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.51]. However, the General Principles have been interpreted as also incorporating a 'best interests' test: see the Tribunal's comments in *Re JD* [2003] QGAAT 14, [22] discussed at [4.170] above.

649 L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 450.

650 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 87.

- Should the Health Care Principle continue to be set out as a separate provision, or should it be incorporated into the General Principles?
- Should the General Principles continue to apply to decisions about an adult's health matters and special health matters in addition to the Health Care Principle and, if so, should the legislation specify an order of priority between the Health Care Principle and the General Principles?

### **Submissions**

#### *The role and purpose of the Health Care Principle*

5.77 The submissions that addressed this issue expressed various views about the role that the Health Care Principle should have in the Queensland Guardianship legislation.

5.78 Several respondents, including Alzheimer's Australia (Qld) and the former Public Advocate, suggested that the Health Care Principle's primary purpose is to provide guidance to decision-makers about how to make health-related decisions for an adult with impaired decision-making capacity.<sup>651</sup>

5.79 Another respondent considered that the role of the principle is to establish the responsibility that decision-makers have in making decisions for adults and to ensure that the correct decision was made and is reviewable.<sup>652</sup>

5.80 Disability Services Queensland (now Disability and Community Care Services<sup>653</sup>) submitted that the Health Care Principle gives 'statutory recognition of the rights of people with a decision-making disability by being the philosophical cornerstone of the guardianship legislation for health matters or special health matters'.<sup>654</sup>

5.81 Queensland Advocacy Incorporated considered that the Health Care Principle has a dual purpose:<sup>655</sup>

It establishes that adult's who have lost capacity still have rights and it operates to safeguard those rights by ensuring health decisions are not made arbitrarily in the face of those rights. It is important that the Health Care Principle continues to fill these roles.

5.82 Other respondents considered that the Health Care Principle plays an important role in ensuring that an adult's wishes are protected wherever possible.<sup>656</sup> Some respondents suggested that this role would best be protected by

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651 Submissions 9, 15, 20A, 55, 56, 91.

652 Submission 14.

653 Disability and Community Care Services forms part of the Department of Communities.

654 Submission 93.

655 Submission 34A.

656 Submissions 42, 52.

the implementation of a statement of core values for decision-makers to utilise when making decisions for an adult.<sup>657</sup>

5.83 One respondent suggested that the Health Care Principle serves as a good educational tool for decision-makers and others in the community. This respondent also suggested that the Principle's purpose and function should be widened and that this could be achieved by providing examples of how the Principle applies in practice for use by the wider community.<sup>658</sup>

#### *The United Nations Convention*

5.84 The submissions that addressed this issue were strongly of the view that the Health Care Principle should be consistent with the principles of the United Nations Convention dealing with the exercise of a person's legal capacity. A number of respondents, including Alzheimer's Australia (Qld), Queensland Alliance and Disability Services Queensland, commented that the principle should be consistent with the Convention.<sup>659</sup>

5.85 One respondent qualified its view with the proviso that the legislation must also ensure that the adult's representative is 'suitably qualified'.<sup>660</sup>

5.86 Disability Services Queensland submitted that the Health Care Principle is in essence consistent with the Convention.<sup>661</sup>

#### *General or specific*

5.87 Several respondents considered that the Health Care Principle should be expressed in general terms.<sup>662</sup>

5.88 Disability Services Queensland considered that the Health Care Principle should be expressed in general terms in order to provide 'greater scope and fluidity in its application' and avoid creating a 'check list' process.<sup>663</sup>

5.89 On the other hand, Queensland Advocacy Incorporated submitted that the Health Care Principle should be expressed in specific and detailed terms.<sup>664</sup> It suggested that consumers should be provided with an accompanying Code of Practice which would provide decision-makers with objective guidance in fulfilling their roles.

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657 Submissions 23, 53, 55.

658 Submission 20A.

659 Submissions 9, 14, 27, 64, 93.

660 Submission 14.

661 Submission 93.

662 Submissions 9, 14, 93.

663 Submission 93.

664 Submission 34A.

5.90 Several respondents also commented that it would be useful if the Health Care Principle contained examples to demonstrate the application of the Principle in practice.<sup>665</sup>

*Relationship with the General Principles*

5.91 A number of respondents submitted that the Health Care Principle should remain separate from the General Principles.<sup>666</sup> Several respondents considered it appropriate that the guardianship legislation includes a separate Health Care Principle as it acknowledges the ‘special nature’ of health care.<sup>667</sup>

5.92 Queensland Advocacy Incorporated commented that the Health Care Principle should continue to be applied with the General Principles.<sup>668</sup>

The Health Care Principle should embody the human rights for people with disability that are relevant to health matters and special health matters. It should help to safeguard these rights by providing a non-exhaustive set of prescriptive guidelines describing the factors individuals and entities must consider and processes they must follow when exercising powers for health matters and special health matters. To ensure these functions are properly performed, the Health Care Principle should continue to be applied with the General Principles. If it is severed from the General Principles, it must be redefined to incorporate the rights contained in the General Principles.

5.93 Several of the respondents who favoured keeping the principles separate suggested that the legislation should provide that the Health Care Principle take priority over the General Principles.<sup>669</sup> Queensland Advocacy Incorporated suggested that, if the ‘best interests’ principle cannot resolve the conflict, the Health Care Principle should prevail but only to the extent of the conflict and in the way that least restricts the adult’s rights.<sup>670</sup>

5.94 One respondent considered that giving priority to the Health Care Principle would help to avoid any conflict with the General Principles.<sup>671</sup> Another respondent suggested that the Health Care Principle should be drafted with the General Principles as the underpinning principles.<sup>672</sup> However, this respondent also commented that ‘the General Principles are too vague to give sufficient guidance to a guardian or a similar party’. Another respondent considered that, if the Health Care Principle is given priority over the General Principles, it may be useful to

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665 Submissions 20A, 55.

666 Submissions 14, 20A, 23, 34A, 55, 56, 69, 93.

667 Submissions 20A, 69.

668 Submission 34A.

669 Submissions 20A, 52, 55, 81.

670 Submission 34A.

671 Submission 20A.

672 Submission 81.

provide detailed guidelines about how the Health Care Principle should be applied.<sup>673</sup>

5.95 However, Alzheimer's Australia (Qld) and the Watchtower Bible and Tract Society of Australia considered that the Health Care Principle should be incorporated into the General Principles.<sup>674</sup> The Watchtower Bible and Tract Society of Australia commented that having two principles creates confusion and would be better utilised by incorporating the two together.<sup>675</sup>

*The application of the General Principles to decisions about health matters and special health matters*

5.96 Several respondents were of the view that the General Principles should continue to apply to decisions about special health care, as well as the Health Care Principle.<sup>676</sup> In particular, the Endeavour Foundation considered that the General Principles are higher order principles and are necessary in guiding the use of the Health Care Principle,<sup>677</sup> while Disability Services Queensland suggested that the General Principles complement and reinforce the Health Care Principle and should continue to be observed by decision-makers.<sup>678</sup>

5.97 Alzheimer's Australia (Qld), Queensland Advocacy Incorporated and another respondent submitted that the legislation should specify an order of priority between the General Principles and the Health Care Principle.<sup>679</sup>

5.98 Queensland Advocacy Incorporated proposed that a staged approach should be taken to the application of the Principles:<sup>680</sup>

As with the General Principles a staged approach as described above should apply to the Health Care Principle. Simply because a matter concerns a health issue it cannot be allowed on that basis alone to override an adult's rights. The primary position should be that an adult is presumed to have capacity to make decisions about health matters. If an adult does not have capacity, then effect should be given to the adult's views and wishes as far as practicable without adversely affecting the adult's interests. The principle of substituted decision making should prevail. That is, if an adult cannot give their preferences but they can be established by reasonable means they should be. If an adult's preferences cannot be established or if giving effect to them would expose the adult or their interests to significant risk then the least restrictive option appropriate and necessary to 'maintain or promote the adult's health or wellbeing' should be adopted. The Tribunal has extended the meaning of this

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673 Submission 52.  
 674 Submissions 9, 72.  
 675 Submission 72.  
 676 Submissions 9, 14, 69, 93.  
 677 Submission 69.  
 678 Submission 93.  
 679 Submissions 9, 14, 34A.  
 680 Submission 34A.

formulation, which is contained in the Health Care Principle, to encompass 'best interests'. However, the Health Care Principle at 12(1)(b)(ii) also permits decision makers to decide health matters on the basis that they are 'in all the circumstances, in the adult's best interests'. To prevent redundancy, to ensure the least restrictive option is applied, and to prevent best interests forming a position of first resort, a priority should be established between these options. Only when all other options are exhausted should the best interests principle apply.

5.99 On the other hand, Disability Services Queensland considered that the guardianship legislation should not specify an order of priority between the two types of Principles:<sup>681</sup>

Depending on the circumstances, different sets of General Principles might apply in conjunction with the Health Care Principle. It would be difficult to enunciate in legislation which principles are more important in any given situation. Priority of principles should be informed by the adult and circumstances involved in each individual case. Furthermore, by setting an order of priority, this could affect the inherent value and importance of the General Principles themselves in their application to matters other than health or special health matters.

5.100 Alzheimer's Australia (Qld) considered that the Health Care Principle should 'inform' the General Principles.<sup>682</sup>

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

5.101 In the Commission's view, there should continue to be a separate Health Care Principle. The role of the Health Care Principle should be to provide broad guidance in relation to decisions about an adult's health care, rather than to provide a mechanism for directing the outcome of particular decisions.

5.102 The Commission considers, however, that the Health Care Principle should not duplicate matters that are already provided for by the revised General Principles. Instead, the Health Care Principle should supplement the General Principles by elaborating on the application of specific General Principles in the context of health care decisions. Further, the Health Care Principle should include any additional requirements that are not already covered by the General Principles.

5.103 The Commission further considers that, as well as avoiding duplication of matters covered by the revised General Principles, the Health Care Principle should be redrafted to reflect the principles enunciated in the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>683</sup> This should be done by incorporating in the Health Care Principle an express requirement to apply the General Principles. As explained in Chapter 4, the Commission has redrafted the General Principles to reflect more closely the relevant articles of the Convention.

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681 Submission 93.

682 Submission 9.

683 As explained in Chapter 3 of this Report, the United Nations *Convention on the Rights of Persons with Disabilities* is now the most recent international statement of rights for people with disabilities, including people with mental or intellectual disabilities.

5.104 Although the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) already provide that a person or other entity performing a function or exercising power for a health matter or a special health matter must apply both the General Principles and the Health Care Principle,<sup>684</sup> the advantage of including a specific requirement to apply the General Principles is that it lessens the risk that the legislative requirement to apply the General Principles will be overlooked.

5.105 In supplementing the revised General Principles, the Commission considers that it is desirable for the Health Care Principle to elaborate on the application of the new General Principle 2. The redrafted Health Care Principle should therefore provide:

#### **11 Same human rights and fundamental freedoms**

In applying General Principle 2—

- (a) the principle of non-discrimination requires, among other things, that all adults be offered appropriate health care, including preventative health care, without regard to a particular adult's capacity; and
- (b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons.

### **THE FIRST LIMB: THE 'LEAST RESTRICTIVE' REQUIREMENT**

#### **Issue for consideration**

5.106 Section 12(1)(a) of the Health Care Principle provides that power for a health matter or special health matter for an adult should be exercised in the way that is least restrictive of the adult's rights.<sup>685</sup>

5.107 This requirement is consistent with General Principle 7(3)(c), which currently provides that a person or entity in performing or exercising a function or power under the legislation must do so in the way least restrictive of the adult's rights.<sup>686</sup>

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684 *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(1); *Powers of Attorney Act 1998* (Qld) s 66.

685 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)(a); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)(a). This requirement previously applied under the *Intellectually Disabled Citizens Act 1985* (Qld) reprint 2B, s 26(5A). See [5.16] above.

686 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(c).

5.108 It is also consistent with similar principles adopted under the *Disability Services Act 2006* (Qld) and the *Mental Health Act 2000* (Qld).<sup>687</sup>

5.109 In addition, it accords with article 12 of the Convention, which provides that measures relating to a person's exercise of legal capacity shall respect the person's rights, be proportional and tailored to the person's circumstances, and apply for the shortest time possible.<sup>688</sup>

5.110 The requirement to exercise power in the way that is least restrictive of the adult's rights is also mirrored in the health care principle found in the *Powers of Attorney Act 2006* (ACT).<sup>689</sup>

## Discussion Paper

5.111 In the Discussion Paper, the Commission noted that decision-making in the way that it least restrictive of the adult's rights is a reflection of the adult's right to autonomy, and has been recognised as an important concept underpinning substitute decision-making for adults with impaired capacity.<sup>690</sup>

5.112 The Commission commented that recognition and respect for the adult's autonomy may be especially important in the context of health decisions because of the highly personal nature of such decisions. It suggested that the least restrictive principle might also be particularly important for health decisions that could have serious or lasting consequences, especially if the adult may later regain the capacity to make such decisions for himself or herself. The Commission noted that the common law has recognised that 'the right to determine what shall be done with one's own body is a fundamental right'.<sup>691</sup>

5.113 The Commission referred to the suggestion that, particularly in relation to the withholding or withdrawal of a life-sustaining measure, it may be difficult for lay decision-makers to identify the rights of the adult that are relevant to that decision.<sup>692</sup> The Commission suggested that one such right might be the right to

<sup>687</sup> *Disability Services Act 2006* (Qld) s 19(3)(b) provides that, when using disability services, people with a disability have the right to receive services in a way that results in the minimum restriction of their rights and opportunities. *Mental Health Act 2000* (Qld) s 9 provides that a power or function under the Act relating to a person who has a mental illness must be exercised or performed so that the person's liberty and rights are adversely affected only if there is no less restrictive way to protect the person's health and safety or to protect others, and any adverse effect on the person's liberty and rights is the minimum necessary in the circumstances.

<sup>688</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

<sup>689</sup> *Powers of Attorney Act 2006* (ACT) sch 1 s 1.11(1)(a).

<sup>690</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.56], referring to R Creyke, *Who Can Decide? Legal Decision-Making For Others* (1995) 41, 267.

<sup>691</sup> *Ibid* [5.57], referring to *Malette v Shulman* (1990) 72 OR (2d) 417, 432 (Robins JA), cited with approval in *Re T* [1993] Fam 95, 116–17 (Dame Butler-Sloss LJ) and in *Re B* [2002] 2 All ER 449, [19] (Dame Butler-Sloss LJ).

<sup>692</sup> *Ibid* [5.58], referring to M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 181, 184–5.

refuse treatment, which is referred to in section 12(4) of the Health Care Principle.<sup>693</sup>

5.114 In the Discussion Paper, the Commission sought submissions on whether the Health Care Principle should continue to provide that power for a health matter or special health matter for an adult should be exercised in the way least restrictive of the adult's rights.<sup>694</sup>

5.115 It also raised the issue of whether there is a need to give examples of, or otherwise specify, what rights of the adult may be relevant to a decision about the adult's health care or special health care.<sup>695</sup>

## Submissions

### *Retention of the least restrictive principle*

5.116 A number of respondents were of the view that the Health Care Principle should continue to provide that power for a health matter or special health matter should be exercised in the way that is least restrictive of the adult's rights.<sup>696</sup>

5.117 Queensland Advocacy Incorporated considered that 'the principle of least restrictive intervention is essential if an adult's rights are to be preserved to the greatest possible extent'.<sup>697</sup> It explained that:

It is embodied in the [Convention of the Rights of People with Disabilities] and mandated in the General Principles and the Health Care Principle. It must remain there and continue to apply to all acts and interventions that may affect an adult's rights. It is an essential safeguard against arbitrary, ill-conceived and unnecessary infringements on an adult's rights.

5.118 It also noted that:

in the words of Article 12 of the [Convention of the Rights of People with Disabilities] least restrictive would seem to mean at the very least that the option chosen respects the rights, will and preferences of the person, is free of conflict of interest and undue influence, is proportional and tailored to the person's circumstances, applies for the shortest time possible and is subject to regular review by a competent, independent and impartial authority or judicial body. It may be useful to include in the example of least restrictive intervention given in the Health Care Principle, and also in the General Principles, some of the concepts expressed in Article 12 of the [Convention of the Rights of People with Disabilities].

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693 Ibid. See the discussion of s 12(4) of the Health Care Principle commencing at [5.209] below.

694 Ibid 89.

695 Ibid.

696 Submissions 1, 9, 14, 27, 55, 72, 93.

697 Submission 34A.

5.119 Disability Services Queensland considered that the provision, which is also mirrored in the *Disability Services Act 2006* (Qld), ensures that adults receive services in a way that results in minimum restriction of their rights and opportunities.<sup>698</sup> The Watchtower Bible and Tract Association of Australia considered that the least restrictive principle confirms an adult's right to individual autonomy and self-determination.<sup>699</sup>

### **Specification of the adult's rights**

5.120 Several respondents considered the Health Care Principle should include examples to assist decision-makers in identifying the adult's relevant rights in making decisions about health care or special health care matters.<sup>700</sup>

5.121 The former Public Advocate suggested that the least restrictive principle remains important, but requires some refining to make it more useful as guidance to decision-makers. She also noted that the current example given in the Health Care Principle refers to the least restrictive option as the least 'intrusive' treatment available to meet the identified need but considered that this option 'may not accord with the clearly expressed wishes the adult articulated before losing capacity or continues to articulate, or may not be the most appropriate treatment option for other reasons':<sup>701</sup>

Regarding rights of the adult which may be relevant for inclusion, it is suggested that those relevant rights which are articulated in the UN Convention should be included, in particular, the following could be considered for inclusion: Right to life: article 10; Right to liberty and security of the person: article 14; Right to respect for physical and mental integrity: article 17; and Right to enjoyment of the highest attainable standard of health without discrimination: article 25. Arguably, freedom from cruel, inhumane or degrading treatment or punishment (article 15) and freedom from exploitation, violence and abuse (article 16) also have a place in the [Health Care Principle].

5.122 Alzheimer's Australia (Qld) and Disability Services Queensland both opposed the inclusion of examples. In their view, examples would make the Health Care Principle too specific and may limit appropriate decision making.<sup>702</sup>

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698 Submission 93.

699 Submission 72.

700 Submissions 14, 20A, 55.

701 Submission 91.

702 Submissions 9, 93.

## The Commission's view

5.123 In Chapter 4 of this Report, a majority of the Commission has recommended a new General Principle 7, which provides for the manner in which functions and powers are to be performed and exercised. The new General Principle 7 is in the following terms:<sup>703</sup>

### **7 Performance of functions or powers**

A person or other entity in performing a function or exercising a power under this Act, or a person in making a decision for an adult on an informal basis, [or an enduring document,]<sup>704</sup> must do so—

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
- (b) in the way least restrictive of the adult's rights, interests and opportunities.

5.124 As noted above, the Commission has decided that the Health Care Principle should not duplicate matters already provided for by the General Principles. Accordingly, it is not necessary for the redrafted Health Care Principle to retain the requirement in section 12(1)(a) of the current Health Care Principle to exercise power in the way that is least restrictive of the adult's rights.

## THE SECOND LIMB: ALTERNATIVE REQUIREMENTS

### The law in Queensland

5.125 At present, the Health Care Principle provides that power for a health matter or special health matter should be exercised (which could be consenting to health care or refusing health care) only if the exercise of power satisfies one of two requirements.

### ***Necessary and appropriate to maintain or promote health or well-being***

5.126 The first requirement under section 12(1)(b) is that the exercise of power:<sup>705</sup>

- (i) is necessary and appropriate to maintain or promote the adult's health or wellbeing.

<sup>703</sup> A minority of the Commission has recommended new General Principles 7(1) and 8(1) in the same terms.

<sup>704</sup> The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or a person in making a decision for an adult on an informal basis' and insert the words in square brackets.

<sup>705</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)(b)(i); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)(b)(i).

5.127 This is similar to the health care principle in the ACT powers of attorney legislation.<sup>706</sup> The legislation in New South Wales also includes a similar requirement.<sup>707</sup>

5.128 This requirement is also consistent with the *Mental Health Act 2000* (Qld). General Principle 8(h) of that Act provides that treatment provided under that Act 'must be administered to a person who has a mental illness only if it is appropriate to promote and maintain the person's mental health and well-being'.<sup>708</sup> It is also consistent with the Australian Medical Association's Code of Ethics, which provides that the doctor should 'consider first the well-being of [the] patient'.<sup>709</sup>

### **Best interests**

5.129 The second and alternative requirement under section 12(1)(b) is that the exercise of power:<sup>710</sup>

- (ii) is, in all the circumstances, in the adult's best interests.

5.130 This requirement is consistent with the common law and with the position in many of the other Australian jurisdictions.<sup>711</sup>

5.131 As explained earlier, the best interests requirement was added to the Health Care Principle by the *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld). It appears to have been included in the legislation to provide a basis for decisions about the withholding or withdrawal of life-sustaining measures that might not be justified as necessary and appropriate to maintain or promote the adult's health or well-being. In particular, it seems to have been addressed to circumstances in which intervention 'would be futile and unlikely to have any effective benefit to the person'.<sup>712</sup>

<sup>706</sup> *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.11(1)(b)(i). This principle provides that an individual is entitled to have decisions about health care matters made by an attorney only if the exercise of power is, in the attorney's opinion, necessary and appropriate to maintain or promote the individual's health and well-being.

<sup>707</sup> *Guardianship Act 1987* (NSW) ss 32(b), 40(3), 44(2). Those sections require the decision-maker to have regard to the need to ensure that treatment is carried out for the purpose of promoting and maintaining the adult's health and well-being.

<sup>708</sup> *Mental Health Act 2000* (Qld) s 8(h). 'Treatment' is defined as 'anything done, or to be done, with the intention of having a therapeutic effect on the person's illness' and includes measures taken to address the symptoms of a disease such as the provision of artificial hydration and nutrition: *Mental Health Act 2000* (Qld) s 10 sch 2; and *Adult Guardian v Langham* [2006] 1 Qd R 1, [17], [32].

<sup>709</sup> Australian Medical Association, *Code of Ethics* (2004), editorially revised 2006, [1.1](a) <<http://www.ama.com.au/web.nsf/tag/amacodeofethics>> at 19 September 2010.

<sup>710</sup> *Powers of Attorney Act 1998* (Qld) sch 1 cl 12(1)(b)(ii); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 12(1)(b)(ii).

<sup>711</sup> See [5.23], [5.52]–[5.56] above.

<sup>712</sup> See the Parliamentary Debate of the Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 2001, 4336 (Rod Welford, Attorney-General and Minister for Justice). See also Explanatory Notes, *Guardianship and Administration and Other Acts Amendment Bill 2001* (Qld) 6.

5.132 It is noted, however, that in considering the application of the Health Care Principle, the Tribunal had previously given a wide interpretation to the words ‘promote or maintain the adult’s health or well-being’.<sup>713</sup>

This term cannot mean simply that a power can only be exercised if it improves the person’s life. This term must be read to mean if the health care will be of some *benefit* to the person and therefore in the person’s best interests.

5.133 The best interests approach has also been criticised as paternalistic<sup>714</sup> and as being ‘at odds’ with the underlying philosophy of the legislation and the General Principles.<sup>715</sup>

5.134 It has also been argued that the best interests test is inadequate in guiding decisions about the withholding or withdrawal of life-sustaining measures. The test ‘is susceptible to the ‘picking and choosing’ of factors (especially where there is inconsistency) that might equally support either of the two possible conclusions’.<sup>716</sup> It also raises the discomfiting question whether it can properly be said that being allowed to die is in a person’s best interests.<sup>717</sup> An approach that expressly focuses on the adult’s views and wishes might be more appropriate for such decisions.<sup>718</sup>

5.135 In the absence of legislative guidance in relation to the meaning of ‘best interests’, the Tribunal has applied the common law.<sup>719</sup> The common law best

<sup>713</sup> *Re RWG* [2000] QGAAT 49, [69]. See also at [82]. See also *Re AX* [2000] QGAAT 4, [45]; *Re TM* [2002] QGAAT 1, [154]. Prior to the amendments made by the *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld), the Health Care Principle did not apply to special health care which, at that time, included the withholding and withdrawal of life-sustaining measures. Nevertheless, the Tribunal had held that the Health Care Principle should be applied in relation to special health care to the greatest extent possible: *Re RWG* [2000] QGAAT 49, [71]; *Re AX* [2000] QGAAT 4, [40]; *Re TM* [2002] QGAAT 1, [153].

<sup>714</sup> Eg, Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [2.50]; South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) 84–5.

<sup>715</sup> M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 172, 188.

<sup>716</sup> P MacFarlane, ‘What is food? Withdrawal of nutrition and hydration and other matters’ (2003) 24 *Queensland Lawyer* 135, 141.

<sup>717</sup> *Ibid*; M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 185. See, eg, *Re TM* [2002] QGAAT 1, [165].

<sup>718</sup> For example, the Australian Medical Association suggests that decisions to withdraw or withhold life-sustaining treatment should be undertaken in collaboration with the medical practitioner and having regard to the patient’s known values and goals regarding end of life care: Australian Medical Association, *Position Statement: The Role of the Medical Practitioner in End of Life Care* (2007) [9.3], [9.5] <<http://www.ama.com.au/web.nsf/doc/WEEN-76L9US>> at 19 September 2010. Other approaches to this issue have also been suggested: eg, P MacFarlane, ‘What is food? Withdrawal of nutrition and hydration and other matters’ (2003) 24 *Queensland Lawyer* 135, 141–2; and NL Cantor, ‘Twenty-Five Years After *Quinlan*: A Review of the Jurisprudence of Death and Dying’ (2001) 29 *Journal of Law, Medicine & Ethics* 182, 192–3. The withholding and withdrawal of life-sustaining measures is considered in Chapter 11 of this Report. See also the approach endorsed by the Draft Advance Care Directives Framework 2010, which favours substituted judgment over best interests: Clinical, Technical and Ethical Principal Committee, Australian Health Ministers’ Advisory Council, *A National Framework for Advance Care Directives: Consultation Draft 2010* (2010) 29.

<sup>719</sup> *Re HG* [2006] QGAAT 26, [89]. See also *Re MC* [2003] QGAAT 13, [56]–[61].

interests test is applied to children and to adults who are unable to provide consent to treatment.<sup>720</sup> It involves a balancing exercise, dependent on the facts of each individual case. Medical opinion is not determinative.<sup>721</sup> It involves ‘a welfare appraisal in the widest sense’<sup>722</sup> encompassing ‘every kind of consideration capable of impacting on the decision’.<sup>723</sup>

These include, non-exhaustively, medical, emotional, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations.

5.136 The courts have also suggested that it would be undesirable to attempt to set bounds to what is relevant in making a best interests determination.<sup>724</sup>

5.137 In *Re HG*,<sup>725</sup> the Tribunal gave the following explanation of its approach to the best interests requirement of the Health Care Principle:<sup>726</sup>

The approach of the Tribunal in trying to determine the question of what is actually in HG’s best interests is very similar to the approach taken by the medical experts in trying to determine the question of good medical practice. The Tribunal must weigh up a series of factors and essentially decide which side of the balance sheet has the greatest number of entries. This is very much

720 The Supreme Court has a protective jurisdiction known as the *parens patriae* jurisdiction. The *parens patriae* jurisdiction will be invoked when ‘it is clear on the material that the order sought is positively in the interests of a child or person within the Court’s protection’: *Christensen v Christensen* [1999] QCA 241, [19] McMurdo P (McPherson JA, Shepherdson J agreeing). See also *VJC v NSC* [2005] QSC 068, [13] (Wilson J). The *Guardianship and Administration Act 2000* (Qld) does not affect the Supreme Court’s inherent jurisdiction, including its *parens patriae* jurisdiction: *Guardianship and Administration Act 2000* (Qld) s 240.

721 *R (Burke) v General Medical Council* [2005] QB 424, [116] (Munby J). Cf *Airedale NHS Trust v Bland* [1993] AC 789, which suggested that it is for the doctor to decide what is in the patient’s best interests, having regard to a body of informed and responsible medical opinion; *Re F* [1990] 2 AC 1, 78 (Lord Goff); and, more recently, *Messiha v South East Health* [2004] NSWSC 1061, [25] (Howie J). In the latter case, it was said that ‘it would be an unusual case where the Court would act against what is unanimously held by medical experts as an appropriate treatment regime’.

722 *R (Burke) v General Medical Council* [2005] QB 424, [116], [213](d) (Munby J).

723 *An NHS Trust v MB* [2006] EWHC 507 (Fam), [16](v) (Holman J). See also *R (Burke) v General Medical Council* [2005] QB 424, [116], [213](d) (Munby J). For example, Nicholas J of the New South Wales Supreme Court held that the factors relevant to a best interests determination in a case involving the donation of blood stem cells by an intellectually disabled adult to his brother included the patient’s wishes, the risks to the patient involved in the treatment, including side-effects, and the patient’s relationship with the brother: *Northern Sydney and Central Coast Area Health Service v CT* [2005] NSWSC 551, [26]–[28].

The test was summarised in *Portsmouth Hospitals NHS Trust v Wyatt* [2005] 1 WLR 3995, [87], a case involving a declaration as to the withdrawal of mechanical ventilation from a prematurely born infant, hospitalised since birth, with chronic respiratory and kidney problems and severe, permanent brain damage:

The judge must decide what is in the child’s best interests. In making that decision the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the patient (*In re J* [1991] Fam 33). There is a strong presumption in favour of a course of action which will prolong life, but that presumption is not irrebuttable (*In re J*). The term ‘best interests’ encompasses medical, emotional, and all other welfare issues (*In re A* [2000] 1 FLR 549). The court must conduct a balancing exercise in which all the relevant factors are weighed (*In re J*) and a helpful way of undertaking this exercise is to draw up a balance sheet (*In re A*).

724 *Portsmouth Hospitals NHS Trust v Wyatt* [2005] 1 WLR 3995, [88], citing *Re S* [2001] Fam 15, 30 (Thorpe LJ).

725 [2006] QGAAT 26.

726 *Ibid* [92]. Both *Portsmouth Hospitals NHS v Wyatt* [2005] 1 WLR 3995 and *An NHS Trust v MB* [2006] EWHC 507 (Fam), cited by the Tribunal, are decisions relating to children.

the approach the English Court of Appeal has been taking in recent cases. In *Wyatt v Portsmouth Hospital NHS*, the Court stated that the test of best interests meant balancing all the conflicting considerations to see where the final balance of best interest lies. The Court indicated that the term 'best interests' is used in the widest possible sense and includes every possible kind of consideration including medical, emotional, sensory and instinctive. This approach was also recently endorsed in the decision of *An NHS Trust v MB (a child)*. (notes omitted)

5.138 *Re HG* involved the question whether consent should be given to the withdrawal of artificial hydration. The Tribunal held that the matters relevant to determining what was in the adult's best interests included the following:<sup>727</sup>

- (a) what is regarded as good medical practice in the circumstances of the case which would require a consideration of matters including:
  - (i) the seriousness of the adult's medical condition;
  - (ii) the adult's prospect of recovery;
  - (iii) whether the proposed treatment is of therapeutic value to the adult;
  - (iv) a consideration of the benefits versus the burdens of treatment.
- (b) the effect of treatment on the adult's dignity; and
- (c) the views and wishes of the adult.

5.139 The present lack of legislative guidance about what 'best interests' means has been criticised. In particular, concern has been expressed that lay decision-makers, who cannot be expected to know the common law, are left to rely on their own value judgments.<sup>728</sup> The common law best interests approach has been subject to similar criticism.<sup>729</sup>

<sup>727</sup> *Re HG* [2006] QGAAT 26, [93].

<sup>728</sup> M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 181, 185; P MacFarlane, 'What is food? Withdrawal of nutrition and hydration and other matters' (2003) 24 *Queensland Lawyer* 135, 141.

Note also the concern raised in the parliamentary debate of the Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld) that the 'best interests' principle is not clearly defined and, in the context of the withholding or withdrawal of life-sustaining measures such as artificial nutrition and hydration, would 'allow others to determine that a person's life is not worth living': Queensland, *Parliamentary Debates*, Legislative Assembly, 6 December 2001, 4334 (Liz Cunningham), quoting from correspondence received from the Queensland Right to Life movement.

<sup>729</sup> Eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 270–1, 272 (Brennan J); *R (Burke) v General Medical Council* [2005] QB 424, [115] (Munby J). See also M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 172, 185, 187; P MacFarlane, 'What is food? Withdrawal of nutrition and hydration and other matters' (2003) 24 *Queensland Lawyer* 135, 139.

## Discussion Paper

### ***Necessary and appropriate to maintain or promote health or well-being***

5.140 In the Discussion Paper, the Commission suggested that the requirement that power should be exercised only if it is necessary and appropriate to maintain or promote the adult's health or well-being may help prevent unnecessary or unwarranted treatment being given to an adult, especially if the adult may subsequently regain the capacity to make his or her own treatment decisions. In this respect, the Commission suggested that this requirement also appeared to be least restrictive of the adult's autonomy.<sup>730</sup>

5.141 The Commission sought submissions on whether the Health Care Principle should continue to provide that power for a health matter or special health matter for an adult should be exercised only if the exercise of power is necessary and appropriate to maintain or promote the adult's health or well-being.<sup>731</sup>

### ***Best interests***

5.142 In the Discussion Paper, the Commission suggested that the inclusion of a best interests principle could inappropriately widen the circumstances in which consent to health care for an adult can be given. The Commission commented that, at present, any health decision could be made on the basis of the best interests principle. It suggested, however, that there might be some health care decisions that should not be made, even if they could be said to be in the adult's best interests.<sup>732</sup>

5.143 The Commission raised as an issue for consideration whether the Health Care Principle should continue to include a best interests test. It noted that a related issue is whether, if a best interests test continues to apply, it should continue to apply generally to all health care decisions, or should be limited so that it applies to particular types of decisions only, such as those involving the withholding or withdrawal of life-sustaining measures.<sup>733</sup>

5.144 The Commission observed that the Tasmanian legislation, which adopts a best interests approach, specifies that, when determining if the treatment<sup>734</sup> is in the adult's best interests, the decision-maker must take into account that the treatment is to be carried out only to promote and maintain the health and well-being of the adult.<sup>735</sup> A similar approach is adopted in Victoria.<sup>736</sup>

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730 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.62].

731 Ibid 90.

732 Ibid [5.113].

733 Ibid [5.117].

734 Note, in Queensland, it is the 'exercise of power' that must be in the adult's best interest. This requirement is not restricted to treatment, but could also apply to a refusal of treatment.

735 *Guardianship and Administration Act 1995* (Tas) s 43(2)(e).

5.145 A further issue raised was whether, if a best interests test remains in the Health Care Principle, the meaning of ‘best interests’ should be clarified. The Commission noted that, at present, the legislation does not define ‘best interests’ and does not specify what matters should be considered in determining whether a decision is in the adult’s best interests.<sup>737</sup> Nor does the legislation specify from whose perspective the adult’s best interests should be assessed: the adult’s, the health provider’s or the decision-maker’s.<sup>738</sup>

5.146 The Commission noted that, in Tasmania and Victoria, for example, the legislation specifies a number of matters to be taken into account in determining the adult’s best interests.<sup>739</sup> It suggested that some of the concerns raised about the best interests test might be addressed by including a list of factors in the legislation that the decision-maker must consider in making a best interests determination.<sup>740</sup>

5.147 In the Discussion Paper, the Commission sought submissions on whether the Health Care Principle should continue to provide that one of the circumstances in which power for a health matter or special health matter for an adult may be exercised is if the exercise of power is, in all the circumstances, in the adult’s best interests and, if so, whether the best interests test should apply in respect of all health decisions, or only in respect of some health decisions (and, if so, which types of decisions).<sup>741</sup>

5.148 The Commission also sought submissions on whether, if the best interests principle remains part of the Health Care Principle, the term ‘best interests’ should be clarified, for example, by setting out a list of factors to be considered in determining whether an exercise of power is in the adult’s best interests, such as any one or more of the following:<sup>742</sup>

- (a) what is regarded as good medical practice in the circumstances, including a consideration of:
  - (i) the seriousness of the adult’s medical condition;
  - (ii) the adult’s prospect of recovery;

736 *Guardianship and Administration Act 1986* (Vic) s 38(1)(f). Under that provision, the decision-maker must consider ‘whether’ the treatment is only to promote and maintain the adult’s health and well-being.

737 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.118].

738 M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 181.

739 *Guardianship and Administration Act 1995* (Tas) s 43(2); *Guardianship and Administration Act 1986* (Vic) s 38(1). These provisions are set out at [5.52] and [5.54] above.

740 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.126].

741 *Ibid* 95.

742 *Ibid* 95–6.

- (iii) whether the proposed treatment is of therapeutic value to the adult;
- (b) a consideration of the benefits versus the burdens of treatment;
- (c) the effect of the treatment on the adult's dignity;
- (d) the views and wishes of the adult;
- (e) the consequences to the adult if the proposed treatment is not carried out;
- (f) any alternative treatment available to the adult;
- (g) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment;
- (h) whether the treatment can be postponed because better treatments may become available;
- (j) the views and wishes of members of the adult's support network;
- (j) other?

### **Submissions**

#### *Necessary and appropriate to maintain or promote health or well-being*

5.149 Several respondents, including the former Public Advocate and Disability Services Queensland suggested that the Health Care Principle should continue to provide that power for a health matter or special health matter should be exercised only if necessary and appropriate to maintain or promote the adult's health or well-being.<sup>743</sup>

5.150 The former Public Advocate also suggested that the Health Care Principle could place a positive obligation on decision-makers to promote the adult's health and well-being by requiring them to have or gain sufficient knowledge of the person to determine that a medical or allied health review is needed.<sup>744</sup>

#### *Best interests*

5.151 A number of respondents were of the view that the Health Care Principle should continue to provide that the power to make decisions for health matters and special health matters should be exercised only if it is, in all circumstances, in the adult's best interests.<sup>745</sup>

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<sup>743</sup> Submissions 9, 14, 23, 50, 91, 93.

<sup>744</sup> Submission 91.

<sup>745</sup> Submissions 9, 14, 23, 27, 34A, 56, 93.

5.152 Queensland Advocacy Incorporated suggested that a staged approach should apply to the application of the Health Care Principle, and that acting in the adult's best interest should be the final stage of that approach.<sup>746</sup>

The primary position should be that an adult is presumed to have capacity to make decisions about health matters. If an adult does not have capacity, then effect should be given to the adult's views and wishes as far as practicable without adversely affecting the adult's interests. The principle of substituted decision making should prevail. That is, if an adult cannot give their preferences but they can be established by reasonable means they should be. If an adult's preferences cannot be established or if giving effect to them would expose the adult or their interests to significant risk then the least restrictive option appropriate and necessary to 'maintain or promote the adult's health or wellbeing' should be adopted. It is only when all these options have failed or proved impracticable that the best interests principle should prevail.

5.153 However, some respondents considered that a best interests test created the potential for a substitute decision-maker to make decisions based on his or her own views and wishes rather than those of the adult.<sup>747</sup>

5.154 The Watchtower Bible and Tract Society of Australia considered that the best interests approach is 'at odds' with the underlying philosophy of the legislation and the General Principles.<sup>748</sup>

A person who has taken the trouble to document their health care wishes does not usually do so lightly. The Health Care Principle should ensure that what the individual has clearly specified is fully respected. No decision-maker, no matter how well-intentioned and claiming to act in the adult's 'best interests', should be able to overrule that direction by second-guessing their capacity to give the advance health direction in the first place or by claiming that the direction is not valid because, when giving it, they did not understand the possible implication of such direction. Any challenge of this kind invariably occurs when the individual concerned is incapacitated and thus unable to have any input into the matter, or at a time when such pressure is contrary to their health needs.

5.155 Right to Life Australia expressed concern about the inclusion of the best interests test in the Health Care Principle on the basis that it enables a person to claim that it may be in a person's best interests for the adult to die.<sup>749</sup>

*The application of the best interests test to all or some health decisions*

5.156 Alzheimer's Australia (Qld) considered that the best interests test should apply to all health decisions.<sup>750</sup> In contrast, the former Public Advocate and another respondent both considered that the test should apply only in respect of

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746 Submission 34A.

747 Submissions 22, 24, 56.

748 Submission 72.

749 Submission 62.

750 Submission 9.

some health decisions.<sup>751</sup> For example, the former Public Advocate suggested that if the best interests test continues to be included in the Health Care Principle:<sup>752</sup>

it should be limited to circumstances regarding limited and specified health care and special health care only, and that the matters to be considered when determining 'best interests' should be specified.

...

[i]t is suggested that it should be applicable to end-of-life decision-making and that the criteria to be considered should be specified.

5.157 Disability Services Queensland suggested that there should be an expectation that the adult's best interests would be considered before the making of health decisions, notwithstanding that some health decisions may not require the best interests test to be applied.<sup>753</sup>

*Whether 'best interests' should be defined*

5.158 Several respondents supported the inclusion of a definition of 'best interests' for the purpose of the Health Care Principle.<sup>754</sup>

5.159 Queensland Advocacy Incorporated considered that 'best interests' should be non-exhaustively defined to provide clear guidelines to decision makers about the factors to consider and processes to follow when applying the best interests principle:<sup>755</sup>

As previously stated the best interests standard is an objective one. It is not code for best intentioned or well-meaning. It does not offer up to decision makers the discretion to act as they see fit or as they think best. It does not present an opportunity for decision-makers to apply their personal values to a circumstance affecting the rights and values of someone else. For these reasons it is appropriate to define the factors a decision-maker must consider when making a health care decision in another's best interests. It would be inappropriate to attempt to define these factors exhaustively. The factors and circumstances to which they might apply are too many to contemplate.

5.160 Queensland Advocacy Incorporated suggested that 'a good strong core of useful factors that could assist in most conceivable situations might be inclusively defined in the following way':

When determining what is in an adult's best interests under this provision the person or body making the decision must consider all the relevant factors and circumstances. These include but are not restricted to ...

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751 Submissions 14, 91.

752 Submission 91.

753 Submission 93.

754 Submissions 14, 34A, 53, 93.

755 Submission 34A.

Factors which may be appropriate to incorporate in such a definition could include those the Tribunal described in *Re HG*, namely:

- (a) what is regarded as good medical practice in the circumstances of the case which would require a consideration of matters including:
  - (i) the seriousness of the adult's medical condition;
  - (ii) the adult's prospect of recovery;
  - (iii) whether the proposed treatment is of therapeutic value to the adult;
  - (iv) a consideration of the benefits versus the burdens of treatment.
- (b) the effect of treatment on the adult's dignity; and
- (c) the views and wishes of the adult.

Other relevant factors could include:

- (1) The consequences to the adult if the proposed treatment is not carried out;
- (2) any alternative treatment available to the adult;
- (3) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment;
- (4) whether the treatment can be postponed because better treatment might become available;
- (5) the views and wishes of the adult's family and support network.

5.161 Disability Services Queensland commented that, although guidance about what constitutes 'best interests' may be found in the common law, lay decision-makers would not be expected to have this knowledge.<sup>756</sup> Consequently, it considered that it may be useful to have a list of the more prominent factors that have been recognised at common law to guide decision-makers.

5.162 The former Public Advocate, who was generally opposed to the retention of a best interests test, noted that, in the absence of a legislative definition of best interests, the Tribunal has taken guidance from the common law:<sup>757</sup>

Guidance has been taken from the common law by GAAT. The common law suggests that a wide variety of matters may be considered. There is no definitive list of relevant considerations. The common law test has been criticised as a legal test since it results in an unexaminable exercise of discretion in the hands of the decision-maker. Lay decision-makers are unlikely to realise that the term has a particular meaning at common law. In the absence of any guidance, they will each subjectively decide what is relevant to

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756 Submission 93.

757 Submission 91.

'best interests' and apply the test however they see fit from whose ever perspective they decide to apply it.

5.163 Alternatively, the former Public Advocate suggested that the expression 'best interests' could be changed to 'interests'. She considered that this might avoid the 'paternalistic overtones' that the expression 'best interests' evokes, and might also avoid the situation where decision-makers with a legal background resort to the common law meaning of the expression 'best interests'.

5.164 Although the Watchtower Bible and Tract Society of Australia was opposed to a 'best interests' test, it suggested that, if the test were retained, the legislation would do well to incorporate a list of objective factors that the decision-maker must consider in determining the ambit of an exercise of power. It considered that the primary factor should be the adult's views and wishes, and expressed concern about a number of other factors on which the Commission had sought submissions:<sup>758</sup>

Otherwise, lay decision-makers may indeed rely on their own value and belief judgments. To be consistent with the purpose of the legislation, the primary factor which should be considered is (d) the views and wishes of the adult. However, we have concerns about factors (e) and (f).<sup>759</sup> If a determination of an adult's ability to decide on a course of treatment relates to the consequences to the adult if the proposed treatment is not carried out, it should be noted that there is seldom just one alternative. For example, throughout history, many have given their lives fighting for a principle, for what they believed to be right. The consequences cannot always be measured in medical terms. Such a statement makes no provision for decisions of conscience. Thus, the decision-maker formulates his or her decision on the likely consequences to the individual concerned, as assessed through his or her values, and not necessarily on the consequences to the one concerned as governed by that one's values. Moreover, factor (a) is of great concern to Jehovah's Witnesses living in Qld as it contains a reference to the highly subjective standard 'good medical practice'. Its possible application has the potential to erode one of the important human rights, namely, to make choices with which others (including a treating doctor) may not agree. We would strongly recommend that this provision not be included, otherwise it significantly undermines the established common law rights relative to self-determination and personal autonomy. (note added)

5.165 Alzheimer's Australia (Qld) suggested that attempting to define 'best interests' may lead to a rigid definition that may not cover all the circumstances that might affect an adult.<sup>760</sup>

### The Commission's view

5.166 Section 12(1)(b) of the Health Care Principle currently provides that power for a health matter, or a special health matter, should be exercised only if the exercise of power:

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758 Submission 72.

759 See [5.148] above.

760 Submission 9.

- is necessary and appropriate to maintain or promote the adult's health or well-being; or
- is, in all the circumstances, in the adult's best interests.

5.167 An exercise of power for a health matter or a special health matter can be a decision to consent to health care or a decision to refuse health care.

5.168 The first limb of section 12(1)(b) is intended to ensure that consent is given for health care only if the health care is, in effect, appropriate.

5.169 The second limb of section 12(1)(b), although not limited to a refusal of health care, nevertheless operates to guide the circumstances in which it is appropriate for health care to be refused (including for a life-sustaining measure to be withheld or withdrawn). As explained earlier, it was added when the legislation was amended to make the withholding or withdrawal of a life-sustaining measure a health matter.<sup>761</sup>

5.170 The inclusion of this second limb in the Health Care Principle and, more importantly, the fact that the legislation enables a guardian, attorney or statutory health attorney and the Tribunal to consent to the withholding or withdrawal of a life-sustaining measure recognises that, in some circumstances, it may not be in an adult's interests to receive, or to continue to receive, health care — for example, where the provision of the life-sustaining measure would cause unnecessary suffering and indignity to the adult and not have a therapeutic benefit or where the provision of the health care (which might not necessarily be a life-sustaining measure) would be inconsistent with fundamental and strongly held beliefs of the adult.

5.171 As explained earlier in this chapter, the Commission considers that the role of the Health Care Principle should be to provide broad guidance in relation to decisions about an adult's health care and to supplement the guidance already provided by the General Principles.

5.172 In Chapter 4 of this Report, the Commission has recommended a new General Principle 7,<sup>762</sup> which provides for the manner in which a function or a power under the legislation, or an enduring document, is to be performed or exercised. That principle requires a function or a power to be performed or exercised in a way that promotes and safeguards the adult's rights, interests and opportunities, and in the way that is least restrictive of those rights, interests and opportunities. The application of this principle in the health context allows health care to be refused in appropriate circumstances. In making such a decision, a substitute decision-maker or the Tribunal must apply all of the General Principles, including the principles mentioned in General Principle 2(2).

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761 See [5.17]–[5.21] above.

762 The minority view of the Commission is the same in relation to this point: see General Principles 7(1) and 8(1) at [4.261] above.

5.173 While the new General Principles provide a sound basis for making health care decisions, the Commission considers that the application of the General Principles should be supplemented by the inclusion in the Health Care Principle of a new provision that elaborates on the application of General Principles 7 and 8. The purpose of the new provision is to provide guidance in terms of specific matters that should be taken into account in making health care decisions. The additional provision should be in the following terms:

## **12 Performance of functions or powers**

In applying General Principles 7 and 8, a person or other entity in performing a function or exercising a power under this Act [, or an enduring document,] must take into account:

- (a) information given by the adult's health provider;
- (b) the nature of the adult's medical condition, if any;
- (c) if the adult has a medical condition, the adult's prognosis;
- (d) if particular health care is proposed, any alternative health care that is available;
- (e) the nature and degree of any significant risks associated with the proposed health care or any alternative health care;
- (f) whether the proposed health care can be postponed because a better health care option may become available or the adult is likely to become capable of making his or her own decisions about the proposed health care;
- (g) the consequences to the adult if the proposed health care is not carried out;
- (h) a consideration of the benefits versus the burdens of the proposed health care; and
- (i) the effect of the proposed health care on the adult's dignity and autonomy.

5.174 These factors are based on a combination of:

- the reference in section 12(2)(b) of the current Health Care Principle to information given by the adult's health provider;
- the factors listed in the Tasmanian and Victorian legislation;<sup>763</sup> and
- the considerations articulated by the Tribunal in *Re HG*.<sup>764</sup>

<sup>763</sup>

*Guardianship and Administration Act 1995* (Tas) ss 43(2), 45(2); *Guardianship and Administration Act 1986* (Vic) s 38(1), which are discussed at [5.53]–[5.55] above.

<sup>764</sup>

[2006] QGAAT 26, [93], set out at [5.138] above.

5.175 It is not necessary to include a reference to the wishes of the adult, which is also listed in section 12(2)(a) of the current Health Care Principle and in the Tasmanian and Victorian legislation, as the requirement to take the adult's views and wishes into account is already provided for by the majority's new General Principle 8(4) and by the minority's new General Principles 7(3) and 8(2).

5.176 It is inevitable that some decisions about health care, particularly decisions to withhold or withdraw a life-sustaining measure, will remain complex and difficult decisions. However, the Commission considers that the new General Principles (in particular General Principles 2, 7 and 8) together with the new Health Care Principle 12 proposed above ensure that these decisions are approached in a principled way, directing consideration to factors that will be of special relevance in these situations.

5.177 In the Commission's view, these principles provide a better basis for decision-making than the matters presently referred to in section 12(1)(b) of the current Health Care Principle. They also avoid the paternalistic language of 'best interests', which is used in section 12(1)(b)(ii) of the current Health Care Principle.

5.178 Accordingly, the Commission is of the view that the redrafted Health Care Principle should not include the matters presently referred to in section 12(1)(b) of the current Health Care Principle.

5.179 At present, section 61(b) of the *Guardianship and Administration Act 2000* (Qld) mirrors the language of section 12(1)(b) of the current Health Care Principle. Section 61 provides:

**61 Purpose to achieve balance for health care**

This chapter seeks to strike a balance between—

- (a) ensuring an adult is not deprived of necessary health care only because the adult has impaired capacity for a health matter or special health matter; and
- (b) ensuring health care given to the adult is only—
  - (i) health care that is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
  - (ii) health care that is, in all the circumstances, in the adult's best interests.

*Editor's note—*

See also section 11 (Principles for adults with impaired capacity).

5.180 In view of the Commission's recommendation not to include in the redrafted Health Care Principle a provision to the effect of section 12(1)(b) of the current Health Care Principle, section 61 of the *Guardianship and Administration Act 2000* (Qld) should also be amended. Section 61(b) should be replaced with a new paragraph in the following terms:

- (b) ensuring health care is given to the adult only if it is appropriate in all the circumstances.

## VIEWS, WISHES AND INFORMATION FROM OTHERS

### The law in Queensland

5.181 As noted earlier, section 12(1)(b) of the Health Care Principle provides that power for a health matter or a special health matter should be exercised only if the exercise of power (that is, the decision to consent to, or to refuse, the health care) satisfies one of two alternative requirements. It is necessary that the exercise of power:

- is necessary and appropriate to maintain or promote the adult's health or well-being; or
- is, in all the circumstances, in the adult's best interests.

5.182 Section 12(2) of the Health Care Principle then provides that, in deciding whether the exercise of a power is appropriate, the relevant decision-maker must, to the greatest extent practicable:<sup>765</sup>

- (a) seek the adult's views and wishes and take them into account; and
- (b) take the information given by the adult's health provider into account.

5.183 Section 12(3) provides that the adult's views and wishes may be expressed orally, in writing or in another way, including by conduct.<sup>766</sup>

5.184 The requirement to take the adult's views and wishes into account is consistent with the principle of autonomy and with article 12 of the Convention, which requires respect for the adult's rights, will and preferences.<sup>767</sup>

5.185 However, there is some doubt about whether the requirement in section 12(2) applies to both of the circumstances set out in section 12(1)(b) of the Health Care Principle or only to the requirement in section 12(1)(b)(i). It has been suggested that because of the word 'appropriate', the requirement to consider the views of the adult and the information given by the health provider arises only if the

<sup>765</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(2).

<sup>766</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(3); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(3).

<sup>767</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

power is sought to be exercised on the first of those bases.<sup>768</sup> The Health Care Principle does not expressly require such information to be considered when exercising power on the basis of the adult's best interests.

5.186 It has been noted, however, that lay decision-makers may not make this distinction and may seek to take account of such information in any case.<sup>769</sup> It is also noted that the application of the common law to the best interests approach will require such information to be considered.<sup>770</sup> In any event, General Principle 7(3)(b) currently requires the adult's views and wishes to be sought and taken into account to the greatest extent practicable when exercising power for any matter.<sup>771</sup>

### The law in other jurisdictions

5.187 The legislation in New South Wales, Victoria and Tasmania requires:

- the adult's wishes to be taken into account;<sup>772</sup> and
- information about the proposed treatment to be considered.<sup>773</sup>

### Discussion Paper

5.188 In the Discussion Paper, the Commission suggested that it was a matter of practical necessity for information given by the health provider about the nature of the adult's condition and the proposed and alternative health care to be considered in every case in which power for a health matter is to be exercised.<sup>774</sup>

5.189 It raised as an issue for consideration whether the decision-maker should be required to consider the views of any other persons, such as members of the

<sup>768</sup> L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 449; B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 67; M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 183.

<sup>769</sup> M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 182, 183.

<sup>770</sup> L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 449.

<sup>771</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(b); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(b).

<sup>772</sup> *Guardianship Act 1987* (NSW) ss 40(3)(a), 44(2)(a)(i); *Guardianship and Administration Act 1986* (Vic) s 38(1)(a); *Guardianship and Administration Act 1995* (Tas) s 43(2)(a).

<sup>773</sup> *Guardianship Act 1987* (NSW) ss 40(3)(b), 44(2)(b); *Guardianship and Administration Act 1986* (Vic) s 38(1)(c)–(e); *Guardianship and Administration Act 1995* (Tas) s 43(2)(b)–(d).

<sup>774</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.86].

adult's family or 'support network'.<sup>775</sup> The Commission noted that the Victorian legislation provides, for example, that the person responsible is to take into account the wishes of any nearest relative or other family members of the adult.<sup>776</sup>

5.190 The Commission observed that the guardianship legislation specifically provides that, if there are two or more persons who are guardians, attorneys or statutory health attorney for an adult, they must consult with one another on a regular basis to ensure that the adult's interests are not prejudiced by a breakdown in communication between them.<sup>777</sup> It considered that this requirement applied generally and so would operate in the context of health decisions for the adult.<sup>778</sup>

5.191 The Commission noted, however, that there is currently no requirement for decision-makers to consider the views of the adult's family or support network when exercising power for an adult's health matter. While the Commission considered that consultation with members of the adult's support network may provide valuable information to help with decision-making,<sup>779</sup> it acknowledged that consideration of others' views might undermine respect for the adult's autonomy, particularly in the context of health decisions that are of a highly personal nature.<sup>780</sup> The Commission noted that it is also important, as provided in article 12 of the Convention, to avoid conflicts of interest.<sup>781</sup>

5.192 In the Discussion Paper, the Commission sought submissions on whether the guardianship legislation should be changed to clarify that the requirement in section 12(2) of the Health Care Principle to take into account the views and wishes of the adult, and the information given by the health provider, must be complied with whenever power for a health matter or special health matter is exercised and not just when it is exercised under section 12(1)(b)(i).<sup>782</sup>

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775 Ibid [5.87]. An adult's 'support network' consists of members of the adult's family, close friends of the adult and anyone else the Tribunal decides provide support to the adult: *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 (definition of 'support network').

776 *Guardianship and Administration Act 1986* (Vic) s 38(1)(b). However, if the adult is likely to be capable of giving consent within a reasonable time and objects to a relative or other family member being involved in such decisions, the relative or family member is taken not to be the nearest relative or family member of the adult: s 38(2).

777 *Guardianship and Administration Act 2000* (Qld) s 40(1); *Powers of Attorney Act 1998* (Qld) s 79.

778 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.89].

779 Under the *Intellectually Disabled Citizens Act 1985* (Qld), which applied prior to the enactment of the guardianship legislation, the legal friend was required to take all reasonable steps to consult with the adult's relatives who provided ongoing care for the adult and to consult with persons who provided ongoing care for the adult, appropriate professional persons, and relatives of the adult or other persons who appeared to have a proper interest in the adult's well-being in order to inform himself or herself as fully as possible on matters requiring consent and the options available: *Intellectually Disabled Citizens Act 1985* (Qld) reprint 2B, s 26(5).

780 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.90].

781 Ibid, referring to United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

782 Ibid 99.

5.193 It also sought submissions on whether the Health Care Principle should be changed to require a decision-maker to take into account the views of any other persons, such as members of the adult's support network.<sup>783</sup>

## Submissions

5.194 Most of the submissions that addressed this issue considered that the legislation should be changed to clarify that the requirement in section 12(2) of the Health Care Principle to take into account the views and wishes of the adult, and the information given by the health provider, must be complied with whenever power for a health matter or special health matter is exercised and not just when it is exercised under clause 12(1)(b)(i).<sup>784</sup>

5.195 In order to promote consistency with the principle of autonomy, the Watchtower Bible and Tract Society of Australia suggested that the legislation should stipulate that the views and wishes of the adult should be the primary consideration, if the power is sought to be exercised in the adult's 'best interests'.<sup>785</sup>

5.196 A number of submissions considered that the Health Care Principle should be changed to require a decision-maker to take into account the views of any other persons, such as members of the adult's support network.<sup>786</sup>

5.197 Queensland Advocacy Incorporated considered that such a requirement should apply where it is reasonably practicable to do so. It also noted that a requirement to consult does not constitute a requirement to follow opinions or advice arising from the consultation.<sup>787</sup>

5.198 Carers Queensland commented that, in order to properly understand and consider the adult's views and wishes, considerable discussion with family and carers will often be required.<sup>788</sup> It also noted that '[w]hile this consultation will primarily focus on the family's views of the adult's wishes, their views may also have relevance to the adult's interests'.

5.199 One respondent suggested that a requirement for a decision-maker to consult members of the adult's support network should apply if the decision-maker is not a member of the network.<sup>789</sup>

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783 Ibid.

784 Submissions 9, 14, 23, 27, 34A, 67, 93.

785 Submission 72.

786 Submissions 23, 24, 27, 34A, 43, 50, 67, 71, 93.

787 Submission 34A.

788 Submission 71.

789 Submission 27.

5.200 Two other submissions gave qualified support for such an amendment to the Health Care Principle. The former Public Advocate suggested that, if the Health Care Principle were amended to require the decision-maker to take into account the views of members of the support network, those views should not take precedence over the adult's own views or interests.<sup>790</sup> Alzheimer's Australia (Qld) supported a requirement to take the views of members of the adult's support network into account but only if they are able to respond in the best interests of the adult.<sup>791</sup>

5.201 The Watchtower Bible and Tract Society of Australia did not support the concept of a decision-maker being required to take into account the views of other persons, including members of the adult's support network.<sup>792</sup> It considered that such a requirement could undermine an adult's autonomy, particularly in the context of health decisions.

### The Commission's view

5.202 In Chapter 4 of this Report, a majority of the Commission has recommended new General Principles 8(4) and 9(3), which provide for an adult's views and wishes to be sought and taken into account:<sup>793</sup>

#### **8 Structured decision-making**

...

- (4) Third, the person or other entity must recognise and take into account any other views and wishes expressed by the adult.

#### **9 Maximising an adult's participation in decision-making**

...

- (3) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, or in making a decision for an adult on an informal basis,<sup>794</sup> must seek the adult's views and wishes.

5.203 As noted above, the Commission has decided that the Health Care Principle should not duplicate matters already provided for by the General Principles. Accordingly, it is not necessary for the redrafted Health Care Principle to retain the present requirement in section 12(2)(a) of the Health Care Principle to seek the adult's views and wishes and take them into account.

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790 Submission 91.

791 Submission 9.

792 Submission 72.

793 A minority of the Commission has also recommended that the General Principles should require an adult's views and wishes to be sought and taken into account, but in new General Principles 7(3), 8(2) and 9(3).

794 The General Principles that are included in the *Powers of Attorney Act 1998* (Qld) should omit the words 'or in making a decision for an adult on an informal basis'.

5.204 Further, the majority's new General Principle 8 is also better expressed than section 12(2)(a) of the current Health Care Principle, which does not refer to the principle of substituted judgment. In contrast the majority's new General Principle 8(3) requires the principle of substituted judgment to be used, as does the minority's new General Principles 7(3) and 8(2).

5.205 However, the Commission considers that the redrafted Health Care Principle should include a provision that gives guidance in relation to the application, in the context of health care decisions, of the new General Principle 8(3) that has been recommended by a majority of the Commission. The new principle should be in the following terms:

### **13 Substituted judgment**

For the purpose of applying General Principle 8(3),<sup>795</sup> which requires the principle of substituted judgment to be used, the views and wishes of an adult expressed when the adult had capacity may also be expressed—

- (a) in an advance health directive; or
- (b) by a consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the health care.

5.206 This principle will replace section 12(3) of the current Health Care Principle.

5.207 Earlier in this chapter, the Commission has recommended that the Health Care Principle include a new provision requiring specified matters to be taken into account in applying General Principles 7 and 8, including information given by the adult's health provider. This reflects the requirement in section 12(2)(b) of the current Health Care Principle to take into account the information given by the adult's health provider.

5.208 Under the guardianship legislation, the rights and interests of the adult are paramount. Accordingly, the Commission considers that it would not be appropriate for the Health Care Principle to make specific provision requiring the views of the adult's support network to be taken into account. However, the new General Principle 4 provides expressly that maintaining an adult's existing supportive relationships may involve consultation with relevant persons in the adult's support network.

## **REFUSAL OF HEALTH CARE**

### **The law in Queensland**

5.209 At present, section 12(4) of the Health Care Principle provides that:<sup>796</sup>

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<sup>795</sup>

To reflect the minority view, this should refer to General Principles 7(3) and 8(2). General Principles 7 and 8 of the minority view are set out at Recommendation 4-5 of this Report.

- (4) The health care principle does not affect any right an adult has to refuse health care.

5.210 It is not clear why this provision was included as part of the Health Care Principle or how it is intended to operate.

5.211 It has been noted, for example, that this would appear to apply only when the adult has capacity to give or refuse consent.<sup>797</sup> Alternatively, it may be that the decision-maker for an adult with impaired capacity should consider whether the adult would have refused the treatment if he or she had been able to make the decision.<sup>798</sup>

5.212 Another view is that section 12(4) of the Health Care Principle is intended to specify one of the adult's rights to which section 12(1)(a) refers when it provides that power for a health matter or special health matter should be exercised 'in the way least restrictive of the adult's rights'.<sup>799</sup> The reference to this in the Health Care Principle may also give some content, for health decisions, to General Principle 2 which provides for the recognition of an adult's basic human rights.<sup>800</sup> For example, in considering whether to consent to the withholding or withdrawal of artificial nutrition and hydration, the Tribunal noted in *Re HG* that:<sup>801</sup>

An adult does not lose the right to have life-sustaining measures withheld or withdrawn because that adult has lost capacity to make the decision for himself or herself. In the Irish case of *In the Matter of a Ward of Court*<sup>802</sup> where the Court allowed the withdrawal of artificial nutrition and hydration it held that incapacity did not justify any reduction in the degree of legal protection to which a person was entitled. (original note)

5.213 Reference in the Health Care Principle to the adult's right to refuse health care may also direct decision-makers to its importance when considering the adult's views and wishes.<sup>803</sup>

796 *Guardianship and Administration Act 2000* (Qld) sch 1 s 2(4); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(4).

797 *Re Bridges* (2001) 1 Qd R 574, 583 (Ambrose J). This seems to be consistent with the approach adopted by the Tribunal in *Re RWG* [2000] QGAAT 49, [55]–[56].

798 See, eg, M Howard, 'Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 182.

799 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)(a); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)(a). This seems to have been the approach adopted by the Tribunal in *Re MC* [2003] QGAAT 13, [63].

800 *Guardianship and Administration Act 2000* (Qld) sch 1 s 2; *Powers of Attorney Act 1998* (Qld) sch 1 s 2.

801 *Re HG* [2006] QGAAT 26, [69].

802 [1995] 2 ILMR 401.

803 This seems to have been the approach adopted by the Tribunal in, for example, *Re TM* [2002] QGAAT 1, [166]–[168].

### ***The effect of an adult's objection to health care***

5.214 Although the Health Care Principle refers to an adult's right to refuse health care, the *Guardianship and Administration Act 2000* (Qld) does not recognise a right to refuse health care on the part of an adult with impaired capacity. Instead, section 67(1) provides that an adult's objection to health care will generally be effective if the health provider knows, or ought reasonably to know, that the adult objects to the health care. As explained earlier, the Commission has made recommendations in Chapter 12 about the effect of an adult's objection to health care.

### **Discussion Paper**

5.215 In the Discussion Paper, the Commission sought submissions on the operation of section 12(4) of the Health Care Principle in practice.<sup>804</sup>

5.216 The Commission also sought submissions on whether the Health Care Principle should continue to include a provision to the effect that the Health Care Principle does not affect any right an adult has to refuse health care.<sup>805</sup> The Commission also sought submissions on whether, alternatively, a provision to that effect should be incorporated into, or relocated near, those sections of the *Guardianship and Administration Act 2000* (Qld) that deal with the effect of an adult's objection to health care.<sup>806</sup>

### **Submissions**

5.217 A number of submissions generally supported the retention of section 12(4) of the Health Care Principle.<sup>807</sup>

5.218 One respondent commented that the right to refuse treatment is paramount: because the adult is usually lacking capacity, the person responsible for making health care decisions for the adult must consider the previous representations made by the adult. This respondent also commented that, as health care is so broad, the adult may have capacity for simple health care matters, and therefore the consent of the adult must still be first sought from the adult; when it is demonstrated that they lack the ability to understand the treatment, then consent must be obtained from the guardian or statutory health attorney.<sup>808</sup>

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804 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 100.

805 Ibid.

806 Ibid 101.

807 Submissions 9, 13, 14, 24, 53, 72, 91.

808 Submission 81.

5.219 Several respondents considered that section 12(4) should apply only where the adult is proven to have the capacity to make such a decision.<sup>809</sup>

5.220 In contrast, the former Public Advocate commented that it is appropriate for the Health Care Principle to acknowledge that a person with impaired capacity has the right to refuse health care.<sup>810</sup>

At common law, a competent person has the right to accept or refuse offered health care. A person with impaired capacity for the matter has the same right. It is appropriate for the guardianship regime, and in particular the [Health Care Principle] to acknowledge this right. A person with impaired capacity should not be compelled, because of their disability, to accept any and all offered health care treatment. When making a decision about whether to consent to particular health care, a substitute decision-maker should be aware of the adult's rights in this regard. However, it should not be applied as a basis to deny an adult necessary health care, and therefore some clarification is needed about how it is to be applied. Clearly, it would not be appropriate to assume that because an adult could refuse health care, that he or she would do so.

5.221 The Watchtower Bible and Tract Society of Australia explained that the directions given in an advance health directive made by a Jehovah's Witness simply contain that person's refusal to accept one type of medical treatment, (that is, blood transfusions) and authorise the administration of non-blood medical management for the person's condition. It therefore considered that the Health Care Principle should enable an adult to refuse one treatment in favour of a preferred treatment, 'even if the adult's preferred treatment is more expensive for the hospital, takes more time, or is otherwise less favoured by the health carer'.

5.222 The submissions generally supported the relocation of section 12(4) of the Health Care Principle into those sections of the *Guardianship and Administration Act 2000* (Qld) which deal with the effect of an adult's objection to health care.<sup>811</sup>

### The Commission's view

5.223 The Commission has referred above to the confusion surrounding the meaning of section 12(4) of the Health Care Principle, which is expressed in terms that are more appropriate to an adult with capacity for the health matter or special health matter.

5.224 In the Commission's view, the role of section 12(4) is to serve as a reminder to persons or entities making health care decisions for an adult that the proper exercise of power for a health matter may include the refusal of health care. Earlier in this chapter, however, the Commission has recommended that the Health

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809 Submissions 14, 24, 69.

810 Submission 91.

811 Submissions 9, 13, 14, 24, 93.

Care Principle include a new principle to the effect that, in applying General Principle 2:<sup>812</sup>

- (a) the principle of non-discrimination requires, among other things, that all adults be offered appropriate health care, including preventative health care, without regard to a particular adult's capacity; and
- (b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons.

5.225 In the Commission's view, paragraph (b) of the new Health Care Principle 11 is a better expression of what is currently section 12(4) of the Health Care Principle. It acknowledges the two aspects of an exercise of power in relation to a health matter or special health matter (that is, consent and refusal), and emphasises the importance of taking into account the principles mentioned in the new General Principle 2(2). In doing so, it also recognises that the proper application of those principles may not only justify a consent to health care but may also justify a refusal of health care.

5.226 For these reasons, the redrafted Health Care Principle should not include a principle to the effect of section 12(4) of the current Health Care Principle.

## SPECIAL HEALTH CARE

### The law in Queensland

5.227 As explained earlier, special health care includes matters such as tissue donation, sterilisation and termination of pregnancy.<sup>813</sup> Consent for special health care may be given (and in the following order of priority):<sup>814</sup>

- by a direction in an adult's advance health directive; or
- if there is no such relevant direction, by the Tribunal or other relevant entity.

5.228 Guardians,<sup>815</sup> attorneys and statutory health attorneys are not able to give consent to special health care.

5.229 The *Guardianship and Administration Act 2000* (Qld) deals with the circumstances in which the Tribunal may give consent to special health care. It

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812 See [5.105] above.

813 See [5.36] above.

814 *Guardianship and Administration Act 2000* (Qld) s 65.

815 Under s 74 of the *Guardianship and Administration Act 2000* (Qld), the Tribunal may appoint a guardian to give consent to subsequent or similar special health care for an adult if the Tribunal has consented to special health care for the adult.

provides different criteria for different types of special health care.<sup>816</sup> This reflects the fact that each type of special health care has its own considerations.

5.230 In addition, section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) applies specifically to special health care. It provides:<sup>817</sup>

- (5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account—
  - (a) a guardian appointed by the tribunal for the adult;
  - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
  - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

5.231 Because attorneys and statutory health attorney are not able to consent to special health care for an adult, the Health Care Principle set out in the *Powers of Attorney Act 1998* (Qld) does not include an equivalent provision to section 12(5).

## Discussion Paper

5.232 In the Discussion Paper, the Commission referred to the suggestion that the inclusion of section 12(5) in the Health Care Principle may be confusing for guardians, who may not be aware that ‘special health care’ has a particular meaning under the guardianship legislation. It referred to the example of a guardian who ‘may think that because of its life-ending consequences’, consent to the withholding or withdrawal of a life-sustaining measure is a special health matter.<sup>818</sup>

5.233 The Commission sought submissions on whether section 12(5) should continue to be included as part of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) or whether it should be relocated to Part 3 of Chapter 5 of the *Guardianship and Administration Act 2000* (Qld), which deals specifically with special health care.<sup>819</sup>

<sup>816</sup> See *Guardianship and Administration Act 2000* (Qld) ss 69 (Donation of tissue), 70 (Sterilisation), 71 (Termination of pregnancy), 72 (Special medical research or experimental health care), 73 (Prescribed special health care).

<sup>817</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s12(5). This was not included in the recommendations made by the Queensland Law Reform Commission in its Report, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996).

<sup>818</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.99], referring to M Howard, ‘Principles for Substituted Decision-Making About Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform’ (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166, 183.

<sup>819</sup> *Ibid* 102.

## Submissions

5.234 The submissions that addressed the issue of the location of section 12(5) of the Health Care Principle supported its relocation to Part 3 of Chapter 5 of the *Guardianship and Administration Act 2000* (Qld).<sup>820</sup>

5.235 For example, Disability Services Queensland commented that the inclusion of section 12(5) in the Health Care Principle may be confusing for guardians as lay decision-makers may not be aware that special health care has a particular meaning.<sup>821</sup> In order to avoid confusion, it considered that it would be sensible to relocate that provision to Part 3 of Chapter 5 of the *Guardianship and Administration Act 2000* (Qld).

5.236 The former Public Advocate also agreed that the relocation of section 12(5) would minimise confusion. Nonetheless, the former Public Advocate also advocated for the provision of a mandatory decision-making process which includes requirements for decision-makers to consult with relevant members of the adult's support network in certain circumstances:<sup>822</sup>

[The views of the adult's support network] should not be given priority over the adult's views. If an adult is to be placed in the same position, as far as possible, with adults who do not have impaired decision-making capacity, this is a reasonable step. A husband or wife, or adult child is unlikely to make significant health care decisions without discussing them with members of his or her intimate support network. Of course, this would not be so or appropriate in relation to day-to-day health care decisions, for example, about whether to consult to a blood test to check cholesterol, or submit to a blood pressure check, and this has been discussed earlier in this submission.

5.237 Two submissions noted that section 12(5) of the Health Care Principle may cause some difficulties in practice. Alzheimer's Australia (Qld) noted that, if some special health care procedures were required at short notice, an attorney or appointed guardian may not be immediately available for the purpose of consultation.<sup>823</sup> Another submission considered that section 12(5) may have the effect of being paternalistic in its application.<sup>824</sup>

## The Commission's view

5.238 Because section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) applies only in relation to special health care, it should be omitted from the Health Care Principle and relocated in Part 3 of Chapter 5 of the Act, which deals with consent to special health care. In the Commission's view, it is more appropriate for the requirements that apply in relation to special

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820 Submissions 9, 13, 14, 24, 91, 93.

821 Submission 93.

822 Submission 91.

823 Submission 9.

824 Submission 24.

health care to be located in a single Part of the Act. The omission of section 12(5) from the Health Care Principle also avoids any confusion by guardians, attorneys and statutory health attorneys who may be unsure whether they are required to apply that subsection.

## COMPLIANCE AND ENFORCEMENT

### The law in Queensland

5.239 The requirement to apply, or comply with, the Health Care Principle is a mandatory duty under the guardianship legislation.<sup>825</sup> However, the Health Care Principle itself provides that power for a health matter or special health matter 'should', as distinct from 'must', be exercised in a particular way.

### Discussion Paper

5.240 In the Discussion Paper, the Commission raised the issue of whether the guardianship legislation makes adequate provision about what may happen if a person fails to apply the Health Care Principle. It noted, in that regard, that the guardianship legislation provides for a number of review mechanisms.<sup>826</sup> It also noted that the Adult Guardian has power to investigate complaints about 'inappropriate or inadequate decision-making arrangements' for an adult,<sup>827</sup> which could include, for example, complaints that a guardian is not applying the Health Care Principle.<sup>828</sup>

5.241 The Commission also referred to the Adult Guardian's power under section 43 of the *Guardianship and Administration Act 2000* (Qld) to exercise power for a health matter for an adult if the adult's guardian or attorney refuses to make a decision, or makes a decision, about the adult's health matters that is contrary to the Health Care Principle.<sup>829</sup>

5.242 In the Discussion Paper, the Commission sought submissions in relation to whether there are difficulties in complying with or applying the Health Care Principle.<sup>830</sup> It also sought submissions about whether the guardianship legislation

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825 *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(2), 174(3); *Powers of Attorney Act 1998* (Qld) s 76.

826 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) n 464, referring to applications for the review of appointments; applications for orders, directions or recommendations; appeals; and the revocation of appointments of guardians and administrators: see *Guardianship and Administration Act 2000* (Qld) ss 31(4)–(5), 138, 163; *Powers of Attorney Act 1998* (Qld) s 116.

827 *Guardianship and Administration Act 2000* (Qld) s 180(b).

828 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.104].

829 *Ibid* [5.105].

830 *Ibid* 103.

makes adequate provision for what may happen if a person does not comply with the Health Care Principle.<sup>831</sup>

## Submissions

5.243 The submissions identified a number of difficulties in applying or complying with the Health Care Principle.<sup>832</sup> The main difficulty perceived in the application of the Principle related to a general lack of awareness of decision-makers about the obligations imposed on them under the Principle or a lack of understanding about the importance of the Principle.<sup>833</sup> Two respondents advocated the provision of education programs about the Principle to health providers and substitute decision-makers.<sup>834</sup> Two other respondents suggested that specific information about the Health Care Principle should be included in the instrument appointing the decision-maker or as part of general guidelines for decision-makers.<sup>835</sup>

5.244 The former Public Advocate commented that:<sup>836</sup>

It is likely that many statutory health attorneys are unaware of the requirements of their formal role to apply the [Health Care Principle]. At present, no-one is required to bring it to their attention. This could be remedied by an obligation on health providers to provide a copy of the Principles/[Health Care Principle] when seeking a decision from [a substitute decision-maker]. This would also serve as a reminder for guardians and personal attorneys for health matters of their obligation to apply the Principles generally.

5.245 On the other hand, one submission considered that there are no difficulties in complying with the Health Care Principle.<sup>837</sup>

5.246 Several respondents considered that the legislation does not make adequate provision for what may happen if a person does not comply with the Health Care Principle.<sup>838</sup>

5.247 However, one respondent considered that it would be difficult to police non-compliance with the Health Care Principle.<sup>839</sup>

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831 Ibid.

832 Submissions 12, 15, 20A, 22, 34A, 50, 51, 52, 53, 55, 67, 69, 71, 81, 91.

833 Submissions 14, 20A, 22, 56, 67, 71, 91, 93.

834 Submissions 20A, 69.

835 Submissions 55, 93.

836 Submission 91.

837 Submission 19.

838 Submissions 24, 50, 93.

839 Submission 14.

5.248 Carers Queensland considered that it would be inappropriate to impose a penalty for non-compliance with the Health Care Principle on statutory health attorneys:<sup>840</sup>

Statutory Health Attorneys' compliance with the Health Care Principle is problematic in that, as it is not a formal appointment, people are very rarely aware of the complexities of their responsibilities in this role. The power may also be exercised in periods of great stress and against a very emotional backdrop. There are not currently adequate mechanisms to support Statutory Health Attorneys in the making of health care decision according to the Health Care Principle. It would therefore seem inappropriate that failure to comply should not therefore result in unnecessarily punitive responses. On a related issue, nor is there adequate understanding or respect for the Statutory Health Attorney by others. We are aware that adults have received 'treatment' without the Statutory Health Attorney's knowledge or consent eg paid staff at services have taken the adult to the Doctor and medication has been prescribed without the family ever knowing. This medication has then interacted with other medication with side-effects. This further reinforces the reasoning for consultation with the family and carers.

5.249 The former Public Advocate suggested that, if an offence were created for non-compliance with the Principles, it may be appropriate to provide an excuse for non-compliance in circumstances where there are tight time constraints and non-compliance is unavoidable.<sup>841</sup>

### The Commission's view

5.250 In Chapter 4 of this Report, the Commission has recommended that section 76 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that the General Principles must be applied, rather than complied with, by a person or other entity who performs a function or exercises a power under that Act or under an enduring document.<sup>842</sup> Section 76 should also be amended to require the Health Care Principle to be applied, rather than complied with, by such a person or other entity. Given the nature of the Health Care Principle, the Commission considers this to be a more appropriate requirement.

5.251 In Chapter 4 of this Report, the Commission has recommended that the requirement to apply the General Principles be extended so as to apply to a person making a decision for an adult on an informal basis.<sup>843</sup> However, the *Guardianship and Administration Act 2000* (Qld) does not enable decisions about health care to be made informally. On the contrary, it is an offence for a person to carry out health care of an adult unless the health care is authorised in one of the ways mentioned in section 79 of the Act.<sup>844</sup> Accordingly, the requirement to apply the

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840 Submission 71.

841 Submission 91.

842 See Recommendation 4-7 of this Report.

843 See Recommendation 4-2 of this Report.

844 *Guardianship and Administration Act 2000* (Qld) ss 65 and 66 set out a priority in relation to the provision of consent for a special health matter or a health matter.

Health Care Principle should continue to apply to a person or other entity who performs a function or exercises a power under the Act and, additionally in the *Powers of Attorney Act 1998* (Qld), a person who exercises power under an enduring document.

5.252 The Commission does not consider that it would be appropriate to impose a penalty for a failure to apply the Health Care Principle. However, a failure by a guardian or an attorney to apply the Health Care Principle would be relevant to whether the person should be removed. A failure by a statutory health attorney might be relevant to whether a guardian should be appointed to ensure that the adult's interests are adequately protected.<sup>845</sup>

## LOCATION OF THE HEALTH CARE PRINCIPLE

5.253 The obligation to apply the Health Care Principle is found in specific sections of the guardianship legislation. The Health Care Principle itself is set out, following the General Principles, in the first schedule of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). As such, the Health Care Principle forms part of the legislation.<sup>846</sup>

## Discussion Paper

5.254 In the Discussion Paper, the Commission raised the issue of whether the Health Care Principle should be set out in another part of the legislation to give it greater prominence.<sup>847</sup> It noted that an alternative approach may to include the Health Care Principle in Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) which deals specifically with health matters and special health matters.<sup>848</sup>

5.255 Accordingly, the Commission sought submissions about whether the Health Care Principle should be set out in another part of the legislation.<sup>849</sup>

## Submissions

5.256 Most of the submissions that addressed this issue supported the relocation of the Health Care Principle to another part of the legislation.<sup>850</sup>

5.257 Queensland Advocacy Incorporated suggested that the Health Care Principle should be located proximate to the provision requiring decision-makers to

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<sup>845</sup> See *Guardianship and Administration Act 2000* (Qld) s 12(1)(c)(ii).

<sup>846</sup> *Acts Interpretation Act 1954* (Qld) s 14(5).

<sup>847</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [5.107].

<sup>848</sup> *Ibid.*

<sup>849</sup> *Ibid* 104.

<sup>850</sup> Submissions 15, 19, 24, 34A, 50, 55, 67, 81.

apply the General Principles and the Health Care Principle.<sup>851</sup> It also suggested that the Health Care Principle should also be repeated after section 61 of the *Guardianship and Administration Act 2000* (Qld) which describes the purpose of Chapter 5, which deals with health matters:

There is already a link between section 61 GAA and the Health Care Principle. Both define the circumstances in which decisions for health matters may be made. These are, if it is necessary to maintain and promote the adult's health and wellbeing, or if it is in all the circumstances, in the adult's best interests.

There is no harm in repeating important principles next to relevant provisions in an Act when this aids clarification and confirms responsibilities. Consequently the content and imperative tone of Clause 12(4) of the Health Care Principle should be repeated as an incorporation into section 67 GAA to strengthen the protection it offers to adults. Clause 12(4) of the Health Care Principle informs relevant parties that an adult has a right to refuse health care. Section 67 GAA advises decision makers and health care providers that generally the power for a health matter or special health matter is ineffective if an adult objects to it. It may be helpful to remind relevant parties at this point that the adult has a right to make that objection. Section 67 GAA then describes the circumstances in which that objection may be overridden. The confirmation that an adult has a right to refuse health care is an important reminder to relevant parties that a right is not removed or lost simply because the capacity to exercise it is lost.

Clause 12(5) of the Health Care Principle should be repeated after section 68 GAA, which defines who may consent to special health care. Clause 12(5) requires the Tribunal or other authorised entity to consult the adult's guardian, attorney or statutory health attorney before deciding a special health matter. Clause 12(2) already requires the Tribunal to consider the adult's views and wishes and any information available from the adult's health practitioner when making a decision about a health matter. Presumably when deciding a special health matter the Tribunal must still comply with Clause 12(2). If so, then Clause 12(2) would also need to be repeated with Clause 12(5) after section 68 GAA. If clause 12(2) does not apply to special health matters, it should and must be redefined to ensure it does. Further the Tribunal should not only have to take the adult's views and wishes into account when making a special health care decision, it should have to give them the maximum effect practicable without exposing the adult or their interests to significant risk.

Clause 12(5) should be reincorporated in the Health Care Principle as a separate clause 13 entitled Special Health Care. There, it could at once define who may consent to special health care. This would clearly inform guardians for general health matters that they can not authorise special health care. The clause could then confirm who the Tribunal must consult including the adult, the adult's health practitioner, and any guardian, attorney, statutory health attorney, or other person required under the Health Care Principle.

Health care and special health care should be defined in the Health Care Principle as well as in the dictionary. This would further clarify matters for decision makers by providing them with essential information in an aggregated source rather than in an alluvial scatter throughout the GAA.

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Submission 34A. See *Guardianship and Administration Act 2000* (Qld) s 11; *Powers of Attorney Act 1998* (Qld) s 76.

5.258 On the other hand, the former Public Advocate and Disability Services Queensland both considered it appropriate to include the Health Care Principle in a schedule of the legislation.<sup>852</sup>

5.259 The former Public Advocate suggested the advantage of this approach is its convenience for the purposes of reproduction and provision to substitute decision-makers.<sup>853</sup> She also suggested that:

A statement to the effect that application is mandatory in respect of health care decisions within the schedule would be helpful for lay decision-makers, although it may not be good legislation-drafting practice to repeat requirements set out elsewhere in the legislation. However, this legislation, perhaps more than any other, is expected to be applied by many lay persons encountering the guardianship regime. Accordingly, this is considered a relevant issue.

5.260 Several respondents considered that it would be helpful if the Health Care Principle was explained in a user-friendly handbook for use by substitute decision-makers.<sup>854</sup>

5.261 However, Right to Life Australia suggested that the Health Care Principle was largely redundant as its content was generally covered by General Principle 7(5).<sup>855</sup>

General Principle 7(5), which requires that anything done under the Act must be done 'in a way consistent with the adult's proper care and protection', would, amongst other things, have to apply to health care. If, when it comes to health care, there is the requirement that proper care and protection be given, that should be a sufficient safeguard. The Health Care Principle is therefore largely redundant and so could be deleted. This redundancy applies particularly to (1)(b) of the Health Care Principle. If it was thought that the other sections of the Health Care Principle were useful they could be retained and just (1)(b) replaced with the wording, 'only if the exercise of power is consistent with the adult's proper care and protection', as in General Principle 7(5). This would have the benefit of removing any potential conflict when trying to apply both the General Principles and the Health Care Principle, as is required.

### The Commission's view

5.262 In Chapter 4 of this Report, the Commission has recommended that the General Principles continue to be located in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and schedule 1 of the *Powers of Attorney Act 1998* (Qld).<sup>856</sup> In view of the requirement to apply both the General Principles and the Health Care Principle when performing a function or exercising a power for a health matter or a special health matter, it is convenient for the Health Care Principle to

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852 Submissions 91, 93.

853 Submission 91.

854 Submissions 19, 22.

855 Submission 62.

856 See Recommendation 4-9 of this Report.

continue to be located in schedule 1 of each Act immediately following the General Principles.

## RECOMMENDATIONS

### ***Redrafting of the Health Care Principle***

**5-1** The Health Care Principle should be redrafted to reflect more closely the relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*, to avoid duplicating matters dealt with by the General Principles, and to provide guidance about the application of the General Principles in the context of health care.

**5-2** The Health Care Principle should be expressed in the following terms:

**10**     Application of the General Principles

A person or other entity who performs a function or exercises a power under this Act [, or an enduring document,]<sup>857</sup> for a health matter or a special health matter<sup>858</sup> in relation to an adult with impaired capacity for the matter must apply the General Principles.

**11**     Same human rights and fundamental freedoms

In applying General Principle 2—

- (a) the principle of non-discrimination requires, among other things, that all adults be offered appropriate health care, including preventative health care, without regard to a particular adult's capacity; and
- (b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence of persons.

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The words in square brackets indicate the additional words that will need to be included in the Health Care Principle in the *Powers of Attorney Act 1998* (Qld). Because decisions about health care for an adult may not be made on an informal basis (see [5.251] above), the new Health Care Principle 10 does not refer to a person making a decision for an adult on an informal basis. Cf the new General Principles 7, 8 and 9(2) recommended in Chapter 4 of this Report.

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The reference to a special health matter should be omitted from the Health Care Principle that is included in the *Powers of Attorney Act 1998* (Qld).

**12      Performance of functions or powers**

In applying General Principles 7 and 8, a person or other entity in performing a function or exercising a power under this Act [, or an enduring document,]<sup>859</sup> must take into account—

- (a) information given by the adult's health provider;
- (b) the nature of the adult's medical condition, if any;
- (c) if the adult has a medical condition, the adult's prognosis;
- (d) if particular health care is proposed, any alternative health care that is available;
- (e) the nature and degree of any significant risks associated with the proposed health care or any alternative health care;
- (f) whether the proposed health care can be postponed because a better health care option may become available or the adult is likely to become capable of making his or her own decisions about the proposed health care;
- (g) the consequences to the adult if the proposed health care is not carried out;
- (h) a consideration of the benefits versus the burdens of the proposed health care; and
- (i) the effect of the proposed health care on the adult's dignity and autonomy.

**13      Substituted judgment**

For the purpose of applying General Principle 8(3),<sup>860</sup> which requires the principle of substituted judgment to be used, the views and wishes of an adult expressed when the adult had capacity may also be expressed—

- (a) in an advance health directive; or
- (b) by a consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the health care.

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See n 7 above.

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To reflect the minority view, this should refer to General Principles 7(3) and 8(2). General Principles 7 and 8 of the minority view are set out at Recommendation 4-5 of this Report.

***Purpose of Chapter 5 of the Guardianship and Administration Act 2000 (Qld)***

**5-3** Section 61(b) of the *Guardianship and Administration Act 2000* (Qld) should be omitted and replaced with the following paragraph:

- (b) ensuring health care is given to the adult only if it is appropriate in all the circumstances.

***Special health care***

**5-4** Section 12(5) of the Health Care Principle in the *Guardianship and Administration Act 2000* (Qld) should be omitted from the Health Care Principle and relocated in Part 3 of Chapter 5 of the Act, which deals with consent to special health care.

***Compliance and enforcement***

**5-5** Section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Health Care Principle must be applied, rather than complied with, by a person or other entity who performs a function or exercises a power under that Act or under an enduring document.

**5-6** Neither the *Guardianship and Administration Act 2000* (Qld) nor the *Powers of Attorney Act 1998* (Qld) should be amended to create an offence of failing to apply the Health Care Principle.

***Location of the Health Care Principle***

**5-7** The Health Care Principle should continue to be located in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and schedule 1 of the *Powers of Attorney Act 1998* (Qld) immediately following the General Principles.

# Chapter 6

## The scope of matters

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### INTRODUCTION

6.1 The Commission's terms of reference require it to review the law relating to 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 personal matters and financial matters and of the powers of guardians and administrators'.<sup>861</sup>

6.2 This chapter deals with the scope of matters under the guardianship legislation. It considers the definitions of 'financial matters', 'personal matters', 'health matters', 'health care', 'special health matters', 'special health care', 'special personal matters' and 'legal matters'.

### THE LAW IN QUEENSLAND

6.3 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) recognise different categories of 'matters' about which decisions may be made. Depending on the type of matter involved, these Acts authorise substitute decisions for an adult with impaired capacity for a matter to be made by a wide range of substitute decision-makers.

6.4 The guardianship legislation distinguishes between decisions concerning 'financial matters' and those concerning 'personal matters'.

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The terms of reference are set out in Appendix 1.

6.5 The legislation also differentiates between 'health matters', 'special health matters', and 'special personal matters'. Each of these terms is defined in the second schedule to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The definitions are nearly identical under both Acts.<sup>862</sup>

## Financial matters

6.6 All matters relating to an adult's financial or property matters are categorised as 'financial matters' under the guardianship legislation. A 'financial matter' is defined as:<sup>863</sup>

### 1 Financial matter

A financial matter, for an adult, is a matter relating to the adult's financial or property matters, including, for example, a matter relating to 1 or more of the following—

- (a) paying maintenance and accommodation expenses for the adult and the adult's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the adult or a dependant of the adult;
- (b) paying the adult's debts, including any fees and expenses to which an administrator is entitled under a document made by the adult or under a law;
- (c) receiving and recovering money payable to the adult;
- (d) carrying on a trade or business of the adult;
- (e) performing contracts entered into by the adult;
- (f) discharging a mortgage over the adult's property;
- (g) paying rates, taxes, insurance premiums or other outgoings for the adult's property;
- (h) insuring the adult or the adult's property;
- (i) otherwise preserving or improving the adult's estate;
- (j) investing for the adult in authorised investments,<sup>864</sup>

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The definition of 'personal matter' in the *Guardianship and Administration Act 2000* (Qld) includes a restrictive practice matter under ch 5B of the Act: *Guardianship and Administration Act 2000* (Qld) sch 2 s 2(j). The definition of 'personal matter' in the *Powers of Attorney Act 1998* (Qld) does not include that matter: *Powers of Attorney Act 1998* (Qld) sch 2 s 2. There are also some minor differences in the annotation style used in each Act. See, for example, the definition of 'special personal matter': *Guardianship and Administration Act 2000* (Qld) sch 2 s 3; *Powers of Attorney Act 1998* (Qld) sch 2 s 3.

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*Guardianship and Administration Act 2000* (Qld) sch 2 s 1; *Powers of Attorney Act 1998* (Qld) sch 2 s 1.

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There is no paragraph (k) in the Act.

- (l) continuing investments of the adult, including 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;
- (m) undertaking a real estate transaction for the adult;
- (n) dealing with land for the adult under the *Land Act 1994* or *Land Title Act 1994*;
- (o) undertaking a transaction for the adult involving the use of the adult's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the adult;
- (p) a legal matter<sup>865</sup> relating to the adult's financial or property matters;
- (q) withdrawing money from, or depositing money into, the adult's account with a financial institution. (notes added)

6.7 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 the behalf of adult; making financial investments; performing the adult's contracts; and all legal matters relating to the adult's financial or property matters.

6.8 Decisions about financial matters for an adult may be made on a formal basis by an administrator appointed by the Tribunal or an attorney acting under an enduring power of attorney.<sup>866</sup> The legislation also recognises that financial decisions may be made on an informal basis by members of the adult's support network.<sup>867</sup>

## Personal matters

6.9 The guardianship legislation categorises all matters (other than 'special personal matters' and 'special health matters') relating to an adult's care or welfare as 'personal matters'. A 'personal matter' is defined as:<sup>868</sup>

### 2 Personal matter

A **personal matter**, for an adult, is a matter, other than a special personal matter or special health matter, relating to the adult's care, including the adult's

<sup>865</sup> A 'legal matter' is defined in the *Guardianship and Administration Act 2000* (Qld) sch 2 s 18 and the *Powers of Attorney Act 1998* (Qld) sch 2 s 18. The definition is set out at [6.23] below.

<sup>866</sup> An administrator may be appointed by the Tribunal to make decisions about financial matters for an adult in certain circumstances: *Guardianship and Administration Act 2000* (Qld) s 12. The powers of administrators are discussed in Chapter 15 of this Report. In an enduring power of attorney, a principal can assign to his or her nominated attorney or attorneys decision-making power for some or all financial matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). The powers of an attorney appointed under an enduring power of attorney are discussed in Chapter 16 of this Report.

<sup>867</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2). 'Support network', for an adult, is defined in sch 4 of the Act: see Chapter 30 of this Report.

<sup>868</sup> *Guardianship and Administration Act 2000* (Qld) sch 2 s 2; *Powers of Attorney Act 1998* (Qld) sch 2 s 2.

health care, or welfare, including, for example, a matter relating to 1 or more of the following—

- (a) where the adult lives;
- (b) with whom the adult lives;
- (c) whether the adult works and, if so, the kind and place of work and the employer;
- (d) what education or training the adult undertakes;
- (e) whether the adult applies for a licence or permit;
- (f) day-to-day issues, including, for example, diet and dress;
- (g) health care of the adult;
- (h) whether to consent to a forensic examination of the adult;

*Editor's note—*

See also section 248A (Protection for person carrying out forensic examination with consent).

- (i) a legal matter<sup>869</sup> not relating to the adult's financial or property matter;
- (j) a restrictive practice matter under chapter 5B,<sup>870</sup>
- (k) seeking help and making representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval under chapter 5B. (notes added)

6.10 The definition of 'personal matter' has been given a wide interpretation by the Tribunal. In *Re JD*, the Tribunal observed:<sup>871</sup>

The definition of personal matters is very wide ... The essential words are the words care or welfare. ... [A] guardian who is appointed to make decisions in relation to all personal matters can essentially make all the decisions in relation to a very broad range of matters and should not be read in a restricted or limited way.

6.11 Personal matters generally cover personal, health care, lifestyle and some legal decisions. 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;<sup>872</sup> and legal matters that do not relate to the adult's

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869 A 'legal matter' is defined in the *Guardianship and Administration Act 2000* (Qld) sch 2 s 18 and the *Powers of Attorney Act 1998* (Qld) sch 2 s 18. The definition is set out at [6.23] below.

870 Paragraphs (j) and (k) of the definition are not included in the *Powers of Attorney Act 1998* (Qld): see n 2 above.

871 [2003] QGAAT 14, [27].

872 See [6.15] below.

financial or property matters.<sup>873</sup> In addition to the examples of personal matters specifically listed in the definition, it has been held that decisions about contact with, or access visits to, the adult<sup>874</sup> and advocacy relating to the care and welfare of the adult<sup>875</sup> are also personal matters.

6.12 Decisions about personal matters for an adult may be made on a formal basis by a guardian appointed by the Tribunal or an attorney acting under an enduring power of attorney.<sup>876</sup> The legislation also recognises that personal decisions (other than for health care)<sup>877</sup> may be made on an informal basis by members of the adult's support network.<sup>878</sup>

6.13 The definition of 'personal matter' also includes 'a restrictive practice matter under chapter 5B'. Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) sets out special approval and consent procedures for the use of certain restrictive practices for managing the challenging behaviour of some adults. These procedures apply only in relation to adults with an intellectual or cognitive disability who receive disability services from particular service providers.<sup>879</sup> Depending on the type of restrictive practice involved, only the Tribunal, the Adult Guardian, a guardian for a restrictive practice matter or an informal decision-maker may approve, or consent to, the use of a restrictive practice.<sup>880</sup> Although the Commission has not generally reviewed Chapter 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.

873 See n 8 above.

874 See, eg, *VJC v NSC* [2005] QSC 68, [29]; *Re WAE* [2007] QGAAT 72; *Re CAA* [2009] QGAAT 7. See also *Omari v Omari, Omari and Guardianship and Management of Property Tribunal* [2009] ACTSC 28, [60].

875 *Re MRA* [2004] QGAAT 14, [35].

876 A guardian may be appointed by the Tribunal to make decisions about personal matters for an adult in certain circumstances: *Guardianship and Administration Act 2000* (Qld) s 12. The powers of guardians are discussed in Chapter 15 of this Report. In an enduring power of attorney, a principal can assign to his or her nominated attorney or attorneys decision-making power for some or all personal matters, including health matters, that may be exercised at a time when the principal has impaired capacity for the matter: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). The powers of an attorney appointed under an enduring power of attorney are discussed in Chapter 16 of this Report.

877 The authority of particular substitute decision-makers to consent to health care is discussed at [6.17] below.

878 *Guardianship and Administration Act 2000* (Qld) s 9(2). 'Support network' is defined in s 3 sch 4 (Dictionary) of the Act: see Chapter 30 of this Report.

879 Chapter 5B applies to 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. 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 ch 5B does not apply: *Guardianship and Administration Act 2000* (Qld) s 80T.

880 The Tribunal may give approval for a relevant service provider to contain or seclude an adult and to review the approval: *Guardianship and Administration Act 2000* (Qld) ss 80V, 80W, 80ZA, 80ZB. If the Tribunal has given, or proposes to give, an approval to contain or seclude the adult, the Tribunal may also give approval for a relevant service provider to use restrictive practices other than containment or seclusion and to review the order: ss 80X, 80ZA, 80ZB. The Tribunal may also appoint a guardian for a restrictive practice matter for an adult: s 80ZD. The Adult Guardian may approve the use of particular restrictive practices on a short term basis: s 80ZH. Informal decision-makers may consent to the use of particular restrictive practices: s 80ZS.

## Health matters

6.14 A 'health matter' is a type of personal matter. Health matters concern the 'health care, other than special health care, of the adult'. A 'health matter' is defined as:<sup>881</sup>

### 4 Health matter

A health matter, for an adult, is a matter relating to health care, other than special health care, of the adult.

6.15 'Health care' is defined in the guardianship legislation as:<sup>882</sup>

### 5 Health care

- (1) Health care, of an adult, is care or treatment of, or a service or a procedure for, the adult—
  - (a) to diagnose, maintain, or treat the adult's physical or mental condition; and
  - (b) carried out by, or under the direction or supervision of, a health provider.
- (2) Health care, of an adult, includes withholding or withdrawal of a life-sustaining measure<sup>883</sup> for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.
- (3) Health care, of an adult, does not include—
  - (a) first aid treatment; or
  - (b) a non-intrusive examination made for diagnostic purposes; or
  - (c) the administration of a pharmaceutical drug if—
    - (i) a prescription is not needed to obtain the drug; and
    - (ii) the drug is normally self-administered; and
    - (iii) the administration is for a recommended purpose and at a recommended dosage level. (note added)

*Example of paragraph (b)—*

a visual examination of an adult's mouth, throat, nasal cavity, eyes or ears

881 *Guardianship and Administration Act 2000* (Qld) sch 2 s 4; *Powers of Attorney Act 1998* (Qld) sch 2 s 4.

882 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5; *Powers of Attorney Act 1998* (Qld) sch 2 s 5.

883 The definition of 'life sustaining measure' is set out at [11.69] below.

6.16 Health care, of an adult, is care or treatment of, or a service or a procedure for, the adult to diagnose, maintain, or treat the adult's physical or mental condition that is carried out by, or under the direction or supervision of, a health provider. It includes the withholding or withdrawal of a life-sustaining measure if the commencement or continuation of the measure would be inconsistent with good medical practice.<sup>884</sup> It does not include first aid treatment, non-intrusive examinations made for diagnostic purposes, or the administration of non-prescription medication which would normally be self-administered.<sup>885</sup>

6.17 Decisions about health care for an adult may be made on a formal basis by a guardian appointed by the Tribunal or an attorney acting under an enduring power of attorney.<sup>886</sup> The legislation also confers automatic authority on an adult's statutory health attorney to make decisions about health matters for the adult when there is no guardian or attorney with authority to do so.<sup>887</sup> In addition, an adult may give directions in an advance health directive about health matters, such as the treatment of a physical or mental condition.<sup>888</sup>

### Special health matters

6.18 'Special health matters' are those relating to 'special health care'.<sup>889</sup> They involve decisions about very significant health issues. The guardianship legislation defines 'special health care' as:<sup>890</sup>

884 The *Guardianship and Administration Act 2000* (Qld), in its original form, categorised the withholding and withdrawal of a 'special life-sustaining measure' as special health care, which required the consent of the Tribunal. The Act was amended in 2001 to re-categorise the withholding and withdrawal of a life-sustaining measure as a health matter, rather than a special health matter: see *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 18, 19. The effect of that change was to enable a guardian, attorney or statutory health attorney for an adult to exercise power for the withholding and withdrawal of a life-sustaining measure for the adult.

885 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2)–(3); *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2)–(3).

886 A guardian may be appointed by the Tribunal to make decisions about personal matters for an adult in certain circumstances: *Guardianship and Administration Act 2000* (Qld) s 12. The powers of guardians are discussed in Chapter 15 of this Report. In an enduring power of attorney, a principal can assign to his or her nominated attorney or attorneys decision-making power for some or all personal matters, including health matters, that may be exercised at a time when the principal has impaired capacity for the matter: *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': s 32(1)(a). The powers of an attorney appointed under an enduring power of attorney are discussed in Chapter 16 of this Report.

887 *Powers of Attorney Act 1998* (Qld) s 62; *Guardianship and Administration Act 2000* (Qld) s 66(5). The role of statutory health attorney is conferred on spouses, carers, close friends and relations of the adult and, as a last resort, the Adult Guardian: *Powers of Attorney Act 1998* (Qld) s 63. The powers of statutory health attorneys are discussed in Chapter 10 of this Report.

888 *Powers of Attorney Act 1998* (Qld) s 35(1). A direction given in an advance health directive operates only while the principal has impaired capacity for the matter covered by the direction, and is as effective as if the principal gave the direction, and had capacity for the matter, when decisions about the matter needed to be made: s 36(1). Advance health directives are discussed in Chapter 9 of this Report.

889 *Guardianship and Administration Act 2000* (Qld) sch 2 s 6; *Powers of Attorney Act 1998* (Qld) sch 2 s 6.

890 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7; *Powers of Attorney Act 1998* (Qld) sch 2 s 7.

- (a) removal of tissue from the adult while alive for donation to someone else;
- (b) sterilisation of the adult;
- (c) termination of a pregnancy of the adult;
- (d) participation by the adult in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the adult;
- (f) prescribed special health care of the adult.

6.19 An adult may give directions in an advance health directive about special health matters, such as tissue donation or participation in experimental health care.<sup>891</sup> If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal may consent to the special health care.<sup>892</sup> The Tribunal, however, cannot consent to electroconvulsive therapy or psychosurgery.<sup>893</sup>

6.20 In its original 1996 report, the Commission explained the reason for requiring the Tribunal's consent for decisions about particular forms of medical treatment for the adult:<sup>894</sup>

The reason for special consent requirements is that some forms of treatment are particularly invasive or have particularly serious consequences, so that the result of making a wrong decision may be particularly grave. There are also situations where the decision may involve a conflict of interest or where the emotional involvement of a family member may make it difficult for them to decide objectively.

### Special personal matters

6.21 The guardianship legislation does not allow substitute decision-makers to exercise power for certain types of matters called 'special personal matters'. These matters are regarded as being of such an intimate or personal nature that it would

<sup>891</sup> *Powers of Attorney Act 1998* (Qld) s 35(1). See n 888 above in relation to the operation of advance health directives.

<sup>892</sup> *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 82(1)(g). If the Tribunal consents to special health care for an adult, the Tribunal may give power to a guardian to consent to subsequent special health care for the adult: *Guardianship and Administration Act 2000* (Qld) s 74. The powers of the Tribunal in relation to special health care are discussed in Chapters 12, 13 and 20 of this Report. Note that the definition of 'special medical research or experimental health care' specifically excludes psychological research: *Guardianship and Administration Act 2000* (Qld) sch 2 s 12(2)(a). Research that is not included in that definition (for example, psychological, social and behavioural research) would fall within the definition of a 'personal matter' under the Act.

<sup>893</sup> Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

<sup>894</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, 58.

be inappropriate for another person to be given the power to make such a decision on behalf of an adult.<sup>895</sup>

6.22 A 'special personal matter' is defined as:<sup>896</sup>

### 3 Special personal matter

A special personal matter, for an adult, is a matter relating to 1 or more of the following—

- (a) making or revoking the adult's will;
- (b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the adult;
- (c) exercising the adult's right to vote in a Commonwealth, State or local government election or referendum;<sup>897</sup>
- (d) consenting to adoption of a child of the adult under 18 years;
- (e) consenting to marriage of the adult;
- (f) entering into, or agreeing to enter into, a surrogacy arrangement under the *Surrogacy Act 2010*,<sup>898</sup>
- (g) consenting to the making or discharge of a parentage order under the *Surrogacy Act 2010*.<sup>899</sup> (notes added)

## Legal matters

6.23 A 'legal matter' is defined as:<sup>900</sup>

### 18 Legal matter

A legal matter, for an adult, includes a matter relating to—

- (a) use of legal services to obtain information about the adult's legal rights; and
- (b) use of legal services to undertake a transaction; and

<sup>895</sup> The power to make decisions for an adult about special personal matters cannot be assigned in an enduring document: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). Nor can it be granted to a substitute decision-maker by order of the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 14(3). Further, there are no other provisions in the guardianship legislation empowering other decision-makers in relation to special personal matters.

<sup>896</sup> *Guardianship and Administration Act 2000* (Qld) sch 2 s 3; *Powers of Attorney Act 1998* (Qld) sch 2 s 3.

<sup>897</sup> See, for example, *Caltabiano v Electoral Commission of Queensland* [2009] QSC 294, [174].

<sup>898</sup> Section 3(f) was inserted by the *Surrogacy Act 2010* (Qld) ss 96–99.

<sup>899</sup> Section 3(g) was inserted by the *Surrogacy Act 2010* (Qld) ss 96–99.

<sup>900</sup> *Guardianship and Administration Act 2000* (Qld) sch 2 s 18; *Powers of Attorney Act 1998* (Qld) sch 2 s 18.

- (c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981*, part 4 or an application for compensation arising from a compulsory acquisition; and

*Editor's note—*

The *Succession Act 1981*, part 4, enables the Supreme Court to make provision for a dependant of a deceased person from the deceased person's estate if adequate provision is not made from the estate for the dependant's proper maintenance and support.

- (d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.<sup>901</sup> (note added)

6.24 A legal matter may be classified as a financial matter or a personal matter, depending on the nature of the matter involved. Legal matters relating to the adult's financial or property matters (for example, making a claim for damages for injuries sustained in a motor vehicle accident) are classified as financial matters. Other types of legal matters (for example, making an application for a domestic violence order) are classified as personal matters.

## THE LAW IN OTHER JURISDICTIONS

6.25 In the other Australian jurisdictions, like Queensland, the guardianship legislation generally distinguishes between financial decisions and personal decisions. In addition, the legislation contains special provisions relating to substitute decisions for an adult's medical or dental treatment.<sup>902</sup> The legislation also identifies some personal decisions for an adult which cannot be delegated to another person or entity.

6.26 The legislation varies in the specificity of the powers conferred in relation to administration (or management). For example, the ACT legislation provides that a manager may be appointed to 'manage all, or a stated part, of an adult's property'.<sup>903</sup> The legislation in South Australia and Tasmania confers similar broad powers, in addition to providing a wide range of specific examples of financial and property matters.<sup>904</sup>

6.27 In each of the other jurisdictions, the legislation confers on a guardian for an adult the general power to make personal decisions for the adult, subject to any

901 The appointment of a litigation guardian for an adult with impaired capacity is discussed in Chapter 28 of this Report.

902 In New South Wales, Tasmania, Victoria and Western Australia, the legislation makes provision for a hierarchy of 'persons responsible' for medical or dental treatment decisions: *Guardianship Act 1987* (NSW) ss 33A, 36; *Guardianship and Administration Act 1995* (Tas) s 39; *Guardianship and Administration Act 1986* (Vic) ss 37, 39, 42H; *Guardianship and Administration Act 1990* (WA) s 119. In South Australia, the legislation provides for an 'appropriate authority' to give consent to medical or dental treatment: *Guardianship and Administration Act 1993* (SA) s 59.

903 *Guardianship and Management of Property Act 1991* (ACT) s 8.

904 *Guardianship and Administration Act 1995* (Tas) s 56(2).

limitations in the appointment order.<sup>905</sup> Without limiting that general power, the legislation in the ACT, the Northern Territory, Tasmania, Victoria and Western Australia also specifies a range of personal matters for which power may be exercised.<sup>906</sup> For example, in the ACT the list includes:<sup>907</sup>

- to decide where, and with whom, the person is to live;
- to decide what education or training the person is to receive;
- to decide whether the person is to be allowed to work, and if so, to decide the nature of the work, the place of employment and the employer;
- to give, for the person, a consent required for a medical procedure or other treatment (other than a prescribed medical procedure); and
- to bring or continue legal proceedings for or in the name of the person.

6.28 The legislation in Tasmania, Victoria and Western Australia also lists access visits to the adult as a matter for which a guardian may be appointed.<sup>908</sup>

6.29 In relation to special personal matters, in the ACT, Victoria and Western Australia, like Queensland, the legislation does not permit a substitute decision-maker to make certain decisions for an adult. In the ACT, a guardian is not empowered to vote, make a will, consent to the adoption of a child, consent to marriage or give consent to certain medical procedures for an adult.<sup>909</sup> In Victoria, an administrator has no power to execute a will for an adult.<sup>910</sup> In Western Australia, a guardian may not exercise power for an adult to vote, make a will, consent to an adoption or consent to certain matters related to surrogacy or marriage.<sup>911</sup>

905 *Guardianship and Management of Property Act 1991* (ACT) s 7(2)–(3); *Guardianship Act 1987* (NSW) ss 16, 21; *Adult Guardianship Act* (NT) ss 17–18; *Guardianship and Administration Act 1993* (SA) s 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 45(2).

906 *Guardianship and Management of Property Act 1991* (ACT) s 7(3); *Adult Guardianship Act* (NT) s 17(2); *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 45–46.

907 *Guardianship and Management of Property Act 1991* (ACT) s 7(3).

908 *Guardianship and Administration Act 1995* (Tas) s 25(2)(d); *Guardianship and Administration Act 1986* (Vic) s 24(2)(e); *Guardianship and Administration Act 1990* (WA) s 45(2)(f).

909 *Guardianship and Management of Property Act 1991* (ACT) s 7B. A guardian cannot consent to certain medical treatment (called 'prescribed medical treatment') including an abortion, reproductive sterilisation, a hysterectomy, a medical procedure concerned with contraception, donation or transplantation of non-regenerative tissue, treatment for mental illness, electroconvulsive therapy or psychiatric surgery: Dictionary (definition of 'prescribed medical procedure'). The Act empowers the Tribunal to make decisions about these matters: s 70.

910 *Guardianship and Administration Act 1986* (Vic) s 50(2).

911 *Guardianship and Administration Act 1990* (WA) s 45(3)–(4).

6.30 Similar to the position in Queensland for special health matters, the legislation in the other jurisdictions provides that special consent procedures apply to certain medical treatment.<sup>912</sup>

## THE SCOPE OF MATTERS UNDER THE GUARDIANSHIP LEGISLATION

6.31 As explained above, the guardianship legislation recognises different types of matters about which decisions may be made.

### Discussion Paper

6.32 The *Guardianship and Administration Act 2000* (Qld) provides that an administrator is conferred, in accordance with the terms of appointment, with the authority to do anything in relation to a financial matter for which he or she is appointed that the adult could have done if the adult had capacity for the matter.<sup>913</sup> A guardian is conferred with similar authority in relation to a personal matter for which he or she is appointed.<sup>914</sup> The *Powers of Attorney Act 1998* (Qld) provides that an attorney appointed under an enduring power of attorney may be authorised to do anything in relation to a financial matter or personal matter (or both) that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised.<sup>915</sup> Given the breadth of the powers that may be conferred on these substitute decision-makers, it is important to ensure that these matters have sufficient and appropriate definitions.

6.33 In the Discussion Paper, the Commission sought submissions in relation to whether the definitions of ‘financial matter’ or ‘personal matter’ are appropriate, or whether they should be changed in some way.<sup>916</sup> These definitions are framed in broad terms to provide for the range of situations in which it is necessary for a substitute decision-maker to have authority. They are non-exhaustive and include matters ‘relating to’ the specific area of decision-making. The addition of further specific examples of matters for which powers may be exercised (for example, contact with or access visits for an adult) may provide further guidance for the Tribunal in fashioning the terms of an appointment order, as well as for appointees in understanding the scope of their appointment. On the other hand, it is arguable that the definitions are sufficient as they currently stand.

912 *Guardianship Act 1987* (NSW) s 45; *Adult Guardianship Act* (NT) s 21(2); *Guardianship and Administration Act 1993* (SA) s 61; *Guardianship and Administration Act 1995* (Tas) ss 41(2), 45; *Guardianship and Administration Act 1986* (Vic) ss 42B, 42F; *Guardianship and Administration Act 1990* (WA) s 57.

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

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

915 *Powers of Attorney Act 1998* (Qld) s 32(1)(a). The principal may also specify terms or information in the enduring power of attorney about exercising the power: s 32(1)(b).

916 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 1, [4.37].

6.34 The Commission also sought submissions on the appropriateness of the other types of matters defined in the legislation.<sup>917</sup>

## Submissions

6.35 Pave the Way considered that the current definitions of the various types of matters under the guardianship legislation are appropriate.<sup>918</sup> It was unaware of any problems with the application of the current definitions of ‘personal matter’ and ‘financial matter’.

6.36 However, several respondents made suggestions in relation to the modification or clarification of some of the definitions.<sup>919</sup>

### ***The definition of ‘financial matter’***

6.37 The Endeavour Foundation suggested that, because many people with intellectual disability are also recipients under government schemes administered by Centrelink, the definition of ‘financial matter’ should include ‘any communications and information required by Centrelink to ensure the continuity of payments received by the adult from Centrelink’.<sup>920</sup>

6.38 The Public Trustee’s submission raised an issue about the wording of subparagraph (p) of the definition of ‘financial matter’, which reads ‘a legal matter relating to the adult’s financial or property matters’.<sup>921</sup> The Public Trustee suggested that it is sometimes difficult to determine whether a legal matter ‘relates’ to the adult’s financial or property matters:

The issue is relatively straightforward if the matter at hand is a transaction or litigation directly affecting property interests or money.

Sometimes the transaction or the litigation however only in part deals with the property or the finances of the adult with an incapacity and partly does not or arguably affects the adult in those respects only in a tangential way.

6.39 By way of example, the Public Trustee referred to *Energex Limited v Sablatura*.<sup>922</sup> In that case, the Supreme Court of Queensland made orders, pending trial, that the respondent permit the applicant Energex to conduct certain works on a registered easement that it had over the respondent’s land, and that the respondent be restrained from interfering with or obstructing the exercise of Energex’s rights in relation to the easement. The respondent had impaired capacity and the Public Trustee had been appointed as his administrator for

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917 Ibid.

918 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.

919 Submissions 63A, 156A, 163, 164, 176.

920 Submission 163.

921 Submission 156A.

922 [2009] QSC 356.

managing all financial matters except day-to-day finances and Centrelink payments.<sup>923</sup> In the course of the proceedings, Atkinson J made the observation that:<sup>924</sup>

The application before the court is a legal matter relating to Mr Sablatura's property because it concerns a registered easement over real property registered in his name and the rights of the applicant, as against the respondent, pursuant to the registered easement over that property.

6.40 The Public Trustee commented in his submission that the application in *Energex Limited v Sablatura*:

was injunctive in character and related to Mr Sablatura's property in that it arose as a result of rights asserted by Energex pertaining to an easement traversing Mr Sablatura's land.

6.41 The Public Trustee further commented that:

The Order however very much dealt with either personal matters as they are defined in the [*Guardianship and Administration Act 2000* (Qld)] or at least could be said not to be Orders relating to financial matters.

Put simply in the context of the [*Guardianship and Administration Act 2000* (Qld)] in that matter it could be said that the litigation 'related to' property matters but the essence of the litigation and the relief sought — to personally restrain an adult with incapacity did not relate to a financial matter.

6.42 The Public Trustee therefore proposed that the *Guardianship and Administration Act 2000* (Qld) be amended to clarify what constitutes a legal matter in this context and, in particular, what is intended by 'relating to the adult's financial or property matters':

The Public Trustee has always taken a relatively broad view of what constitutes legal matters where there is a need for some action to be taken on behalf of an adult with an incapacity.

This however could (and sometimes has) met with some criticism that the Public Trustee as an administrator is venturing into decision-making for which he is not authorised, or at least not properly tasked. In contrast in that matter the Court and the Applicant urged the Public Trustee to accept that decision-making role.

The view currently however turns upon what nexus is required with property or financial matters and in this respect the words 'relating to' have it seems been broadly interpreted [by the courts].<sup>925</sup>

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923 Ibid 2–3.

924 Ibid 4.

925 In this regard, the Public Trustee referred to the decisions of *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 376 and *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301.

***The definition of ‘personal matter’***

6.43 A respondent who is a long-term Tribunal member suggested that the definition of ‘personal matter’ should be amended to specifically list ‘advocacy relating to the care and welfare of the adult’ as an example of a personal matter.<sup>926</sup>

***The definition of ‘special personal matter’***

6.44 Legal Aid Queensland considered that the definition of ‘special personal matter’ is inadequate because it ‘fails to recognise the inherently personal nature of decisions to enter a plea to criminal charges’:<sup>927</sup>

Not uncommonly, Legal Aid lawyers experience situations where a substituted decision-maker attempts to give them instructions to enter a plea for a person with impaired capacity.

Legal Aid lawyers also encounter situations where a substituted decision-maker attempts to give all instructions except the decision to make the plea, leaving it for the person with impaired capacity to personally state their plea.

Under our system of law, a decision to enter a plea should be a decision taken voluntarily by the person who is the subject of a criminal charge. It is an intrinsically personal decision made on the basis that a person understands the nature of the charge, the legal proceedings and consequences of the plea. It is also a decision that must be made by the person who has personal knowledge of what occurred and their state of mind at the time of the alleged offence.

If a person lacks the capacity to make this decision, it is our view that a plea cannot be entered either by that person or someone else on their behalf. Indeed, a lack of informed consent by a person to enter a plea provides grounds for setting aside such a plea.

Furthermore it is ethically improper for a legal practitioner to accept instructions from a client where the legal practitioner believes the client lacks capacity to give instructions. Such a course would leave the legal practitioner exposed to potential disciplinary and negligence proceedings.

6.45 In order to avoid any ‘unnecessary confusion and ambiguity’, Legal Aid Queensland therefore proposed that the definition of ‘special personal matter’ be amended to expressly include entering a plea to criminal law charge.

***The definitions of ‘special health matter’ and ‘special health care’***

6.46 The Adult Guardian submitted that the category of ‘special health matter’ should be removed from the legislation.<sup>928</sup> She reasoned that special health matters are distinguished in the legislation on the basis of the grave consequences of the decisions made about them and the potential conflict of interest or difficulty of making decisions because of family involvement. The Adult Guardian noted that

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926 Submission 179.

927 Submission 63A.

928 Submission 164.

the matters currently specified as special health matters and special health care are usually made on the advice of two or more medical practitioners and may include the need for approval by ethics committees. She further noted, however, that family members make decisions about other matters such as withholding and withdrawing life-sustaining measures, which have grave consequences and involve equally complex issues concerning conflict of interest and decision-making difficulty:

It is difficult to see how the matters listed when considered in the context of the legislation and the types of decisions family members already make warrant the additional step of those matters being determined by the tribunal. Indeed it may be, given the relatively few numbers of those matters determined by the tribunal, that the procedures are being conducted without tribunal approval or alternatively that the procedures are not offered because of the need to seek approval by the tribunal.

In any event it is difficult to see that the reasons offered justify the distinction in decision-maker and may simply place an undue burden of formality, cost and time on family members and the medical teams involved in the procedures.

6.47 Family Voice Australia raised the issue of whether it was appropriate for the Tribunal to be able to consent to the removal of tissue for donation, termination of pregnancy and participation by the adult in special medical research or experimental health care.<sup>929</sup> It proposed that those matters be removed from the definition of 'special health care' and included in the definition of 'special personal matter':

### **2.1 Removal of tissue for donation**

The decision to donate tissue is a personal decision. In the absence of an advanced health directive from the adult addressing this matter, there are no circumstances where the Tribunal should be permitted to 'consent' to such removal and donation. To do so would in fact amount to tissue procurement as it would be completely unjustified, indeed a misuse of words, to speak of donation in the case where the adult was unable to understand the purpose of the procedure and to freely agree to it.

### **2.2 Termination of a pregnancy of an adult**

The Acts recognise that certain 'special personal matters' are regarded as of such an intimate or personal nature that it would be inappropriate for another person to be given the power to make such a decision on behalf of an adult.

These matters include 'consenting to the adoption of a child'.

There is no reason to consider the termination of a pregnancy — which ends the life of an unborn child of the adult — to be in any sense a less personal matter than consenting to the adoption of the child.

(A procedure necessary to save the life of a woman which may incidentally lead to the termination of a pregnancy should not be considered a ‘termination of a pregnancy’ for this purpose, eg treatments for uterine cancer, including hysterectomy.)

### **2.3 Participation by the adult in special medical research or experimental health care**

As with tissue donation, unless such participation is addressed in an advanced health directive, then there is no one capable of giving the kind of consent required. Such consent involves a personal weighing up of risks and benefits, including an altruistic desire to benefit others through such participation.

No one, including a Tribunal, can invoke either a best interest test or substituted decision making principle, to exercise altruism on behalf of the adult.

6.48 Right to Life Australia expressed a similar view about the removal of tissue for donation:<sup>930</sup>

It is unacceptable that the Tribunal has the power to consent to the removal and donation of organs, such as a kidney, from a living adult with impaired capacity who has not indicated that they would want this done. Allowing this changes the adult from a person to a resource that can be mined for parts for the benefit of others. This should not be permitted.

### **Legal matters**

6.49 The Adult Guardian suggested that it may be useful to clarify the scope of the definition of ‘legal matter’.<sup>931</sup>

Our legal practice for our clients continues to grow rapidly. Most frequently our clients are engaged in matters involving criminal law, followed by issues concerning their children (either family law or child safety), and to a lesser extent domestic violence. Our role is frequently limited to engaging legal services. However simply because a lawyer is engaged does not mean that our clients are able to sufficiently participate in the system. Do we for example as guardians for legal matters have the right to accept service of documents on behalf of our clients? Do we have the right to give instructions on behalf of our clients and if so in what matters and for what purpose? Given our clients have been found by the tribunal to lack legal capacity which includes inter alia, understanding the nature and effect of their decisions, to what extent are we able to instruct on their behalf. In health care matters, medical practitioners provide us with advice about our clients’ options, and after application of the health care and general principles, we consent to the option we consider to be more appropriate. Is our role in legal matters any different?

6.50 Legal Aid Queensland considered that the language used in the definition of ‘legal matter’ is primarily directed at civil proceedings rather than criminal proceedings.<sup>932</sup> It proposed that the definition should be amended to state expressly the extent to which a legal matter is intended to include a criminal law

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930 Submission 149.

931 Submission 164.

932 Submission 63A.

matter and to specify clearly the exact nature and extent of decisions that a substitute decision-maker is empowered to make in criminal law matters.

## The Commission's view

### *The definition of 'financial matter'*

*Subparagraph (p): a legal matter relating to an adult's financial or property matters*

6.51 As mentioned above, the Public Trustee raised an issue about the use of the words 'relating to' in subparagraph (p) of the definition of 'financial matter' in the second schedule to the *Guardianship and Administration Act 2000* (Qld), which refers to 'a legal matter relating to the adult's financial or property matters'.<sup>933</sup> The Public Trustee commented that, in some situations, it is difficult to determine whether a legal matter is one 'relating to' the adult's financial or property matters. The Public Trustee submitted that this difficulty may arise where a legal proceeding is partially or tangentially related to the adult's property or financial matters.

6.52 The words 'relating to' and similar phrases are incapable of precise definition. While they require a connection or relationship between the two subject matters in question, the scope of the words will depend on the context in which they appear in the relevant legislation.<sup>934</sup>

6.53 In *Kennon v Spry*, Keifel J observed that:<sup>935</sup>

The expression 'in relation to' is of wide and general import and should not be read down in the absence of some compelling reason for doing so.

6.54 In *PMT Partners Pty Ltd (in liq) v Australian National Parks And Wildlife Service*, Toohey and Gummow JJ observed that:<sup>936</sup>

the words ['in relation to'] are prima facie broad and designed to catch things which have sufficient nexus to the subject. The question of sufficiency of nexus is, of course, dependent on the statutory context.

6.55 The scope of a legal matter 'relating to' the adult's financial and property matters therefore depends on the context in which that provision appears in the guardianship legislation.

<sup>933</sup> This subparagraph is reproduced as subparagraph (o) in the definition of 'financial matter' in the second schedule to the *Powers of Attorney Act 1998* (Qld).

<sup>934</sup> *Kennon v Spry* (2008) 238 CLR 366, 440; *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 330–1; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 376; *Jennings Constructions v Workers Rehabilitation & Compensation Corp* (1998) 71 SASR 465, 480–2; *Perlman v Perlman* (1984) 155 CLR 474, 484; *Butler v Johnston, Guild & Somes* (1984) 55 ALR 265, 268; *Fountain v Alexander* (1982) 150 CLR 615, 629.

<sup>935</sup> (2008) 238 CLR 366, 440.

<sup>936</sup> (1995) 184 CLR 301, 330.

6.56 The definitions of ‘financial matter’ and ‘personal matter’ in the guardianship legislation are framed in broad terms to provide for the range of situations where it is necessary for a substitute decision-maker to have authority. Financial matters involve decisions about the adult’s financial or property matters while personal matters involve decisions about the adult’s care and welfare. These definitions complement each other so that, together, they cover almost all of the decisions that may be made under the guardianship legislation by a substitute decision-maker for an adult.<sup>937</sup>

6.57 As mentioned above, the definition of ‘financial matter’ includes ‘a legal matter relating to the adult’s financial or property matters’. The definition of a ‘legal matter’ includes a matter relating to the use of legal services in a number of contexts in addition to a matter relating to bringing or defending a proceeding.<sup>938</sup> The essential requirement for classification as ‘a legal matter relating to the adult’s financial or property matters’ is that there is a sufficient association between the legal matter and the adult’s financial or property matters.

6.58 The definition of ‘personal matter’ includes ‘a legal matter *not* relating to the adult’s financial or property matter’. This would suggest that the legal matters that fall within this category would be those that have little or no association with the adult’s financial or property matters (for example, bringing or defending an application for a domestic violence order or defending an application for a child protection order). It would also suggest that ‘a legal matter relating to the adult’s financial or property matters’ should not be read too narrowly.

6.59 The ‘legal matter’ in *Energex Limited v Sablatura* — the enforcement of the applicant’s rights under a registered easement over the respondent adult’s property — fell within the definition of a ‘financial matter’ (and not the definition of a ‘personal matter’, as suggested by the Public Trustee) because it directly concerned the adult’s property matters.

6.60 The Commission considers it unnecessary to amend the definition of ‘financial matter’ in the *Guardianship and Administration Act 2000* (Qld) by changing the wording of subparagraph (p) of the definition.

### ***The definition of ‘personal matter’***

6.61 The definition of ‘personal matter’ encompasses decisions relating to an adult’s care (including health care) or welfare. The definition is drafted so that it is non-exhaustive, which enables it to be applied in a flexible way. For example, it has been held that decisions about contact with, or access visits to, the adult<sup>939</sup> and advocacy relating to the care and welfare of the adult<sup>940</sup> are decisions about personal matters.

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937 See [6.21], [6.19] above.

938 See [6.23] above.

939 See, eg, *VJC v NSC* [2005] QSC 68, [29]; *Re WAE* [2007] QGAAT 72; *Re CAA* [2009] QGAAT 7. See also *Omari v Omari, Omari and Guardianship and Management of Property Tribunal* [2009] ACTSC 28, [60].

940 *Re MRA* [2004] QGAAT 14, [35].

6.62 Even though these types of decisions are clearly within the scope of the current definition of ‘personal matter’, the Commission is of the view that there are pragmatic reasons which would justify their inclusion as specific examples in the definition. Firstly, these types of decisions are ones that are commonly made for an adult. Secondly, legislative clarification that these matters are types of personal matters would be of assistance to guardians and attorneys. The combination of these factors justifies a practical approach.

6.63 The Commission therefore considers that the definition of ‘personal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to add the following to the examples of personal matters specifically listed in the definition:

- contact with, or access visits to, the adult; and
- advocacy relating to the care and welfare of the adult.

***The definition of ‘special personal matter’***

6.64 A decision of an alleged offender to enter a plea on a criminal charge is inherently personal, and one for which it would be inappropriate to appoint a substitute decision-maker. This is reflected in *Public Guardian v Guardianship Board [No 11 of 1997]*,<sup>941</sup> in which Hodgson J of the New South Wales Supreme Court said that:<sup>942</sup>

it has never been a feature of criminal procedure that decisions should be taken out of the hands of an accused person to be exercised on their behalf by others.

6.65 The Commission therefore considers that the definition of ‘special personal matter’ should be amended to include ‘entering a plea on a criminal charge’. Such an amendment would remove any doubt that, if an adult who is charged with a criminal offence does not have capacity to decide whether to enter a plea to the charge, no other person may do so on the adult’s behalf.

***The definitions of ‘special health matter’ and ‘special health care’***

6.66 In the Commission’s view, the distinction between ‘special health matters’ and ‘special health care’ on the one hand, and ‘health matters’ and ‘health care’, on the other, is appropriate and should be retained in the legislation.

6.67 The current types of matters that fall within the definition of ‘special health care’ are all matters involving significant health care. Some of these forms of special health care are particularly invasive or may have particularly serious consequences. In some situations, decisions about these matters may involve a conflict of interest or raise emotional issues that may make it difficult for a person who is close to the adult to make the decision objectively. The requirement to

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941 (1997) 42 NSWLR 201.

942 Ibid 208.

obtain consent for special health care from the Tribunal, rather than a substitute decision-maker, is an additional safeguard to ensure that the decision is made objectively in the adult's interests.

6.68 As the Adult Guardian observed in her submission, the withholding or withdrawing of a life-sustaining measure (which is not classified as 'special health care' under the legislation) also raises very sensitive and difficult issues. However, decisions about the withholding or withdrawal of a life-sustaining measure occur in a different context from decisions about special health care. Death and dying are a normal incident of life. In this context, it is appropriate that decisions about the withholding or withdrawal of a life-sustaining measure are made by those closest to the adult. In contrast, decisions about special health care would arise only in specific situations. Given the complexity and gravity of such decisions, it is appropriate that the Tribunal have power to consent to special health care. The Commission therefore does not support the Adult Guardian's submission to remove the definition of 'special health matter' (and by implication, 'special health care') from the legislation.

6.69 The Commission also considers that the matters that are currently listed in the definition of 'special health care' are appropriate. As noted above, these matters are subject to special consent procedures under the legislation. If the matters of the removal of tissue for donation, the termination of pregnancy and participation by the adult in special medical research or experimental health care were reclassified as 'special personal matters' under the legislation, as has been suggested by some respondents, the Tribunal would no longer be able to give consent for those matters in the absence of further amendment to the Act. In the Commission's view, this approach is too restrictive as the adult would be unable to receive that particular health care unless by order of the Supreme Court acting in its *parens patriae* jurisdiction. The Commission considers that the current approach under the legislation, in which Tribunal has a discretionary power to consent to special health care in a very limited range of circumstances, is appropriate.

### ***The definition of 'legal matter'***

6.70 The Commission considers it unnecessary to amend the definition of 'legal matter' in the guardianship legislation to specify the sorts of decisions for which a substitute decision-maker who is appointed for the adult's legal matters has authority. This is because any involvement of a substitute decision-maker in this context is subject to the processes and procedures that apply to adults with impaired capacity in the civil and criminal justice systems. For example, the *Mental Health Act 2000* (Qld) has jurisdiction to determine questions in relation to an alleged offender's state of mind. However, in order to clarify a particular ambiguity raised by Legal Aid Queensland in relation to the fundamental rights of an adult in relation to the entry of a plea in a criminal proceeding, the Commission has recommended in this chapter that the definition of 'special personal matter' in the guardianship legislation should be amended to remove any doubt that an adult's

substitute decision-maker cannot enter a plea for the adult in a criminal proceeding.<sup>943</sup>

6.71 In its submission to this Commission, Legal Aid Queensland also raised the question of whether there should be a pre-trial process for the referral of criminal law proceedings to the Mental Health Court in respect of State summary offences as already operates for indictable offences:

The *Mental Health Act 2000* (Qld) established the Mental Health Court and provides a statutory process for the referral of criminal law proceedings to the Mental Health Court where there is evidence or allegations that a person is mentally ill or was mentally ill at the time the alleged offence occurred or has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial need to be considered prior to the trial of the criminal charges. If the Mental Health Court is satisfied that one of the factors exists, then the criminal proceedings can be dismissed or stayed and the Mental Health Court can make orders appropriate to the circumstances of the case.

This process only applies to situations where there is an indictable offence.<sup>944</sup>

In Queensland, there is no pre-trial statutory process that applies to State summary offences. Currently if an issue arises in regard to mental illness, unsoundness of mind or fitness for trial, the issue can be raised in submissions by the defence to the prosecuting authority but it is at the prosecuting authority's discretion as to whether the prosecution will withdraw proceedings.

It is the experience of Legal Aid lawyers that charges proceed in circumstances where they should have been withdrawn. Examples include: persons being charged with obstructing police in respect of incidents that occur while they are in a psychotic state and being involuntarily admitted to a psychiatric unit

6.72 Legal Aid Queensland submitted that, to overcome this difficulty, Queensland should enact a legislative provision which would allow issues of mental illness, unsoundness of mind or fitness for trial to be considered by the Magistrates Court and dealt with appropriately in regard to State summary charges, similar in effect to section 20BQ of the *Crimes Act 1914* (Cth).<sup>945</sup> Legal Aid Queensland also cautioned that the recommendations made in the *Review of the civil and criminal justice system in Queensland* (the 'Moynihan Report')<sup>946</sup> for the reform of the criminal justice system reforms 'will potentially significantly reduce the number of

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943 See [6.65] above.

944 *Mental Health Act 2000* (Qld) ss 256 and 257 allow a referral of a charge of a summary offence to the Mental Health Court only where there is also an existing charge of an indictable offence in relation to the person before the Mental Health Court

945 Section 20BQ of the *Crimes Act 1914* (Cth) provides that, where, in proceedings before a court of summary jurisdiction in respect of a federal offence, it appears to the court that the person charged is suffering from mental illness or intellectual disability and that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law; the court may dismiss the charge and discharge the person, adjourn the proceedings, remand the person on bail or make any other order that the court considers appropriate.

946 Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland* (December 2008).

defendants who can access the Mental Health Court, as more indictable offences will be required to be dealt with in the Magistrates Court’.

6.73 The Commission considers that the question of whether there should be a pre-trial process for the referral of criminal law proceedings to the Mental Health Court in respect of State summary offences is a question that falls outside the Commission’s current Terms of Reference. Nonetheless, Commission acknowledges that these are complex and difficult issues that may require attention in another forum.

## RECOMMENDATIONS

- 6-1** Subject to recommendations 6-2 and 6-3 below, the definitions of ‘financial matter’, ‘personal matter’, ‘health matter’, ‘special health matter’, ‘special personal matter’ and ‘legal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are appropriate and should be retained without amendment.
- 6-2** The definition of ‘personal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to add the following to the examples of personal matters specifically listed in the definition:
- (a) contact with, or access visits to, the adult; and
  - (b) advocacy relating to the care and welfare of the adult.
- 6-3** The definition of ‘special personal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to include ‘entering a plea on a criminal charge’.



# Chapter 7

## Decision-making capacity

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## INTRODUCTION

7.1 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 *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>947</sup>

7.2 Queensland's guardianship legislation provides a framework for decision-making by and for adults who have impaired decision-making capacity. Amongst other things, it provides for the making of substitute decisions for an adult who has impaired decision-making capacity. A threshold issue in reviewing the law relating to substitute decision-making is the legal test of decision-making capacity.<sup>948</sup>

7.3 This chapter focuses on the nature of decision-making capacity, and its assessment under the guardianship legislation. Chapter 13 deals with the capacity to make an enduring document.

## DECISION-MAKING CAPACITY

7.4 To be autonomous and capable of self-determination is a large part of what people value in terms of their freedom and independence. Part of being an adult is the ability to make decisions independently.

7.5 Adults are presumed to have capacity to make their own decisions. This includes the ability to make decisions about daily life, as well as more serious or significant decisions.

7.6 However, a person's capacity to make certain decisions may be impaired, for example, as a result of an intellectual disability, dementia or an acquired brain injury.

7.7 A person may lack capacity for some decisions, but have capacity for all others. The level of a person's capacity might also fluctuate according to particular factors such as the passage of time or presence of illness.<sup>949</sup>

## GENERAL APPROACHES TO DEFINING DECISION-MAKING CAPACITY

7.8 There are a number of approaches used for understanding the concept of decision-making capacity. These approaches influence how capacity is assessed

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

948 Legal and health professionals both frequently use the terms 'capacity' and 'competence' interchangeably.

949 For example, the level of cognitive impairment shown by people suffering dementia may be influenced by environmental stimuli and distractions, as well as drugs, fatigue and the time of day: B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 66.

in practice. Three main approaches have been identified:<sup>950</sup>

- The *functional approach*: where a person has impaired capacity for a particular decision if he or she is unable to understand the nature and effects of the decision at the time the decision is to be made.
- The *status approach*: where a person lacks the requisite capacity if he or she has a certain 'status', for example, the status of being under 18 years of age, or of being a person with a particular disability or condition.
- The *outcome approach*: where a person lacks the requisite capacity if the content of his or her decision does not accord with other people's opinion of what the decision should be, or does not objectively appear to be in the person's interests.

7.9 The legal concept of decision-making capacity has developed consistently towards the functional model.<sup>951</sup> It has been suggested that this reflects 'the law's support for individual self-determination and flexibility, rather than rigidly distinguishing the competent from the incompetent according to age, diagnostic status (for example, presence of mental illness), or conformity with some objective standard'.<sup>952</sup>

7.10 A number of jurisdictions where law reform has occurred in the area of substitute decision-making, including Queensland, have adopted a statutory test of decision-making capacity (or incapacity) wholly or predominantly modelled on the functional approach.<sup>953</sup> The Queensland model is discussed below.

## THE LAW IN QUEENSLAND

7.11 The Queensland guardianship legislation establishes a mechanism for decisions about personal matters (including health matters), financial matters and special health matters to be made for adults who do not have capacity to make their own decisions about these matters. It authorises certain people to make substitute decisions for the adult, including:

950 Eg Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.3]–[3.5]; M Parker and C Cartwright, 'Mental Capacity in Medical Practice and Advance Care Planning: Clinical, Legal and Ethical Issues' in B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 62; New South Wales Attorney General's Department, *Are the rights of people whose capacity is in question being adequately promoted and protected?*, Discussion Paper (March 2006) 6.

951 J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 57; Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.30]; Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.14]; South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [4.31]–[4.32].

952 J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 57.

953 Eg *Guardianship and Administration Act 2000* (Qld); *Mental Capacity Act 2005* (UK); *Mental Capacity and Guardianship Bill 2008* (Ireland).

- statutory health attorneys;
- attorneys appointed by the adult in an enduring document;
- guardians or administrators appointed by the Tribunal; and
- in limited circumstances, the Adult Guardian, the Public Trustee and the Tribunal.<sup>954</sup>

7.12 The guardianship legislation also enables a decision or proposed decision of an informal decision-maker to be ratified or approved by the Tribunal.<sup>955</sup>

7.13 Substitute decision-makers have power to make decisions for an adult only if the adult has impaired capacity for the matter.<sup>956</sup> The *Guardianship and Administration Act 2000* (Qld) acknowledges ‘that an adult with impaired capacity has a right to adequate and appropriate support for decision making’.<sup>957</sup> It also states that ‘the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent’.<sup>958</sup>

### The presumption of capacity

7.14 As mentioned above, every adult is presumed to have decision-making capacity.<sup>959</sup> The presumption of capacity is enshrined in both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) as General Principle 1 in the first schedule to those Acts.

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If a guardian, administrator or attorney for an adult disagrees with another person who is a guardian, administrator or 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). During the suspension of the operation of the power of an attorney for a personal matter under an enduring power of attorney, the Adult Guardian is taken to be the attorney for the adult for the exercise of the suspended power: *Guardianship and Administration Act 2000* (Qld) s 196(2). During the suspension of the operation of the power of an attorney for a financial matter under an enduring power of attorney, the Public Trustee is taken to be the attorney for the adult for the exercise of the suspended power: *Guardianship and Administration Act 2000* (Qld) s 196(3). The Tribunal has power to consent to some types of special health care for an adult with impaired capacity for the special health matter: *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.

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*Guardianship and Administration Act 2000* (Qld) s 154.

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Eg *Powers of Attorney Act 1998* (Qld) ss 33(3), (4) (When attorney’s power exercisable), 36(1)(a), 2(c), (3) (Operation of advance health directive), 62(2) (Statutory health attorney); *Guardianship and Administration Act 2000* (Qld) ss 12(1)(a) (Appointment), 63(1)(a) (Urgent health care), 63A(1)(a) (Life-sustaining measure in acute emergency), 64(1)(a) (Minor, uncontroversial health care), 65(1) (Adult with impaired capacity—order of priority in dealing with special health matter), 66(1) (Adult with impaired capacity—order of priority in dealing with health matter), 69(1) (Donation of tissue), 70(1) (Sterilisation), 71(1) (Termination of pregnancy), 72(1) (Special medical research or experimental health care), 73(1) (Prescribed special health care), 198A (Consent to forensic examination).

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*Guardianship and Administration Act 2000* (Qld) s 5(e).

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*Guardianship and Administration Act 2000* (Qld) s 5(d).

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Eg *Re Bridges* [2001] 1 Qd R 574; *Re T* [1993] Fam 95, 115 (Lord Donaldson MR).

7.15 General Principle 1 provides:<sup>960</sup>

**1 Presumption of capacity**

An adult is presumed to have capacity for a matter.

7.16 The presumption of capacity is also reflected in article 12 of the United Nations *Convention on the Rights of People with Disabilities*, which deals with the exercise of legal capacity by persons with disabilities.<sup>961</sup>

7.17 The presumption is rebuttable; an adult is presumed to have capacity unless the contrary is proven.<sup>962</sup> The burden of proving that a person has impaired capacity falls on the person who is seeking to rebut the presumption.<sup>963</sup>

7.18 Section 11(1) of the *Guardianship and Administration Act 2000* (Qld) provides that 'a person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter' must apply the General Principles (including the presumption of capacity) and, for a health matter or a special health matter, the Health Care Principle. Section 76 of the *Powers of Attorney Act 1998* (Qld) makes similar provision in relation to a person or entity who performs a function or exercises a power under that Act.

7.19 The application of the presumption of capacity under the *Guardianship and Administration Act 2000* (Qld) was recently considered by the Supreme Court of Queensland in *Bucknall v Guardianship and Administration Tribunal (No 1) ('Bucknall')*.<sup>964</sup>

7.20 The Supreme Court's decision in *Bucknall* sets out the following facts.<sup>965</sup> The Supreme Court had previously appointed a trustee company to administer a settlement sum made in respect of a claim for damages by the adult in a personal injuries action. In subsequent proceedings, the Tribunal substituted the Public Trustee as administrator to manage the settlement fund. At the same time, the Tribunal dismissed the adult's application for a declaration that she had capacity for

<sup>960</sup> Section 7(a) of the *Guardianship and Administration Act 2000* (Qld) explains that the Act 'provides that an adult is presumed to have capacity for a matter'.

<sup>961</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12.

<sup>962</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1.

<sup>963</sup> Previously, at common law, once it had been proved that a person lacked capacity, a presumption of continuance operated: the lack of capacity was presumed to continue until the contrary was proved. However, the presumption of continuance was rejected by the English Court of Appeal in *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162. In that case, the plaintiff suffered brain damage as the result of a road traffic accident. It was contended that, where there was evidence that he was incapable of managing his property and affairs for a time, the plaintiff could rely on a presumption of continuance to avoid having to prove that he lacked capacity at a later stage. Kennedy LJ at [17] (Potter and Chadwick LJ concurring) held that 'if there is clear evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity'.

<sup>964</sup> [2009] 2 Qd R 402.

<sup>965</sup> Ibid [1]–[5].

that matter on the basis that the presumption of capacity had been rebutted. The appointment of an administrator was continued and the adult's application was refused because, on a consideration of the evidence, the Tribunal found that the adult had impaired capacity for making complex financial decisions, including the management of the settlement fund.

7.21 The adult subsequently made a new application to the Tribunal for a declaration about her capacity to make complex financial decisions. She also sought a review under section 31(1) of the *Guardianship and Administration Act 2000* (Qld) of the appointment, including an order discharging the administrator on the basis that 'there is no need for the appointment'. The Tribunal dismissed the application for a declaration about the adult's capacity and, on the review, continued the appointment of the Public Trustee as administrator for managing the settlement fund. The following passages from the Tribunal's reasons for decision in that proceeding are set out in the Supreme Court's decision in *Bucknall*.

7.22 In rejecting the adult's submission that the presumption of capacity was relevant for both proceedings, the Tribunal stated:<sup>966</sup>

The Tribunal has previously found that Mrs Bucknall has impaired capacity and until such time as the Tribunal makes an order to the contrary, the presumption of capacity remains rebutted ...

7.23 The Tribunal also commented that:<sup>967</sup>

In any event, the Tribunal relies on the evidence before the previous Tribunal about Mrs Bucknall's ability to make decisions freely and voluntarily, and the extent of the influence exercised by Mr Bucknall on Mrs Bucknall. Section 130 of the Act requires the Tribunal to ensure that, as far as it considers practicable, it has all relevant information and material before it. It is therefore quite appropriate to take the previous Orders of the Court and the Tribunal and the supporting evidence into account when considering the issue of the application of the presumption of capacity. The fact that the evidence of Mrs Bucknall's ability to make decisions is historical does not, in these circumstances, detract from its value.

7.24 The adult then appealed to the Supreme Court against the dismissal of her application and the outcome of the review, contending that the Tribunal had misconstrued its statutory obligation under section 11(1) of the *Guardianship and Administration Act 2000* (Qld) in failing to apply the presumption of capacity for the matter of managing her settlement sum.

7.25 In *Bucknall*, the Supreme Court allowed the appeal, finding that the Tribunal was required to apply the presumption of capacity in respect of both the application for a declaration about the adult's capacity and the review of the Public

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966 Ibid [14].

967 Ibid [16].

Trustee's appointment.<sup>968</sup> In reaching that conclusion, the Court made the following findings.

7.26 The Court found that an administrator's powers are not analogous to the Tribunal's functions; the Tribunal is required to apply the presumption of capacity when it determines an adult's capacity for a matter but an administrator who is appointed for the adult for the matter is not required to do so.<sup>969</sup>

The Tribunal's decision was influenced by an absurd consequence that would attend application of the presumption by an administrator appointed in respect of a matter like Mrs Bucknall's. Section 12 of the Act allows the Tribunal to appoint an administrator for a financial matter if three conditions are satisfied. One is that the 'adult has impaired capacity for the matter'.

Section 11(1) requires an administrator who exercises a power under the Act to 'apply the principles stated in schedule 1...'; and Example 1(a) makes that plain. But it would be a nonsense if an administrator had to give effect to the first of those principles: the presumption of capacity.

As the Tribunal observed, an administrator whose appointment depends upon a determination that the presumption had been rebutted could scarcely set about applying it in making decisions. To do so would be fundamentally at odds with a finding of fact by the Tribunal essential to the administrator's appointment. And for an administrator to apply the presumption would inevitably frustrate the very object of the appointment.

In short, the Tribunal was correct in holding that, so far as an administrator's powers and functions go, the presumption has no work to do.

It does not follow, however, that the presumption has no potential operation in Tribunal proceedings where capacity is revisited after a s 12 appointment has been made.

7.27 The Court also commented that it appeared that Parliament had intended that the Tribunal must apply the presumption every time it makes a determination about an adult's capacity:<sup>970</sup>

The Parliament might, sensibly enough, have adopted a regime under which, once found by the Tribunal, mental impairment is presumed to continue until the contrary is established. That, after all, was the general law solution. However, it is not the only rational choice.

There is nothing absurd about the Tribunal's applying the presumption every time it investigates capacity. For one thing, cognitive functions sometimes improve over time; and an adult with impaired capacity at one time might not lack capacity a year or two later.

Even if the issue is revisited soon after impaired capacity is found, no particularly inconvenient consequences would attend a fresh application of the presumption. The Tribunal is empowered to gather the evidence needed to

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968 [2009] 2 Qd R 402, [43] (Byrne SJA).

969 Ibid [21]–[26].

970 Ibid [27]–[31].

make an informed decision. And, as with Mrs Bucknall's case, a Tribunal that revisits capacity may take into account, if still relevant, evidence adduced in the earlier proceeding when the impaired capacity was declared. For the Tribunal to give effect to the presumption more than once is not so bothersome that the Parliament is unlikely to have intended that to be done.

In any event, the Act contains an explicit indication that the legislature did expect that the presumption would apply in such circumstances. (note omitted)

7.28 The Court also considered the significance of section 31 of the Act, which authorises the Tribunal to conduct a review of an appointment of a guardian or administrator. In particular, in relation to section 31(2), which provides that, 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, the Court observed that:<sup>971</sup>

Relevantly for present purposes, s 31(2) directs attention to the conditions required to be satisfied for a s 12 appointment. The reference to a 'new' application appears to be concerned with the conditions to be satisfied where an appointment is first proposed. On initial application for a s 12 appointment, the presumption is to be applied.

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

7.29 The Court also commented on the 'absurdity' in section 11 of the *Guardianship and Administration Act 2000* (Qld), which stipulates that the General Principles apply where the Tribunal exercises a statutory power 'for a matter in relation to an adult with impaired capacity for the matter':<sup>972</sup>

Literally construed, this provision means that only those adults who suffer impaired capacity can invoke the presumption. Such an interpretation would deny the presumption any operation in capacity proceedings in the Tribunal. Especially as s 7(a) promises that '[t]his Act ... provides that an adult is presumed to have capacity for a matter', so capricious a result cannot have been intended.

That the Parliament did not intend what its words naturally mean is confirmed by the extrinsic material.

The explanatory notes accompanying the Guardianship and Administration Bill 1999 mentioned that '[t]he Bill will implement those aspects of the Queensland Law Reform Commission Report Number 49...released in June 1996 (QLRC Report 49) that were not implemented in the Powers of Attorney Act 1998'.

Relevantly, the draft Bill with that report provided:

'General principles must be complied with by all

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971 Ibid [33]–[34].

972 Ibid [36]–[42].

21. The principles in part 2 ('the general principles') must be complied with by a person or other entity who performs a function or exercises a power under this Act.'

In part 2, headed 'List of General Principles', s 23 stipulated:

'An adult is presumed to have the capacity to make the adult's own decisions'.

The extrinsic material does not reveal why clause 21 of the draft Bill was altered when s 11 was enacted. But that drafting change to add the problematic words could not be explained by an anxiety to make a mockery of the s 7(a) assurance.

The absurdity produced by a literal interpretation of s 11 should be avoided by according the provision a purposive construction. In respect of Mrs Bucknall's proceedings, this involves ignoring the words 'for a matter in relation to an adult with impaired capacity for the matter'. (note omitted)

## The statutory test of capacity

### *The elements of the definition*

7.30 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) provide that an adult has 'impaired capacity' for a matter if the person does not have capacity for the matter.<sup>973</sup> 'Capacity' is defined in both Acts as:<sup>974</sup>

**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.

7.31 The definition of capacity is specific to the particular decision or type of decision to be made.<sup>975</sup> It therefore reflects a functional approach to defining decision-making capacity, which focuses on a person's understanding in relation to a particular task.<sup>976</sup>

973 *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) sch 3.

974 *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) sch 3.

975 *Aziz v Prestige Property Services Pty Ltd* [2007] QSC 265, [24] (Lyons J).

976 Commentators in this area have expressed different views about whether the concept of understanding means actual understanding or the ability to understand: see, eg C Stewart and P Biegler, 'A primer on the law of competence to refuse medical treatment' (2004) 78 *Australian Law Journal* 325, 328; B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 64–5; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58.

7.32 The definition includes two of the abilities which are usually considered to be required for decision-making capacity: cognitive understanding and communication.<sup>977</sup> The remaining element of voluntariness is ordinarily a separate, but related, requirement for the validity of a legally binding decision.<sup>978</sup>

### **Related matters**

7.33 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>979</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.

7.34 The Act also acknowledges that 'the right to make decisions includes the right to make decisions with which others may not agree'.<sup>980</sup>

### **Declarations of capacity**

7.35 One of the Tribunal's functions is to make declarations about an adult's capacity for a matter.<sup>981</sup> It is also empowered to make declarations about the capacity of a guardian, administrator or attorney for a matter.<sup>982</sup> The Tribunal has power to make a declaration about capacity on its own initiative or on application.<sup>983</sup>

7.36 In making a decision under the *Guardianship and Administration Act 2000* (Qld), the Tribunal must ensure that it has all the relevant information and material before it, to the extent it considers practicable.<sup>984</sup> However, it may proceed without

<sup>977</sup> The abilities that are generally agreed to be required for decision-making capacity are the abilities to (a) receive, comprehend, retain and recall relevant information; (b) integrate information received and relate it to one's situation; (c) evaluate benefits and risks in terms of personal values; (d) select an option and give cogent reasons for the choice; (e) communicate one's choice to others; and (f) persevere with the choice until the decision is acted upon: I Kerridge, M Lowe and J McPhee, *Ethics and Law for the Health Professions* (2nd ed, 2005) 175–6; and J Cockerill, B Collier and K Maxwell, 'Legal Requirements and Current Practices' in B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 27, 38–9.

<sup>978</sup> M Parker, 'Judging capacity: paternalism and the risk-related standard' (2004) 11 *Journal of Law and Medicine* 482, 486; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58–9.

<sup>979</sup> *Guardianship and Administration Act 2000* (Qld) s 5(c).

<sup>980</sup> *Guardianship and Administration Act 2000* (Qld) s 5(b).

<sup>981</sup> *Guardianship and Administration Act 2000* (Qld) s 82(1)(a).

<sup>982</sup> *Guardianship and Administration Act 2000* (Qld) s 146(1).

<sup>983</sup> *Guardianship and Administration Act 2000* (Qld) s 146(2).

<sup>984</sup> *Guardianship and Administration Act 2000* (Qld) s 130(1).

receiving further information if it considers that urgent or special circumstances justify it doing so or if all the active parties agree.<sup>985</sup>

7.37 A declaration about whether a person had capacity to enter a contract is, in a subsequent proceeding in which the validity of the contract is in issue, evidence about the person's capacity.<sup>986</sup>

## THE POSITION IN OTHER JURISDICTIONS

### Australia

7.38 The legislation in the other Australian jurisdictions provides for the appointment of substitute decision-makers (for example, guardians and administrators) for adults who lack the capacity to make their own decisions. The test of impaired capacity differs in each jurisdiction, although there are some similarities.

#### *The test of impaired capacity*

7.39 In each of the other Australian jurisdictions, the definition of impaired capacity (or its equivalent) focuses on a person's inability to make decisions or manage his or her affairs. Unlike Queensland, these definitions also refer to some form of 'diagnostic threshold'. That is, a person has impaired capacity if his or her capacity is impaired because of a particular disability or condition.

7.40 In South Australia, the test for impaired capacity also specifically refers to a person's ability to communicate his or her decisions.

#### *Inability to decide or to manage affairs*

7.41 In New South Wales, the legislation provides for the making of a guardianship order for 'a person who, because of a disability, is totally or partially incapable of managing his or her person'.<sup>987</sup> The relevant consideration in making financial management orders is whether a person is capable of managing his or her own affairs.<sup>988</sup>

7.42 The South Australian legislation defines 'mental incapacity' as 'the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs'.<sup>989</sup>

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985 *Guardianship and Administration Act 2000* (Qld) s 131.

986 *Guardianship and Administration Act 2000* (Qld) s 147.

987 *Guardianship Act 1987* (NSW) ss 3 (definition of 'person in need of a guardian'), 6A(1)(a), 14(1).

988 *Guardianship Act 1987* (NSW) s 25G(a).

989 *Guardianship and Administration Act 1993* (SA) s 3.

7.43 Incapability of looking after one's own health and safety is also one of the grounds for a guardianship order under the Western Australian legislation.<sup>990</sup>

7.44 In the Northern Territory, Tasmania, Victoria and Western Australia, the legislation applies to a person who is unable to make 'reasonable judgments' about his or her affairs.<sup>991</sup>

7.45 In the ACT, the legislation applies if the person's decision-making ability is 'impaired' because of certain condition or state.<sup>992</sup>

*The diagnostic threshold*

7.46 In the ACT, the legislation applies if the person's decision-making ability is impaired 'because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness'.<sup>993</sup>

7.47 In New South Wales, Tasmania and Victoria, the legislation applies to a person with a disability.<sup>994</sup> In New South Wales, the legislation provides no further guidance as to what this means. In Tasmania, 'disability' means:<sup>995</sup>

any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner.

7.48 In Victoria, a disability means 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.<sup>996</sup>

7.49 In the Northern Territory, the diagnostic threshold is 'an intellectual disability' being a disability 'resulting from an illness, injury, congenital disorder or organic deterioration or of unknown origin'.<sup>997</sup>

7.50 In South Australia, the legislation applies to a person who is unable to look after his or her own affairs because of 'any damage to, or any illness, disorder,

990 *Guardianship and Administration Act 1990* (WA) s 43(1)(b)(i).

991 *Adult Guardianship Act* (NT) s 3(1) (definition of 'intellectual disability'); *Guardianship and Administration Act 1995* (Tas) ss 20(1)(b), 51(1)(b); *Guardianship and Administration Act 1986* (Vic) ss 22(1)(b), 46(1)(a)(ii); *Guardianship and Administration Act 1990* (WA) s 43(1)(b)(ii).

992 *Guardianship and Management of Property Act 1991* (ACT) s 5.

993 *Guardianship and Management of Property Act 1991* (ACT) s 5.

994 *Guardianship Act 1987* (NSW) s 2 (definition of 'person in need of a guardian') (in contrast, a financial management order may be made if the person is 'not capable of managing' his or her own affairs: s 25G(a)); *Guardianship and Administration Act 1995* (Tas) ss 20(1)(a), 51(1)(a); *Guardianship and Administration Act 1986* (Vic) ss 22(1)(a), 46(1)(a)(i).

995 *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'disability').

996 *Guardianship and Administration Act 1986* (Vic) s 3 (definition of 'disability').

997 *Adult Guardianship Act* (NT) ss 3(1) (definition of 'intellectual disability'), 15(1)(a).

imperfect or delayed development, impairment or deterioration, of the brain or mind'.<sup>998</sup>

7.51 In Western Australia, an administrator may be appointed in respect of a person with a 'mental disability' which includes 'an intellectual disability, a psychiatric condition, an acquired brain injury and dementia'.<sup>999</sup>

*Inability to communicate*

7.52 The guardianship legislation in South Australia provides that 'mental incapacity' includes the inability to look after one's own affairs as a result of:<sup>1000</sup>

any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever.

7.53 This is the only Australian jurisdiction, other than Queensland, that specifically refers to a person's ability to communicate his or her decisions as part of the test of impaired capacity.

***The exclusion of certain factors***

7.54 The ACT and the Northern Territory specifically exclude certain factors from what may be taken as impaired capacity under their guardianship legislation.<sup>1001</sup> For example, the ACT legislation provides that a person is not taken to have impaired decision-making ability only because the person:<sup>1002</sup>

- (a) is eccentric; or
- (b) does or does not express a particular political or religious opinion; or
- (c) is of a particular sexual orientation or expresses a particular sexual preference; or
- (d) engages or has engaged in illegal or immoral conduct; or
- (e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).

998 *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'mental incapacity' para (a)).

999 *Guardianship and Administration Act 1990* (WA) ss 3 (definition of 'mental disability'), 64(1)(a).

1000 *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'mental incapacity' para (b)).

1001 *Guardianship and Management of Property Act 1991* (ACT) s 6A; *Adult Guardianship Act* (NT) s 3(3).

1002 *Guardianship and Management of Property Act 1991* (ACT) s 6A (Limits on finding impaired decision-making ability). The *Powers of Attorney Act 2006* (ACT) includes a similar provision which additionally provides that a person is not taken to have impaired capacity only because he or she makes unwise decisions: s 91.

## The United Kingdom

### *The test of impaired capacity*

7.55 The test of impaired capacity under the *Mental Capacity Act 2005* (UK) combines both the functional and status approaches to defining capacity.

7.56 Section 2(1) of the Act provides that a person lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. The Act also specifies that it does not matter whether the impairment or disturbance is permanent or temporary.<sup>1003</sup>

7.57 For the purposes of deciding whether a person is unable to make a decision in relation to a matter, section 3 of the Act provides the following test:

#### **3 Inability to make decisions**

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
  - (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
  - (a) deciding one way or another, or
  - (b) failing to make the decision.

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<sup>1003</sup>

*Mental Capacity Act 2005* (UK) s 2(2).

### **The exclusion of certain factors**

7.58 The *Mental Capacity Act 2005* (UK) also states that a lack of capacity cannot be established merely by reference to:<sup>1004</sup>

- a person's age or appearance; or
- a condition of the person, or an aspect of the person's behaviour, which might lead others to make unjustified assumptions about the person's capacity.

### **Ireland**

7.59 In 2006, the Law Reform Commission of Ireland completed a review of vulnerable adults and the law.<sup>1005</sup> Among other things, the review dealt with how the law should approach the concept of capacity to make decisions, and what structures are needed to support vulnerable persons when they come to make those decisions.<sup>1006</sup> The Commission recommended a functional test of 'capacity', which it defined as 'the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made'.<sup>1007</sup> It also recommended that a person will not be regarded as lacking capacity if they have the ability to make a decision with the assistance of simple explanations or visual aids.<sup>1008</sup>

### **ISSUES FOR CONSIDERATION**

7.60 Capacity is an important threshold issue under the guardianship legislation because it determines whether an individual will in law have autonomy over decision-making in relation to his or her affairs. The test of capacity provides a way of identifying those persons who may need others to make a decision or decisions for them.<sup>1009</sup> The presumption of capacity, the statutory definition of capacity and the application of the definition raise various issues for consideration. Consideration of these issues should take into account that impaired capacity for a person may be partial, temporary or fluctuating.

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1004 *Mental Capacity Act 2005* (UK) s 2(3).

1005 Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006).

1006 *Ibid* [1.02].

1007 *Ibid* [2.45].

1008 *Ibid* [2.46].

1009 If a person does not meet the test of capacity, he or she has 'impaired capacity' under the legislation. The grounds on which the Tribunal must be satisfied in order to appoint a guardian or administrator for a matter for an adult, include that the adult has impaired capacity for the matter: *Guardianship and Administration Act 2000* (Qld) s 12(1)(a). A finding of impaired capacity may also trigger the exercise of decision-making power for an adult by other substitute decision-makers: see n 956 above.

## THE PRESUMPTION OF CAPACITY

7.61 Section 11(1) of the *Guardianship and Administration Act 2000* (Qld) provides that 'a person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter' must apply the General Principles and, for a health matter or a special health matter, the Health Care Principle. Section 76 of the *Powers of Attorney Act 1998* (Qld) makes similar provision in relation to a person or other entity who performs a function or exercises a power under that Act. As mentioned above, the presumption that an adult has capacity for a matter is the first of the General Principles in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>1010</sup>

7.62 Although the effect of these provisions would appear to be that, when performing a function or exercising a power under the guardianship legislation, a person or entity must apply the presumption of capacity, the legislation does not specify how the presumption of capacity is to be applied if the Tribunal or the Supreme Court (when it exercises jurisdiction under the legislation) has made a formal determination that the adult has impaired capacity. Such a determination may take the form of a declaration about the adult's capacity or otherwise a formal finding as part of the determination of whether an appointment order should be made.

7.63 As mentioned above, the Supreme Court of Queensland has held in *Bucknall*<sup>1011</sup> 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).<sup>1012</sup> The Court also commented that, if a formally appointed substitute decision-maker (in that case, an administrator) whose appointment depends upon the Tribunal's determination that the presumption 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'.<sup>1013</sup>

## Discussion Paper

### *The application of the presumption of capacity*

7.64 In its Discussion Paper, which pre-dated the decision of the Supreme Court in *Bucknall*, the Commission noted that the way in which the presumption is applied in practice by the Tribunal, substitute decision-makers and third parties who have dealings with the adult raised some significant issues.<sup>1014</sup> As an example, the

<sup>1010</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1.

<sup>1011</sup> [2009] 2 Qd R 402.

<sup>1012</sup> *Ibid* [43]. See [7.25]–[7.29] above.

<sup>1013</sup> *Ibid* [24].

<sup>1014</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [6.51].

Commission raised the question of whether the presumption is required to be applied each time a person or entity exercises a power or performs a function under the guardianship legislation for an adult. In particular, the Commission raised the question of how the presumption is to be applied if the Tribunal has previously determined that the adult has impaired capacity for the matter.

7.65 Accordingly, the Commission sought submissions in relation to the following matters:<sup>1015</sup>

- how the presumption that an adult has capacity for a matter is applied in practice by the Tribunal, substitute decision-makers and third parties who have dealings with the adult; and
- how the presumption is to be applied if the Tribunal has previously determined that the adult has impaired capacity for the matter.

### ***Location of the presumption of capacity in the legislation***

7.66 The presumption of capacity, which is stated in General Principle 1, is currently located, along with the other General Principles, in the first schedule to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The Commission noted in its Discussion Paper that, given the fundamental importance of the presumption of capacity, it may be appropriate to make the presumption of capacity the subject of a separate substantive provision.<sup>1016</sup> On the other hand, it may be considered that the relocation of the provision is unnecessary, particularly given that the guardianship legislation requires compliance with the General Principles. Accordingly, the Commission sought submissions about whether the presumption of capacity should be located in another part of the legislation.<sup>1017</sup>

## **Submissions**

### ***The application of the presumption of capacity***

7.67 A number of submissions commented that there are some difficulties in the application of the presumption of capacity under the guardianship legislation, depending on the circumstances in which it is applied.<sup>1018</sup> These submissions raised issues similar to those considered in *Bucknall v Guardianship and Administration Tribunal (No 1)*.

7.68 For example, the former Public Advocate commented that, if the presumption of capacity is not applied by the Tribunal where it has previously found that an adult has impaired capacity, it would be ‘incongruent with the underpinning

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<sup>1015</sup> Ibid 117.

<sup>1016</sup> Ibid [6.55]. The question of whether the General Principles should be relocated to another part of the guardianship legislation is discussed in Chapter 4 of this Report.

<sup>1017</sup> Ibid 117.

<sup>1018</sup> Submissions 20, 68, 71, 90, 91, 95A.

philosophy of the guardianship legislation, which seeks to recognise the adults' right to self-determination to the greatest extent possible'. In the former Public Advocate's view, the practical effect of such an approach is that the onus is on the adult to prove his or her capacity.

7.69 The former Public Advocate also commented that:<sup>1019</sup>

The statement of the presumption of capacity within the Principles themselves currently presents some issues. A lay decision-maker is likely to be confused about how they are meant to apply this principle in circumstances when [the Tribunal] has found the adult has impaired capacity for all or some matters and [the Tribunal] has appointed them to make all personal and financial decisions. Accordingly, at least some clarification about requirements is appropriate.

7.70 The Public Trustee also considered that it would be difficult for the Public Trustee, when acting as an administrator, to apply a presumption of capacity because the role of administrator for a particular matter is predicated upon a decision having been made by the Tribunal that the adult concerned lacks capacity for that matter.<sup>1020</sup>

7.71 Several submissions specifically commented that the application of the presumption of capacity may create difficulties where an adult has impaired capacity.<sup>1021</sup> For example, one respondent observed that the continued application of the presumption may seem futile in situations where the adult has no prospect of having or regaining capacity in the future:<sup>1022</sup>

Is the decision-maker under an obligation to adopt a Presumption of capacity every day when he or she comes in contact with the adult who suffers from impaired decision-making capacity?

This is understandable if the Adult has fluctuating incapacity but it is also very frustrating if the carer, and decision-maker, who lives with the adult, is required to assume capacity on a daily basis when a doctor has claimed that capacity will never return.

7.72 In the experience of another respondent, the presumption is sometimes not applied by substitute decision-makers.<sup>1023</sup>

7.73 A number of submissions made suggestions about how the presumption of capacity should be applied under the legislation.<sup>1024</sup>

7.74 Several respondents, including Queensland Advocacy Incorporated and the former Public Advocate, suggested the adoption of a similar approach to that

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1019 Submission 91.

1020 Submission 90.

1021 Submissions C6A, C74, 20.

1022 Submission 80.

1023 Submission 19.

1024 Submissions 5, 9, 20A, 34A, 56, 63, 71, 91.

subsequently taken by the Supreme Court in *Bucknall v Guardianship and Administration Tribunal (No 1)*.<sup>1025</sup>

7.75 These respondents considered that the Tribunal should be required to apply the presumption each time it determines an adult's capacity. For example, Queensland Advocacy Incorporated considered that:<sup>1026</sup>

The presumption of capacity should be applied in a way that balances preserving an adult's rights with ensuring necessary decisions are made promptly and effectively.

Currently upon first application to the Tribunal, the adult who is the subject of the application is presumed to have capacity. The entity bringing the application must rebut that presumption. This should remain the position on all subsequent applications to the Tribunal. If for example, an adult applies to have a Tribunal order reviewed, for that purpose the presumption of capacity should apply. The onus of proving a lack of capacity should again fall upon the person in whose favour the order was first made. An adult should never be placed in the position of having to prove in the Tribunal they have capacity. Limitations on resources and expertise could make it very difficult for an adult trying to prove their own capacity, particularly in a finely balanced case.

7.76 They also considered that, if the Tribunal makes a determination that an adult has impaired capacity, that determination should continue to apply and be followed by carers and substitute decision-makers until and unless such a determination is replaced by a subsequent determination of capacity by the Tribunal. For example, Queensland Advocacy Incorporated expressed the view that:

once the Tribunal has made an order that an adult lacks capacity for a matter a decision maker operating under that order and strictly within its terms should be able to make decisions defined under the order without having to demonstrate each time they exercised the power that the adult lacked capacity for that matter. If a power granted under an order had to be exercised often and regularly, a requirement to demonstrate an adult lacked capacity upon each exercise of the power could delay its exercise and jeopardise the adult's interests. When the order is reviewed, however, the presumption that the adult has capacity should again prevail. The onus of rebutting the presumption and proving incapacity should lie upon the person exercising the power.

7.77 Associate Professor Malcolm Parker commented that:<sup>1027</sup>

There will be occasions where the repeat rebuttal of the presumption is rendered unnecessary on the grounds of medical assessment of profound and permanent impairment of cognitive function, eg advanced dementia. Difficulties arise in cases of fluctuating incapacity, recovery from brain trauma and similar cases. Where an adult, who has previously been deemed lacking in capacity, applies for a declaration of capacity, there is no principled reason why the presumption should not hold and the onus be on those who would rebut the

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1025 Submissions 5, 9, 34A, 91.

1026 Submission 34A.

1027 Submission 5.

presumption. As a general rule, a declaration by the Tribunal of incapacity should hold and be followed by carers and substitute decision-makers until and unless such a declaration is replaced by a subsequent declaration of capacity by the Tribunal. Applicants for review of declarations should be guided by medical assessment as to the stability of a change in capacity status.

7.78 The former Public Advocate also made the observation that:<sup>1028</sup>

guardians and administrators should be obliged, if they consider the person has regained capacity for the matter/s for which they are appointed, to apply for the Tribunal to review their appointment. Further, it has been recommended that in accordance with (revised) GPs,<sup>1029</sup> the adult's views and wishes should most often be determinative of decision-making in any event, so that in practice, the adult's autonomy is respected pending the review hearing and the adult continues to receive the adequate support for decision-making. Adults who consider they no longer have impaired capacity can also seek a declaration of capacity at any time.

A further related issue may be the Tribunal's approach to listing applications for review earlier than the period of the appointment and declarations of capacity.

Of course, for the system to operate in a manner which properly respects the presumption of capacity and an adult's autonomy, when a decision is made by the Tribunal that the person has impaired capacity, careful consideration must be given to the matter/s for which capacity is impaired. Many adults will have impaired capacity for complex financial matters, but have capacity for day-to-day financial decisions. An adult may not have capacity for decisions about complex health care procedures but will have capacity for more simple matters. (note added)

7.79 The former Public Advocate also noted that, in relation to an attorney under an enduring power of attorney, if an attorney's power depends upon the principal having impaired capacity for a matter, the attorney may be required by a person dealing with the attorney to provide evidence of the impairment of capacity:<sup>1030</sup>

Commonly, the evidence provided will be a medical certificate as anticipated by the [*Powers of Attorney Act 1998* (Qld)]. Again, it is unlikely to be workable for a fresh certificate or letter regarding capacity to be obtained before each and every decision is made by an attorney. Unless a person dealing with the attorney believes that the principal now has capacity and the attorney continues to believe the principal's capacity is impaired, the attorney can probably continue to rely upon it. However, the legislation currently provides that the attorney cannot exercise the power if the adult regains capacity for the matter. This would seem to require attorneys to re-assess capacity of the principal before any decision is made when their appointment can only operate during periods that the adult's capacity is impaired.

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1028 Submission 91.

1029 The former Public Advocate proposed in her submission that the General Principles should be rearticulated to include a procedural framework for decision-making.

1030 Submission 91. 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: *Powers of Attorney Act 1998* (Qld) s 33(5).

### **Location of the presumption of capacity in the legislation**

7.80 A number of submissions considered that the presumption of capacity should be set out as a separate section of the legislation.<sup>1031</sup>

7.81 Queensland Advocacy Incorporated considered that, in keeping with its relative importance, the presumption of capacity should be moved into the main body of the legislation.<sup>1032</sup> It noted that this might be achieved by moving the General Principles from the schedule into the body of the legislation, and by redrafting section 7(a) of the *Guardianship and Administration Act 2000* (Qld) in the unequivocally clear language used in General Principle 1. In this regard, Queensland Advocacy Incorporated suggested that it might be helpful to insert a new section 7A, which provides that 'an adult is presumed to have capacity for a matter' into the Act.

7.82 Legal Aid Queensland considered that the presumption of capacity should be removed from the General Principles and contained in a provision in the Act.<sup>1033</sup>

7.83 The Public Trustee suggested that the presumption of capacity might be moved to the body of the legislation, and be expressed to apply (at least) to Part 1 of Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) (which deals with the appointment of guardians and administrators). It also suggested that an important and related consideration is that General Principles 7(1) (the adult's right to participate in the decision making) and 7(3)(b) (that the adult's views and wishes are to be sought and taken into account) are given effect when guardians, administrators and attorneys make decisions in those capacities.<sup>1034</sup>

7.84 On the other hand, the former Public Advocate considered that, because the presumption of capacity is an important foundation of the guardianship regime, a decision about whether it should be relocated within the legislation requires careful consideration. She also considered that, if the presumption of capacity remains within the Principles themselves, some explanatory information or examples are required to clarify expectations about application. She also considered that it would appear useful to specify with greater particularity how the Tribunal and others are to apply the presumption.<sup>1035</sup>

7.85 Several other respondents considered it unnecessary to relocate the presumption provision as it is 'a fundamental principle' under the legislation and 'is well entrenched in the common law'.<sup>1036</sup>

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1031 Submissions 34A, 61, 63, 90.

1032 Submission 34A.

1033 Submission 63.

1034 Submission 90.

1035 Submission 91.

1036 Submissions 5, 22, 93.

## The Commission's view

### *The application of the presumption of capacity*

7.86 The object of the guardianship legislation is to balance the adult's right to autonomy with the adult's right to support and assistance in decision-making. The operation of the provisions which deal with the application of the General Principles, including the presumption of capacity, are fundamental to the achievement of this balance.

7.87 As mentioned above, under section 11(1) of the *Guardianship and Administration Act 2000* (Qld), a person or other entity who performs a function or exercises a power for a matter under that Act in relation to an adult with impaired capacity for the matter is required to apply the General Principles, the first of which is the presumption of capacity. Section 76 of the *Powers of Attorney Act 1998* (Qld) is in similar terms.

7.88 The submissions received by the Commission identified difficulties in relation to the application of the presumption of capacity under the legislation, particularly where the Tribunal or the Supreme Court (when it exercises jurisdiction under the legislation) has made a formal determination that the adult has impaired capacity for a matter. As mentioned above, such a determination may take the form of a declaration about the adult's capacity or otherwise a formal finding as part of the determination of whether an appointment order should be made. The Supreme Court's decision in *Bucknall v Guardianship and Administration Tribunal (No 1)* also highlighted the difficulties in applying a literal construction to section 11 of the *Guardianship and Administration Act 2000* (Qld).

7.89 As a consequence, the Commission considers that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to clarify how, in the various circumstances set out below, the presumption of capacity is to be applied if the Tribunal or the Supreme Court has made a formal determination that the adult has impaired capacity for a matter.

#### *The Tribunal or the Supreme Court*

7.90 Where the Tribunal or the Supreme Court is making a determination about an adult's capacity for a matter, the Tribunal or the Court should be required to apply the presumption each time it makes such a determination. This approach implements the Supreme Court's decision in *Bucknall v Guardianship and Administration Tribunal (No 1)*.<sup>1037</sup> The Commission notes that, if the Tribunal or the Court has determined that an adult does not have capacity for a specific matter or type of matter, that determination will not displace the presumption that the adult has capacity in relation to other matters.

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[2009] 2 Qd R 402.

*Guardians or administrators*

7.91 Where the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator should not be required to apply the presumption that the adult has capacity for the matter. As the Supreme Court observed in *Bucknall v Guardianship and Administration Tribunal (No 1)*, where the Tribunal has made a formal determination that the adult has impaired capacity for the matter, the object of the appointment would be defeated if the substitute decision-maker were unable to rely on the Tribunal's determination. In these circumstances, the guardian or administrator must assume that the adult does not have capacity for the matter or, perhaps more accurately, is entitled to rely on the finding that the presumption that the adult has capacity for the matter has been rebutted.

*Other persons or entities who exercise a power or perform a function*

7.92 Similarly, where the Tribunal or the Supreme Court has made a declaration that the adult has impaired capacity for the matter and no further declaration about the adult's capacity for the matter has been made, another person or entity who exercises a power or performs a function under the guardianship legislation must assume that the adult does not have capacity for the matter or, perhaps more accurately, is entitled to rely on the finding that the presumption that the adult has capacity for the matter has been rebutted.

7.93 On the other hand, where the Tribunal or the Supreme Court has not made a formal determination that the adult has impaired capacity for a matter, the person or entity must apply the presumption that the adult has capacity for the matter.

***The deletion of the words 'for a matter in relation to an adult with impaired capacity for the matter'***

7.94 In addition, as noted by the Supreme Court in *Bucknall*, on a literal reading of section 11 of the *Guardianship and Administration Act 2000* (Qld) (and, by analogy, section 76 of the *Powers of Attorney Act 1998* (Qld)), the phrase 'for a matter in relation to an adult with impaired capacity for the matter', suggests that section 11 applies only in relation to adults with impaired capacity. In order to avoid the 'capricious' result that 'only those adults who suffer impaired capacity can invoke the presumption', the Court ignored that phrase by applying a purposive construction to that section.

7.95 To overcome this drafting problem, section 11 of the *Guardianship and Administration Act 2000* (Qld) and section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended by deleting the words 'for a matter in relation to an adult with impaired capacity for the matter'.

***The location of the presumption of capacity***

7.96 The presumption of capacity, which is the first of the General Principles, is essential to the maximisation of an adult's autonomy. Section 11 of the *Guardianship and Administration Act 2000* (Qld) provides that the General

Principles are to be applied by persons or entities who perform a function or exercise a power under the guardianship legislation. It also provides that the community is encouraged to apply and promote the General Principles. In Chapter 4 of this Report, the Commission has recommended that section 11 also should be amended to provide that a person making a decision for an adult on an informal basis must apply the General Principles. In light of these statutory provisions and the Commission's recommendation, the Commission is of the view that the presumption should remain as one of the General Principles. The Commission has also recommended in Chapter 4 that the General Principles should continue to be located in a schedule to the legislation.

## THE APPROACH TO DEFINING 'CAPACITY'

7.97 The test of capacity is a threshold issue in the guardianship legislation because important legal consequences flow from its application. As noted above, the issue of capacity determines whether an adult will in law have autonomy to make his or her own decisions.

7.98 As described in Chapter 3, the United Nations Convention recognises the fundamental human rights and freedoms of people with a disability, including people with a mental or intellectual disability. These rights include respect for inherent dignity, individual autonomy (including the freedom to make one's own choices) and independence.<sup>1038</sup> Article 12 of the Convention, which deals with the exercise of legal capacity, provides that people with disabilities are to be given any necessary support to exercise their legal capacity.<sup>1039</sup> The Convention also recognises the right of people with disabilities to freedom from exploitation and abuse.<sup>1040</sup> It also involves a corresponding focus on ability rather than disability.

7.99 Consistent with this approach, one of the core considerations when examining the merits of a particular approach for determining capacity is the impact that it is likely to have on the adult's autonomy. It is also necessary to consider how to achieve an appropriate balance between promoting the autonomy and rights of the adult while also safeguarding his or her interests. Setting too high a threshold for capacity will tend to weigh against the principle of self-determination, while setting the standard too low may place the adult at risk of harm.

7.100 The major models for understanding the notion of capacity are the functional approach, the status approach and the outcome approach. In practice, the lines between these different approaches are sometimes indistinct.

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<sup>1038</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 3. Article 3 is set out in Chapter 3.

<sup>1039</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12. Article 12 is set out in Chapter 3. Any measures taken in this regard must respect the rights, will and preferences of the person, be free from conflict of interest and undue influence, be proportional and tailored to the person's circumstances, apply for the shortest possible time and be subject to regular review.

<sup>1040</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 16. Article 16 is set out in Chapter 3.

7.101 The Queensland guardianship legislation uses the functional approach in defining capacity. One question that arises for consideration is whether this remains an appropriate model for defining capacity, or whether some other approach, or combination of approaches, is preferable.

### **The functional approach**

7.102 The functional approach is based on the cognitive (functional) ability to make a specific decision, including a specific type of decision, at the time the decision is to be made. It focuses on the reasoning process involved in making decisions.<sup>1041</sup> This encapsulates the abilities to understand, retain and evaluate the information relevant to the decision (including its likely consequences) and to weigh that information in the balance to reach a decision.<sup>1042</sup>

7.103 It has been suggested that one of the advantages of the functional approach is that it 'best accommodates the reality that decision-making capacity is a continuum rather than an endpoint which can be neatly characterised as present or absent'.<sup>1043</sup> In contrast to the status model, there is no requirement for the presence of a particular type of disability or condition. The relevant question is whether the adult lacks capacity for making a decision about a given matter, for whatever cause and for whatever reason.<sup>1044</sup>

7.104 The functional approach is said to acknowledge that 'the presence of a particular type of disability does not necessarily involve a need for assistance'.<sup>1045</sup> It is also said to avoid any problems such as paternalism, prejudice, stigmatisation or unjustified assumptions about an adult's level of capacity that are sometimes associated with labelling people with particular types of disabilities or conditions.<sup>1046</sup> It is also consistent with the principle of least restriction for an adult

1041 J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58.

1042 *Re MM* [2007] EWHC 2003 (Fam) [62]–[82] (Munby J); *Re MB* [1997] 2 Fam Law R 426, 437 (Butler-Sloss LJ); *R (Burke) v General Medical Council* [2005] QB 424, [42] (Munby J); *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

In *Re T* [1992] 4 All ER 649, which concerned the refusal of consent to medical treatment, Lord Donaldson stated (at 661) that:

What matters is that the doctors should consider whether at that time [the patient] had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required.

It has been suggested that this 'sliding scale approach' also takes into account the outcome of the decision: C Stewart and P Biegler, 'A primer on the law of competence to refuse medical treatment' (2004) 78 *Australian Law Journal* 325, 333; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 61–2. See also M Parker, 'Judging capacity: paternalism and the risk-related standard' (2004) 11 *Journal of Law and Medicine* 482, 486, where the author argues that there should be just one standard of assessment of capacity, not a standard that alters with the gravity of the decision.

1043 Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.28].

1044 *Re 'Tony'* (1990) 5 NZFLR 609, [16] (Judge Inglis).

1045 South African Law Reform Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [4.33].

1046 Eg Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making for People Who Need Assistance Because of Mental or Intellectual Disability*, Discussion Paper No 38 (1992) [4.3.2].

in making decisions because it involves proportionate and minimal intrusion on decision-making autonomy.<sup>1047</sup>

7.105 The functional approach is a widely accepted modern capacity model. A number of jurisdictions where recent law reform has occurred have wholly or partly based their statutory test of decision-making capacity (or incapacity) on this model.<sup>1048</sup> The functional approach is consistent with the social model of disability which emphasises human rights and with the legal presumption of capacity. It also reflects a number of aspects of article 12 of the United Nations Convention, including the recognition of legal capacity and the principle of least restriction. As it is decision and time specific, the functional approach also accommodates the partial, temporary or fluctuating nature of impaired capacity that may be experienced by an adult.

7.106 However, the application of the functional approach in practice raises some issues for consideration. It is based on a person's capacity to understand the nature and consequences of a particular decision. This raises the issue of including appropriate safeguards, such as the exclusion of certain factors, in the assessment process to ensure that the test is applied in the correct way. In addition, it has been suggested that a literal understanding of the functional approach would require a capacity assessment to be carried out each time a particular decision needs to be made.<sup>1049</sup> This raises the question of whether it is necessary to continue to assess a person's capacity if he or she has lost decision-making capacity in a particular area of decision-making and is unlikely to regain it. In this regard, the Law Commission of Ireland has suggested that a 'common sense approach be taken to assessing capacity including determining when a separate functional assessment of capacity is merited'.<sup>1050</sup>

### ***The status approach***

7.107 In contrast to the functional approach, the status approach involves making a decision on a person's general legal capacity based on the presence or absence of certain characteristics, for example, a mental disability or other condition, rather than actual decision-making ability. This is consistent with the medical model of capacity which focuses on impairment from a medical perspective.

7.108 The status approach therefore tends to view capacity on an all-or-nothing basis. In contrast to the functional approach, it is not decision-specific; nor does it take into account that an adult with a defined disability or condition may have the capacity to make some decisions. It may also operate unfairly in relation to the issue of fluctuating capacity.

<sup>1047</sup> *Guardianship and Administration Act 2000* (Qld) s 5(d). Also, in exercising a power under the Act, 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: *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c).

<sup>1048</sup> *Eg Mental Capacity Act 2005* (UK); *Adults with Incapacity (Scotland) Act 2000* (Scotland); *Mental Capacity and Guardianship Bill 2008* (Ireland).

<sup>1049</sup> Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.71].

<sup>1050</sup> *Ibid.*

7.109 It has been suggested that, unless a person has no decision-making ability nor any real prospect of regaining capacity, the status approach is unnecessarily disabling in its effect:<sup>1051</sup>

The fact that a person has a disability which commonly means that a person will not be able to make decision for themselves may signify a potential lack of capacity but it should not be decisive of the issue.

7.110 In some jurisdictions, the legislation combines the status and functional approaches.<sup>1052</sup> This is the approach used in the United Kingdom.<sup>1053</sup> The first step in this combined approach is to establish the presence of a ‘mental disability’ precondition (the status approach). The second step is to determine whether the mental disability has affected the person’s ability to make a specific decision at the time the decision is to be made (the functional approach).

7.111 The purpose of a diagnostic threshold, such as a mental disability precondition, is to provide a safeguard against inappropriate interference in the lives of adults whose perceived failure to manage their affairs is attributable merely to factors such as a lack of inclination or eccentricity.<sup>1054</sup> It has been suggested, however, that the inclusion of a diagnostic threshold is not an appropriate safeguard.<sup>1055</sup> It may have the effect of limiting intervention to certain situations while not catering for others. For example, a person may have a particular disability or condition but have no need of intervention. Conversely, a person may not have a particular disability or condition but nevertheless require intervention. Another issue raised by this combined approach is that it raises the same concerns noted above about linking capacity to mental disability.<sup>1056</sup>

### ***The outcome approach***

7.112 The outcome approach determines capacity according to whether the person’s decision conforms to normal social values (or the values of the assessor). It is possible that the likely outcome of a person’s choice may indicate his or her wider understanding of the decision. It has been suggested, however, that the use

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1051 Law Reform Commission of Ireland, *Vulnerable Adults and the Law: Capacity*, Consultation Paper No 37 (2005) [2.37].

1052 Eg *Mental Capacity Act 2005* (UK) s 2; *Adults with Incapacity Act (Scotland) 2000* (Scotland). A combined approach is also evident in relation to the capacity of a child to enter into a contract.

1053 Under the *Mental Capacity Act 2005* (UK), a person lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain: *Mental Capacity Act 2005* (UK) s 2(1).

1054 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.8].

1055 Eg South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [4.33].

1056 See [7.104], [7.107] above. Also see, generally, Law Commission (England and Wales), *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction*, Consultation Paper No 128 (1993) [3.10]–[3.13]. In its final Report, the Law Commission of England and Wales considered that misgivings about the use of a diagnostic threshold tended to relate to the over-use of protective powers rather than the perceived stigma which attached to the relevant definition in the legislation at that time. The Law Commission concluded that a diagnostic threshold would provide ‘a significant protection and would in no sense prejudice or stigmatise those who are in need of help with decision-making’: Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.8].

of this approach as the primary approach to capacity is objectionable because 'its subjective basis tends to involve the projection of the reviewer's subjective values onto the decision of the subject'.<sup>1057</sup> This may mean that a person is considered to lack capacity if he or she makes what are perceived as imprudent or unusual decisions.<sup>1058</sup>

7.113 However, the mere fact that a person makes a decision which is inconsistent with conventional values, or with which the assessor disagrees, does not of itself represent a lack of capacity. In *Bailey v Warren*, Arden LJ observed that the relevant concern is:<sup>1059</sup>

the quality of the decision-making and not the wisdom of a decision. A rational individual has in general the right to make an irrational decision about himself or his affairs. So if an individual was capable in law of making a decision, it will not be set aside because it was unwise or because its outcome is materially adverse to him.

7.114 The guardianship legislation in several jurisdictions, including Queensland, includes measures to discount the use of the outcome approach in practice.<sup>1060</sup> For example, the *Guardianship and Administration Act 2000* (Qld) acknowledges that an adult's right to make decisions 'includes the right to make decisions with which others may not agree'.<sup>1061</sup>

## Discussion Paper

7.115 The Commission, in its Discussion Paper, sought submissions about whether the definition of 'capacity' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be modelled on any of the following approaches:<sup>1062</sup>

- a person's ability to make a specific decision, including a specific type of decision, at the time the decision is to be made (the functional approach);

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<sup>1057</sup> Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.26].

<sup>1058</sup> It has been observed that, in practice, the outcome approach sometimes is applied in the context of medical decision-making: Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.15]; Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.26]. See also n 1042 above.

On one view, a person's capacity to make a decision should not be assessed in terms of the outcome of the decision. This view suggests that adults should be entitled to make decisions with which others disagree. On the other hand, it may be appropriate to consider outcomes in some circumstances. For example, a person should arguably be able to make a decision which involves little or no risk to the person or others, even if the person's decision does not conform to other's values.

<sup>1059</sup> [2006] EWCA Civ 51, [118].

<sup>1060</sup> The exclusion of specific matters in determining decision-making capacity is discussed at [7.234]–[7.256] below.

<sup>1061</sup> *Guardianship and Administration Act 2000* (Qld) s 5(b).

<sup>1062</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 122.

- some form of diagnostic threshold (for example, an intellectual impairment, mental illness, physical disability or dementia) (the status approach);
- the content of a person's decision (the outcome approach);
- a combination of any of the above;
- some other approach.

## Submissions

7.116 The majority of submissions which addressed this issue supported the functional approach to defining capacity.<sup>1063</sup>

7.117 For example, Queensland Advocacy Incorporated commented that the functional approach is preferable because it focuses on the type of decision to be made and the cognitive ability to make that decision at the time it is made.<sup>1064</sup>

7.118 A number of other submissions supported a combination of the functional and status approaches.<sup>1065</sup> The former Public Advocate commented that:<sup>1066</sup>

A definition of capacity which respects the autonomy of an adult as far as possible and gives him/her the greatest possible control over their own life, but access to [a substituted decision-maker] when necessary serves to protect their human rights and to promote their interests to the greatest extent possible. The functional approach best facilitates this approach — capacity is decision-specific and time-specific.

However, there may be merit in combining the functional approach and the status approach as has occurred in some other jurisdictions. This does provide a safeguard against interference in the lives of adults who are eccentric or unconventional and who may make decisions from time to time with which others may not agree. Adults with capacity, of course, have the right to make decisions that observers may find questionable. Most people make, at times, what they consider in hindsight to be bad decisions. This is a feature of the human condition, not necessarily a feature of impaired capacity.

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However, it must be acknowledged that a diagnostic threshold may also result in delays and issues for appointments of [substituted decision-makers] for some adults with impaired capacity who properly require [a substituted decision-maker] to safeguard their interests, who will not submit to examination and who do not consult regularly with health professional/s.

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1063 Submissions 5, 20A, 34A, 52, 64, 68, 70, 71, 73, 81, 179.

1064 Submission 34A.

1065 Submissions 23, 91, 93.

1066 Submission 91.

7.119 The Alzheimer's Association supported a combination of the functional and outcome approaches.<sup>1067</sup>

7.120 Several submissions supported a combination of the functional, status and outcome approaches.<sup>1068</sup>

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

7.121 The Commission supports the retention in the guardianship legislation of the functional approach to defining capacity, rather than the status or outcome approaches.

7.122 A status approach to defining capacity is incompatible with the principle of maximising the adult's autonomy in decision-making. It would also violate the adult's right to freedom from discrimination on the grounds of disability. The outcome approach is unsatisfactory because it involves an assessment of the adult's actual decision rather than an assessment of the adult's ability to make a decision.

7.123 The Commission prefers the functional approach to defining capacity because it focuses on the adult's ability to make a specific decision or type of decision, for whatever cause and for whatever reason. 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. It is also consistent with the presumption of capacity. In addition, as noted above, the functional approach reflects a number of aspects of article 12 of the United Nations Convention, including the recognition of legal capacity and the principle of least restriction.

7.124 The Commission also considers that the functional approach is sufficiently flexible to enable the adult's capacity to be determined for a whole area of decision-making, for example, where an adult has lost decision-making capacity in one or more areas of decision-making and is unlikely to regain it.

7.125 In order to ensure that the definition of capacity is applied correctly, the Commission has also recommended the development of comprehensive guidelines for assessing capacity.<sup>1069</sup>

## **THE DEFINITION OF 'CAPACITY'**

### **The definition of 'capacity' generally**

7.126 The definition of 'capacity' of a person for a matter under the guardianship legislation has three limbs. It requires a person to be capable of understanding the

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<sup>1067</sup> Submission 9.

<sup>1068</sup> Submissions 13, 15, 23, 50.

<sup>1069</sup> See [7.274]–[7.278] below.

nature and effect of decisions about the matter, to freely and voluntarily make decisions about the matter and to communicate the decision in some way.<sup>1070</sup> It is only necessary for one of these elements to be absent for there to be a finding of impaired capacity.

7.127 If a person does not meet this test for a particular matter, he or she is said to have 'impaired capacity' for that matter.<sup>1071</sup> This may trigger the exercise of power by, or the appointment of, a substitute decision-maker for the adult. It is very important, therefore, to ensure that the test of capacity is neither too wide nor too narrow. If it is too wide, adults who do not need others to make decisions for them may have their right to make decisions taken away unfairly. If it is too narrow, there may be some adults who do need help with decision-making whose needs and interests are not met.

### **Discussion Paper**

7.128 In its Discussion Paper, the Commission sought submissions about whether the formulation of the current definition of 'capacity' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) is adequate and appropriate and, if not, what specific changes should be made to the definition.<sup>1072</sup>

### **Submissions**

7.129 The submissions that addressed this issue were divided as to whether the current definition of capacity is adequate and appropriate.

7.130 While the majority of submissions considered that the current definition is adequate and appropriate,<sup>1073</sup> a number of other submissions considered that the current definition should be refined or modified.<sup>1074</sup> These particular refinements or modifications are discussed below.

7.131 A number of other submissions considered that the current definition is inappropriate.<sup>1075</sup> Several of these submissions considered that having a single legislative definition of capacity raised difficulties in practice.<sup>1076</sup> For example, the Public Trustee of New South Wales considered that '[a]lthough a single definition of capacity may seem appealing when first considered, there is the risk that a single definition may be misinterpreted, misused or create inflexibility'.<sup>1077</sup> This

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1070 The test is set out in full at [7.30] above.

1071 Ibid.

1072 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 132.

1073 Submissions 1A, 9, 13, 23, 55, 61, 73, 90, 95A, 148.

1074 Submissions 5, 52, 53, 70, 81, 91, 179.

1075 Submissions 15, 20A, 56, 68, 71.

1076 Submissions 22, 68.

1077 Submission 68.

respondent considered that rather than having a single definition of capacity it would be more helpful to have guidelines to assist in assessing capacity.

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

7.132 The Commission considers that the current definition of capacity achieves an appropriate balance between maximising an adult's decision-making autonomy and safeguarding the adult from neglect, abuse and exploitation.

7.133 The current definition of capacity has several advantages. It is sufficiently flexible to cover decision-making in all areas and across all disabilities and circumstances. Because it is a statutory definition, it provides greater legal certainty than the common law about the meaning of capacity for both professional and lay persons in the community. With one minor exception, the Commission makes no recommendation for change to the definition.<sup>1078</sup> To the extent that persons who are assessing capacity may need some guidance about the application of the specific elements of the definition, the Commission has recommended the development of guidelines for assessing capacity which provide information about the definition of capacity and advice on how it is to be assessed using a best practice approach.

7.134 The three limbs of the definition are considered in more detail below.

### **Ability to understand the nature and effect of the decision: paragraph (a)**

#### **The inclusion of specific criteria for assessing the ability to understand the nature and effect of the decision**

7.135 The first limb of the definition of 'capacity' requires that the person be capable of understanding the 'nature and effect of decisions about the matter'. As mentioned above, this involves matters of understanding and related cognitive operations.<sup>1079</sup> This reflects the common law requirement that a person must be able to understand the nature and effect of a decision when it has been explained to him or her.<sup>1080</sup>

7.136 The Queensland guardianship legislation gives limited guidance about the meaning of being able to understand the nature and effect of decisions. In particular, the *Guardianship and Administration Act 2000* (Qld) gives no assistance

<sup>1078</sup> See [7.232] below, in which the Commission has recommended that paragraph (c) of the definition of 'capacity' should be retained with no amendment, except to the extent that it should contain a cross-reference (by way of a note or an example) to ss 146(3) of the *Guardianship and Administration Act 2000* (Qld), which lists some of the different ways in which a person may be able to communicate (for example, talking, using sign language or any other means).

<sup>1079</sup> See [7.102] above.

<sup>1080</sup> *Gibbons v Wright* (1954) 91 CLR 423, 438 (Dixon CJ, Kitto and Taylor JJ); *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162, [58] (Chadwick LJ); *Aziz v Prestige Property Services Pty Ltd* [2007] QSC 265 [61], [62] (Lyons J). See also, B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 63–4; J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 57, 58.

about the actual mechanics of the process for assessing whether a person is capable of understanding the nature and effect of a decision about the matter.<sup>1081</sup>

7.137 One way to provide such assistance may be to include a provision in the guardianship legislation which sets out specific criteria for assessing a person's ability to understand the nature and effect of decisions about the matter. For example, in the United Kingdom, the *Mental Capacity Act 2005* (UK) refers to a range of capacities involved in the process of understanding decisions. For the purposes of that Act, a person is unable to make a decision if he or she is unable to:<sup>1082</sup>

- understand the information relevant to the decision;
- retain that information;
- use or weigh that information as part of the process of making the decision.

7.138 This test takes into account that, in some cases, a person has the ability to understand and retain information but is unable to act on the information. This may be the case, for example:<sup>1083</sup>

- in certain compulsive conditions (for example, anorexia) which cause people who are able to absorb information to arrive at decisions that are unconnected to the information or their understanding of it;
- where a person is unable, because of a delusional disorder, to believe the information relevant to the decision;<sup>1084</sup> or

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The Commission, in its earlier Report in 1996, considered whether the proposed new guardianship legislation should include additional criteria for assessing a person's decision-making capacity. These functional competences, based on similar criteria then contained in the *Intellectually Disabled Citizens Act 1985* (Qld), included the competence to carry out the usual functions of daily living, the care and maintenance of oneself and one's home environment, the ability to perform civic duties, the ability to enter into contracts, and the ability to make informed decisions concerning oneself. The Commission was not persuaded that additional criteria should be included, noting that the inclusion of criteria may result in the consideration of factors which are irrelevant to that decision: 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, 175.

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*Mental Capacity Act 2005* (UK) s 3(1)(a)–(c). This provision is based on the recommendations made by the Law Commission of England and Wales in its review of the law relating to decision-making for adults with mental incapacity: Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.15]–[3.17]. For the purposes of deciding whether a person is 'unable to make a decision', the Law Commission considered the adoption of a three-part test, requiring a person to be capable of:

- comprehending and retaining information relevant to the decision (including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make that decision);
- believing such information; and
- using the information to arrive at a choice.

The Law Commission based this functional test for capacity on a three-stage test formulated by Thorpe J in *Re C* [1994] 1 All ER 819 and *Re B* [2002] 2 All ER 449.

The *Mental Capacity Act 2005* (UK) also includes, as a residual category of incapacity, the inability to communicate his or her decision (whether by talking, using sign language or any other means): *Mental Capacity Act 2005* (UK) s 3(1)(d). The capacity to communicate is discussed at [7.213]–[7.233] below.

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Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.17].

- where a person is unable, because of a mental or intellectual disability, to exert his or her will over the influence of a stronger person.<sup>1085</sup>

7.139 The provision of specific criteria in the Act for assessing whether a person understands a decision may provide greater clarity for substitute decision-makers for people with impaired capacity and promote consistency in decision-making. On the other hand, it may be considered unnecessary to provide criteria for making such an assessment.

### ***The information required to assess understanding***

7.140 As mentioned above, the required level of understanding is that the person is able to understand the nature and effect of making such a decision after it is explained to him or her.<sup>1086</sup>

7.141 A requirement for information to be given about a specific decision is of particular importance when an explanation about the decision is crucial to a person's ability to understand the decision. The failure to provide adequate disclosure or time for deliberation may result in the appearance of impaired capacity.<sup>1087</sup>

7.142 The General Principles which govern the operation of the guardianship legislation refer to the importance of preserving, to the greatest extent possible, an adult's right to make his or her own decision.<sup>1088</sup> The General Principles also state that the adult must be given 'any necessary support, and access to information' to enable the adult to make his or her own decisions.<sup>1089</sup> The legislation does not further elaborate on the amount or complexity of information that a person might need to be able to understand. One advantage of a broad requirement to provide 'any necessary support, and access to information' is that it allows a flexible approach in assessing this aspect of capacity. This is also consistent with article 12 of the United Nations Convention, which requires persons with disabilities to be given any necessary support to exercise their legal capacity.

7.143 The *Mental Capacity Act 2005* (UK) provides the following guiding principles in relation to the adult's understanding of relevant information when applying the test of capacity:<sup>1090</sup>

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1084 Eg *Re C* [1994] 1 All ER 819 (Thorpe J); *Re MM* [2007] EWHC 2003 (Fam) [81] (Munby J).

1085 In Queensland, this is covered by a separate 'freely and voluntarily' test, not by the test of understanding. See [7.167]–[7.177] below.

1086 See [7.135] above.

1087 J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 72.

1088 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(2). See now the new General Principle 8(2) recommended in Chapter 4 of this Report.

1089 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(a); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(a). See also *Guardianship and Administration Act 2000* (Qld) s 5(e). See now the new General Principle 9(2) recommended in Chapter 4 of this Report.

1090 *Mental Capacity Act 2005* (UK) s 3(2)–(4).

- The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision;
- A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to the person in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means); and
- The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent the person from being regarded as able to make the decision.

7.144 The first of these provisions clarifies that the information relevant to a decision includes information about the likely consequences of the decision. The second provision deals with the need to provide adequate and appropriate information to the person. The third provision may be relevant in the case of a person with memory difficulties or who has fluctuating capacity.

7.145 It may assist an adult to make decisions if the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) contained more detail about the nature and extent of the information required to be given to an adult. For example, it has been suggested that careful explanations, including simplifications and visual aids, may facilitate an adult's capacity to make a decision.<sup>1091</sup>

7.146 On the other hand, it may be unnecessary to provide further guidance about the nature and extent of the information required to be given to an adult. However, even if no further provision regarding such an explanation is made in the Act, it may be desirable to relocate the requirement to give information to an adult within the definition of capacity or a related provision.

### **Discussion Paper**

7.147 In its Discussion Paper, the Commission sought submissions about whether, in relation to the first part of the definition of 'capacity' (the ability to understand the nature and effect of the decision), the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should make provision for any of the following matters:<sup>1092</sup>

- the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision;

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<sup>1091</sup> J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 72.

<sup>1092</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 132–3.

- a person is not to be regarded as unable to understand the information relevant to a decision if the person is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances;
- the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision;
- some other matter.

### **Submissions**

*The inclusion of specific criteria for assessing the ability to understand the nature and effect of the decision*

7.148 Several respondents supported the inclusion in the guardianship legislation of specific criteria about how to accurately assess an adult's ability to understand the nature and effect of the decision.<sup>1093</sup> Carers Queensland observed:<sup>1094</sup>

Further guidance on this is necessary and we would support the inclusion of more specific criteria related to the actual mechanics of the process involved such as retaining information and considering this information.

7.149 The majority of respondents who supported the use of criteria favoured a provision based on the United Kingdom model.<sup>1095</sup> Queensland Advocacy Incorporated stated:<sup>1096</sup>

understanding the nature and effects of a decision includes the ability to understand relevant information, retain that information and use or weigh it as part of the decision-making process. An elaboration of this kind could help decision-makers to more objectively assess an adult's ability to understand the nature and effects of a decision.

7.150 Another respondent observed that the United Kingdom model 'unpacks the process of cognitive decision-making' and should be incorporated into the definition of capacity.<sup>1097</sup>

7.151 A person at a community forum agreed the definition should be 'unpacked further' and considered more 'tangible' tests should be included in the legislation for people to use in their assessment of an adult's capacity.<sup>1098</sup>

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<sup>1093</sup> Submissions 5, 9, 14, 24, 34A, 53, 71, 91, 179.

<sup>1094</sup> Submission 71.

<sup>1095</sup> Submissions 34A, 53, Forum 7.

<sup>1096</sup> Submission 34A.

<sup>1097</sup> Submission 53. See also Forum 6.

<sup>1098</sup> Forum 8.

7.152 The former Public Advocate also supported the use of criteria in the legislation and suggested several matters, many of which mirrored the United Kingdom model, which may be considered relevant to an adult's understanding.<sup>1099</sup>

7.153 A respondent who is a long term Tribunal member also considered that it would be desirable to provide the following additional detail in the definition of capacity, particularly in relation to the cognitive aspect of the definition.<sup>1100</sup> In this regard, this respondent suggested that a person should have the ability to:

- understand information relevant to a decision;
- retain that information for long enough for the decision to be put into effect;
- evaluate information relevant to the decision, if necessary seeking independent advice;
- consider the advantages and disadvantages of options, if options are available;
- demonstrate an understanding of the reasonably foreseeable consequences of the options, including the option of not making a decision;
- make a decision consistent with the person's intention in arriving at decisions;
- act on the decision or have someone else assist with the person partly or wholly to put the decision into effect.

7.154 This respondent also considered that the definition of capacity should refer to principles for guiding the assessment of the adult's understanding of relevant information, similar to those applied under the United Kingdom legislation.

7.155 Associate Professor Malcolm Parker agreed that greater guidance for decision-makers was desirable, but noted the inclusion of any additional elements must be considered carefully to avoid 'setting the bar too high' by including a range of 'sub-capacities' in the definition. He explained:<sup>1101</sup>

For example, a requirement to believe the information provided would render incompetent both the person who does not believe it due to a delusional condition and the person whose stable and enduring belief system is not in tune with generally accepted medical beliefs. This requirement is consequently too stringent. On the other hand, requirements to understand the information, to retain the information, and to consider and weigh it against the person's enduring values and preferences would appear to augment the core understanding requirement, be in conformity with the common law understanding of capacity, and not to potentially rebut capacity inappropriately.

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1099 Submission 91.

1100 Submission 179.

1101 Submission 5.

7.156 Whilst the former Public Trustee of Queensland considered there may be some benefit in expressly including criteria, he observed that, at least in relation to Tribunal hearings, such matters were already being taken into account in the determination of capacity.<sup>1102</sup>

the Tribunal, in determining issues of capacity, will in practical terms test an adult's capacity to understand information relevant to the decision, test the capacity to retain that information and the capacity of the adult to use and weigh the information as part of the process of making a decision.

Very frequently, the Tribunal will test or question the adult concerned as to what the adult considers to be the foreseeable consequences of a decision.

*The information required to assess understanding*

7.157 The submissions that addressed this issue all supported a requirement that the information provided to an adult for making a decision should include information about the reasonably foreseeable consequences of making a particular decision.<sup>1103</sup>

7.158 The submissions also revealed strong support for legislative change to mandate that information relevant to a decision must be given to an adult in a manner that is appropriate to his or her circumstances.<sup>1104</sup>

7.159 Queensland Advocacy Incorporated suggested that a guideline, based on the *Mental Capacity Act 2005* (UK), should be added to the General Principles and the definition of capacity to illustrate the types of information that are relevant for an adult making a decision and to describe the appropriate ways of providing that information. It explained:<sup>1105</sup>

The guideline should emphasise that decision makers must take all necessary steps to provide the information in the form that is appropriate for the adult. This could mean using simple explanations with visual aids or any other appropriate means. The guideline should require decision makers to conduct proper investigations to ascertain what the best means are. It should require decision makers to give adults adequate time to make the decision. It should stress that an ability to retain relevant information temporarily is sufficient. It should include examples of the types of information the adult needs to make their decision. These could include information about the foreseeable consequences of deciding one way or another, or of failing to decide at all.

7.160 Respondents at a community forum noted that there may be bias in the way information is given to an adult where, for example, a service provider is seeking consent.<sup>1106</sup>

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1102 Submission 90.

1103 Submissions 9, 24, 91; Forum 7.

1104 Submissions 9, 24, 34A, 50, 71, 90, 91, 95B; Forum 5.

1105 Submission 34A.

1106 Forum 4.

7.161 In addition, several respondents, including the former Public Advocate, were of the view that the fact a person is able to retain information for a short period only does not prevent him or her from being regarded as able to make the decision.<sup>1107</sup>

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

7.162 The Commission considers that the first element of the definition of capacity — the ability to understand the nature and effect of the decision — should continue to be included in the definition.

7.163 The Commission concurs with the general tenor of the submissions received on this issue that it would be helpful to provide more information about how the first limb of the definition of capacity is to be applied. In particular, a person who is assessing an adult's decision-making capacity may be assisted by the provision of additional information and advice about the cognitive processes involved in understanding and how those processes should be taken into account in the assessment. However, the Commission is of the view that any such additional information or advice should be located in guidelines for assessing capacity rather than in the legislative definition of capacity.<sup>1108</sup>

7.164 In particular, the Commission considers it desirable for any such guidelines to provide the following information and advice in relation to the assessment of an adult's ability to understand the nature and effect of his or her decision:

- The process of understanding covers the abilities to understand and retain the information relevant to the decision (including its likely consequences) and to use or weigh that information in the process of making the decision;
- The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision;
- A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to the person in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means); and
- The fact that a person is able to retain the information relevant to a decision for a short period only does not, of itself, prevent the person from being regarded as able to make the decision.

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1107 Submissions 9, 14, 24, 91, 95B.

1108 The Commission has recommended that the guardianship legislation should be amended to provide for the preparation and issue of legislative guidelines for assessing capacity under the legislation: see [7.274]–[7.278] below.

7.165 The Commission also notes that other stipulations about the provision of information are already included in the guardianship legislation. For example, General Principle 7(3)(a) states that an adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life.

7.166 It is important that the guidelines should also reflect such provisions.

### **Ability to make decisions about the matter freely and voluntarily: paragraph (b)**

7.167 The second limb of the definition of 'capacity' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) is the capacity to make decisions 'freely and voluntarily'.

7.168 Queensland is the only Australian jurisdiction which expressly includes an assessment of voluntariness in its statutory test of capacity. In its original 1996 Report, the Commission proposed that decision-making capacity should be assessed on the basis of the person's ability to understand the nature of a decision and to foresee the consequences of making it in a particular way or to communicate the decision in some way even though all practicable methods of communicating with the person have been attempted.<sup>1109</sup> The second limb of the definition of capacity — the capacity to make decisions freely and voluntarily — was inserted as an additional limb in the definition in both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) when the *Guardianship and Administration Act 2000* (Qld) was enacted in 2000.<sup>1110</sup>

7.169 The Tribunal has generally considered this aspect of the definition in the context of the adult's susceptibility to another person's influence.<sup>1111</sup>

7.170 In *Re ZJ*, the Tribunal noted that the 'free and voluntary aspect' of the definition of capacity under the Queensland guardianship legislation relates to volition (free will) and whether the adult's free will has been so completely overborne that he or she has an inability to make up his or her own mind:<sup>1112</sup>

The Tribunal is aware that in certain circumstances undue influence might lead to a conclusion that a person did not have the capacity to freely and voluntarily decide a matter. The free and voluntary aspect of the Act's definition of capacity, however, relates to volition and whether it can be said that a person's free will has been so completely overborne that there has been an inability of that person to make up his or her own mind. In the Tribunal's opinion, care must be taken to distinguish this manifestation of impaired capacity from the wider legal principles involved when considering the issues of undue influence and unconscionable conduct.

<sup>1109</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, 174–5, 177–8, 180.

<sup>1110</sup> *Guardianship and Administration Act 2000* (Qld) (Act as passed) s 263 sch 4; sch 3 cl 35–36.

<sup>1111</sup> The Tribunal has also held that the effect of a delusional disorder may cause an inability to make decisions freely and voluntarily: *Re DFS* [2005] QGAAT 75, [41]. In the United Kingdom, this is covered by the test of understanding. See [7.138] above, and see *Re C* [1994] 1 All ER 819 (Thorpe J).

<sup>1112</sup> [2006] QGAAT 36, [33]. See also *Re SZ* [2010] QCAT 64, [34]–[35]; *Re PCM* [2006] QGAAT 56, [102].

7.171 The Tribunal has also considered the adult's susceptibility in terms of 'undue influence'.<sup>1113</sup> For example, in *Re GAG* the Tribunal observed that:<sup>1114</sup>

The Tribunal generally has interpreted [the capacity to make decisions freely and voluntarily] to mean that, when making decisions, the adult is not subject to undue influence and that the decision is indeed that of the adult and no one else.

7.172 A question that arises for consideration is whether it is necessary or appropriate to include the ability to make decisions freely and voluntarily ('the voluntariness element') in the definition of capacity in the guardianship legislation.

7.173 It has been suggested that the current definition merges two conditions for legally binding decisions: competence and voluntariness.<sup>1115</sup>

7.174 The first condition reflects the common law requirement that a person has the necessary mental capacity for making a legally effective decision.<sup>1116</sup> This standard requires the person to have the cognitive ability to understand the nature and consequences of the decision or transaction.<sup>1117</sup> It also requires the person to have the cognitive ability to reach a decision by weighing the relevant information in the balance.<sup>1118</sup>

7.175 The second condition would appear to be based on equitable considerations; the absence of free will may vitiate an otherwise valid transaction.

7.176 On one view, the test of capacity should essentially relate to cognitive ability alone. On another view, the test should include a separate assessment of voluntariness.

<sup>1113</sup> Eg *Re GAG* [2002] QGAAT 5, [7.3]; *Re AMH* [2004] QGAAT 2, [35]; *Re FHW* [2005] QGAAT 50, [44]; *Re WO* [2006] QGAAT 5, [33]; *Re ZJ* [2006] QGAAT 36, [33]; *Re PCM* [2006] QGAAT 56, [95]–[104].

The equitable doctrine of undue influence is discussed at [7.179] below. Note that in *Re ZJ* [2006] QGAAT 36, [33] the Tribunal noted that the equitable doctrine of 'undue influence' is legally distinct from the 'free and voluntary aspect' of the definition of 'capacity' under the guardianship legislation.

<sup>1114</sup> [2002] QGAAT 5, [7.3]. See also *Re FHW* [2005] QGAAT 50, [44], in which the Tribunal observed that the test 'looks at volition and the susceptibility of an adult to undue influence'.

<sup>1115</sup> J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 58–9.

<sup>1116</sup> This requirement is illustrated by the making of testamentary dispositions (*Banks v Goodfellow* (1870) LR 5 QB 549), entry into marriage (*Durham v Durham* (1885) 10 PD 80) and consent to medical treatment (*Re C* [1994] 1 All ER 819). In such cases, the disposition or consent, if made without the necessary mental capacity, is void and of no effect. The position is different under contract law. For example, a person cannot enter into a legally binding contract unless he or she has the capacity to understand the nature and effect of the transaction. However, a contract made by a person without the necessary capacity is voidable against the other party to the contract if it is proven that the other party knew of the lack of capacity: *The Imperial Loan Company Ltd v Stone* [1892] 1 QB 599.

<sup>1117</sup> *Gibbons v Wright* (1954) 91 CLR 423. An adult is able to make his or her own decision if he or she is able to understand information relevant to the decision and to make a decision based on that information.

<sup>1118</sup> *R (Burke) v General Medical Council* [2005] QB 424, [42] (Munby J); *Re MB* [1997] 2 Fam Law R 426, 437 (Butler-Sloss LJ); *Re C* [1994] 1 All ER 819, 824 (Thorpe J).

7.177 It has been suggested that, on the face of the current test, it is possible that a person who has cognitive capacity and is otherwise competent, but whose will is overborne, is defined as lacking capacity, and may lose decision-making autonomy.<sup>1119</sup> On the other hand, the test may reflect the practical reality that, in some circumstances, the question of cognitive capacity may give rise to issues about the voluntariness of decision-making, and vice versa.<sup>1120</sup> In this circumstance, where there is a close relationship between the issues of cognitive capacity and volition, the decision reached may not be the adult's 'true' decision. This may be especially the case for an adult who has a limited or questionable level of cognitive capacity and is reliant on others for advice or assistance.<sup>1121</sup> This circumstance may arise, for example, where an elderly person who has a mild cognitive disability is susceptible to the undue influence of family members in relation to financial matters. These scenarios, which concern a person's *ability* to make decisions freely and voluntarily, are distinct from the situation in which an adult chooses to have certain decisions made for him or her in the absence of any real duress.

7.178 The inclusion of the voluntariness element in the definition of capacity may have some practical benefits. Since the determination of a person's cognitive capacity may sometimes raise questions about the person's ability to make a decision freely and voluntarily, it may be convenient to determine both issues together. In relation to legal decisions or transactions, the appointment of a substitute decision-maker for the adult may minimise (although not completely avoid) the prospect of the adult entering into a legal transaction or making a decision which may require subsequent legal action to be set aside. Such an action may be, for example, to set aside a financial transaction on the basis of undue influence or fraud. Similarly, in relation to decisions that are not of a legal nature, the appointment of a substitute decision-maker may safeguard the adult against making poor or unfair decisions. It also enables the issue of volition to be decided by a Tribunal that has expertise in the area of guardianship law, as well as flexibility in its proceedings and procedures. It is also noted that article 12 of the United Nations Convention provides that measures to assist persons with disabilities to exercise their legal capacity must be free of conflict of interest and undue influence.<sup>1122</sup>

1119 Eg M Parker, 'Patient Competence and Professional Incompetence: Disagreements in Capacity Assessments in One Australian Jurisdiction and their Educational Implications' (2008) 16 *Journal of Law and Medicine* 25, 28.

1120 Eg *Re FHW* [2005] QGAAT 50, [33], [48]; *Re PCM* [2006] QGAAT 56, [98]. See also M Parker, 'Patient Competence and Professional Incompetence: Disagreements in Capacity Assessments in One Australian Jurisdiction and their Educational Implications' (2008) 16 *Journal of Law and Medicine* 25, 28, in which the author suggests that the Tribunal considers 'the voluntary status of decisions in relation to the cognitive status of the person, such that a person with cognitive deficits is frequently observed to be more vulnerable to the influence of others'.

1121 Eg *Re PCM* [2006] QGAAT 56, [56].

1122 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

7.179 The equitable doctrine of undue influence<sup>1123</sup> applies to set aside a transaction in which a person who is in a more powerful position to another improperly uses his or her influence over the other person to obtain some benefit for himself, herself or a third party.<sup>1124</sup> However, not all influence involves obtaining some form of benefit or disadvantage. For example, a person may exercise significant influence over another person (for example, to give prudent advice) for no corresponding gain.

7.180 The presence of the voluntariness element in the test of capacity may raise concerns about the nature and scope of its application. It may therefore be desirable for the legislation to clarify the nature and scope of this limb. It may be desirable for the legislation to clarify the nature and extent of the influence involved, if any. It may be helpful, for example, for the legislation to distinguish between improper or unfair influence and other influence. On the other hand, such attempts to define voluntariness may be too prescriptive and inflexible.

7.181 If the scope of the voluntariness element is too wide, it may interfere with an individual's right to enter into transactions as he or she chooses, even if those transactions are imprudent, unreasonable or unjust.<sup>1125</sup> In the case of a legal transaction, if a recognised invalidating circumstance such as fraud or undue influence exists, an appropriate remedy may be sought in the courts.<sup>1126</sup> It is noted, however, that the difficulty and expense involved in taking such action in some cases may be prohibitive. On the other hand, if the test is too narrow, it may not be sufficiently flexible to accommodate the needs and interests of adults with impaired capacity.

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This doctrine was developed by the Courts of Equity to set aside property transactions brought about by one party taking advantage of the vulnerability of the other: *Allcard v Skinner* (1887) 36 Ch D 145, 182–3.

There are some relationships which by their nature raise a presumption of undue influence. In others, there is no presumption, but proof of particular aspects of the relationship may cause the presumption to be inferred: RP Meagher, JD Heydon and MJ Leeming, *Equity: Doctrines and Remedies*, (4th ed). Section 87 of the *Powers of Attorney Act 1998* (Qld) provides that, if an attorney under an enduring power of attorney or advance health directive enters into a transaction with a relation, business associate or close friend of the attorney, it is presumed that the principal was induced to enter the transaction by the attorney's undue influence.

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*Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711, 720 (Hodges J); *Watkins v Combes* (1922) 30 CLR 180, 194 (Isaacs J) quoting *Poosathurdi v Kanappa Chettiar* (1919) LR 47 IA, 1: 43 Madras, 546 (Lord Shaw). The focus of undue influence is on the sufficiency of consent in the sense that the will of the other party is not free and voluntary because it is overborne: M Cope, *Equitable Obligations: Duties, Defences and Remedies* (2007) 31.

In *Watkins v Combes* (1922) 30 CLR 180, 193–4, Isaacs J quoted the observation of Lord Shaw in *Poosathurdi v Kanappa CheHair* (1919) LR 47 IA, 1: 43 Madras, 546:

It is a mistake ... to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used widely, judiciously and helpfully. But ... more than mere influence must be proved so as to render influence, in the language of the law, 'undue'. It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying on his authority or aid.

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See, in relation to legal transactions, *Brusewitz v Brown* [1923] NZLR 1106, 1109 (Salmond J); *Louth v Diprose* (1992) 175 CLR 621, 631 (Brennan J).

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A transaction entered into as a consequence of undue influence may be set aside: RP Meagher, JD Heydon and MJ Leeming, *Equity: Doctrines and Remedies* (4th ed 2002) [15005]. Equitable compensation is also available as a remedy in undue influence: *Smith v Glegg* [2005] 1 Qd R 561, [64] (McMurdo J).

7.182 If the voluntariness element is retained, a related question for consideration is whether the guardianship legislation should include criteria for determining whether a person has the capacity to make decisions freely and voluntarily. It may be relevant to consider factors such as the circumstances in which the decision was made (for example, whether the adult made the decision in the presence of another person who may otherwise exercise influence over him or her), the existence of a pattern of coercion, the adequacy of information given about the decision or transaction and the adequacy of any payment made. On the other hand, the provision of criteria may be unnecessary and give rise to inflexibility.

7.183 There are alternative ways in which the issue of voluntariness in the guardianship legislation may be dealt with other than in the definition of capacity. One approach may be for the legislation to expressly require the Tribunal to consider the issue of voluntariness (or coercion) when determining whether there is a need to appoint a substitute decision-maker for the adult.<sup>1127</sup> However, this approach would be limited to determinations made by the Tribunal.

7.184 Another approach may be to formulate guidelines in relation to intervention when an adult is at risk of being unduly influenced.<sup>1128</sup> Such guidelines, based, among other things, on the principles which underpin the legislation,<sup>1129</sup> might form part of a broader set of guidelines for the assistance of persons who assess decision-making capacity. This is the approach used in the United Kingdom under the *Mental Capacity Act 2005 Code of Practice*. For example, in response to the principle that 'a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success', the Code states that:<sup>1130</sup>

anyone supporting a person who may lack capacity should not use excessive persuasion or 'undue pressure'. This might include behaving in a manner which is overbearing or dominating, or seeking to influence the person's decision, and could push a person into making a decision they might not otherwise have made. However, it is important to provide appropriate advice and information. (note omitted)

7.185 The New South Wales Attorney-General's Department has taken a similar approach in its *Capacity Toolkit*.<sup>1131</sup>

1127 *Guardianship and Administration Act 2000* (Qld) s 12(1)(c). In *Re HEM* [2004] QGAAT 49, the Tribunal considered the susceptibility of the adult to influence as a factor in deciding whether the adult was in need of a guardian.

1128 See [7.257]–[7.278] below.

1129 Eg General Principle 7(2) requires that the importance of preserving, to the greatest extent practicable, an adult's right to make his or her decisions must be taken into account: *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(2). See now the new General Principle 8(2) recommended in Chapter 4 of this Report.

1130 Department for Constitutional Affairs (UK), *Mental Capacity Act 2005 Code of Practice* [2.8] <<http://www.justice.gov.uk/guidance/mca-code-of-practice.htm>> at 30 September 2010.

1131 New South Wales Attorney General's Department, *Capacity Toolkit* (2008) 71 <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_s5\\_1](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5_1)> at 30 September 2010.

Decisions must be made freely and voluntarily. The person making the decision must not feel pressured or deceived into making a decision they would not otherwise make.

7.186 While this approach is broader than the previous alternative, it has the advantage that it applies to capacity assessments in general, rather than being limited to determinations by the Tribunal about the appointment of guardians or administrators. This approach, however, is contingent upon guidelines for the assessment of capacity being developed.

### **Discussion Paper**

7.187 In its Discussion Paper, the Commission sought submissions about whether the definition of 'capacity' under *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should include the voluntariness element.<sup>1132</sup> If so, the Commission also sought submissions about whether the current formulation of the voluntariness element (the ability to make decisions freely and voluntarily) is appropriate or whether the test should be expressed in some other way and, if so, how and for what reasons.<sup>1133</sup>

7.188 The Commission also raised the issue of whether, if the voluntariness element were retained, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should include criteria for determining whether a person has the requisite capacity and if so, what those criteria should be.<sup>1134</sup> Alternatively, the Commission asked whether an assessment of voluntariness (or its equivalent) should be located in another provision of the Acts instead of being included as an element of the definition of 'capacity' and, if so, how the Acts should provide for such an assessment.<sup>1135</sup>

### **Submissions**

7.189 Conflicting views were expressed in the submissions received by the Commission in relation to the voluntariness element in the definition of capacity.

7.190 Many respondents, including the Alzheimer's Association, the Queensland Law Society and the Public Trustee of Queensland, agreed that it was appropriate for voluntariness to remain as an element of the definition of capacity under the Act.<sup>1136</sup>

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1132 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 133.

1133 Ibid.

1134 Ibid.

1135 Ibid.

1136 Submissions 9, 14, 24, 50, 53, 70, 90, 91.

7.191 The Queensland Law Society discussed the importance of maintaining voluntariness:<sup>1137</sup>

This element is important in resisting the effects of undue influence, suggestion, duress or coercion that family members or other people of influence may exert over an adult or any delusional beliefs that the adult may suffer from. Therefore a person who is threatened into making a decision shall be deemed to have not had capacity for that decision at that time. Preservation of the voluntariness element within the definition of capacity will function to preserve the autonomy of the individual, give credence to the other General Principles and reinforce obligations under articles 3 and 16 of the *United Nations Convention on the Rights of Persons with Disabilities* to which Australia is a party.

7.192 However, several respondents (including Disability Services Queensland (now the Disability and Community Care Services<sup>1138</sup>), Queensland Advocacy Incorporated and the former Public Advocate) disagreed with this view and supported the contrary observation made in the Commission's Discussion Paper that the element of voluntariness goes to the validity of a decision rather than to an adult's capacity to make a decision.<sup>1139</sup>

7.193 Disability Services Queensland observed that the 'question of voluntariness would seem to go to the validity of the decision, not whether the person had capacity for the decision', and favoured an approach that separated the requirements of voluntariness and capacity.<sup>1140</sup>

7.194 Queensland Advocacy Incorporated commented:<sup>1141</sup>

There is a vast gulf between a requirement to take all necessary steps to ensure an adult's decisions are free from improper influence, and providing the ability to declare an adult lacks capacity to make decisions because that improper influence exists.

It is inappropriate therefore to provide an entity with the power to strip a person of the ability to make decisions because they have been the victim of unfair and improper influence ... It would seem appropriate then, to remove the voluntariness element from the definition of capacity

7.195 The former Public Advocate, whilst acknowledging some benefits, nevertheless considered that the 'inclusion of the voluntariness element in the definition as it currently stands presents some significant issues ... [and] may lead to unintended consequences'.<sup>1142</sup> The former Public Advocate further explained:

It occurs not commonly that person/s without conditions affecting cognition are unable to make decisions freely and voluntarily. For example, a person may be

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1137 Submission 70.

1138 Disability and Community Care Services forms part of the Department of Communities.

1139 Submissions 5, 34A, 71, 91, 93.

1140 Submission 93. See also Submission 5.

1141 Submission 34A.

1142 Submission 91.

so emotionally co-dependent or physically dependent on another person, that they are overborne by the wishes of the other in decision-making. For example, a wife may be overborne by her husband in circumstances of domestic violence. On the face of the guardianship legislation currently, a statutory decision maker could theoretically be appointed for a wife who is the victim of domestic violence, although she does not have a condition affecting her cognitive abilities. It is not suggested that this has actually happened, but appears possible. It is unlikely that this was an intended consequence of the definition of capacity.

Dependency may present some significant challenges for the guardianship regime. For example, consider the situation of a frail elderly person, who depends upon one of their adult children or a neighbour for support to shop, attend to banking, make and attend medical and other appointments and for companionship. They are largely incapable of independent living and may only be capable of attending to some basic and limited activities of daily living by him/herself.

Although the person may not have a condition which affects their cognition, they are extremely vulnerable to influence by the person/s on whom they most rely. Often they may be afraid of the likely consequences if support is withdrawn as this may mean entering a residential aged care facility and they may prefer to remain in their home. They will likely be very reluctant to lose the support and may be prepared to 'go along with' the wishes of the support person, if that person expresses strong views. Does this constitute an inability to make decisions freely and voluntarily? The adult may consider, as part of their decision-making processes, that his/her own actual preferences are less important than ensuring the maintenance of the status quo with the support-giver. Are they overborne? Arguably, they may be, yet it may be a rational choice made by a person with capacity. Currently, if the person is considered by the Tribunal not to have made decision/s freely and voluntarily, they may be found to have impaired capacity.

Of course, the doctrine of undue influence itself developed and applies in circumstances when the person influenced has capacity. But, it is understood that the guardianship regime was not intended to apply in circumstances when the adult does not have a disability which affects cognition. ...

The definition of capacity has three limbs, and if any one of them is unsatisfied, the adult has impaired capacity for the matter. Accordingly, persons without conditions affecting cognition may be caught by the current definition ... This issue alone suggests that the 'voluntariness' element should be moved to another part of the legislation or dealt with differently in the definition. (notes omitted)

7.196 Some respondents believed that the element of voluntariness, as it is currently interpreted and applied, should be reformulated.<sup>1143</sup>

7.197 A respondent who is a long term Tribunal member considered that the second limb of the definition of capacity should be based on the adult's ability to

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Submissions 53, 71, 91.

make decisions ‘without excessive persuasion, without coercion, undue pressure, or dominance on the part of another person’.<sup>1144</sup>

7.198 Carers Queensland suggested another formulation which focused on the adult’s ability to make decisions without improper or unfair influence:<sup>1145</sup>

Carers Queensland considers that a more appropriate safeguard would be an ability to make decisions without improper or unfair influence.

A person who is judged not to ‘freely and voluntarily’ be able to make decisions is judged to lack capacity. However, sometimes the support that people close to the adult provide could be considered to compromise the freely and voluntarily test even though it is a positive influence or welcomed by the adult. Also, on occasions, adults may willingly cede decision-making in some areas to others.

However, families and carers can also be concerned about the influence of others over the person that they support.

For these reasons, a more appropriate safeguard rather than ability to ‘freely and voluntarily’ make decisions would be the ability to make decisions without ‘improper or unfair influence’.

7.199 However, both the Public Trustee of Queensland and the Queensland Law Society rejected the need for any reformulation of the test of voluntariness. The Public Trustee of Queensland stated that any attempts to redefine voluntariness may ‘lead to overly prescriptive and inflexible criteria’.<sup>1146</sup> Whilst the Queensland Law Society considered that the current formulation was sufficiently broad to ‘capture all forms of threat, coercion or delusional beliefs which may render an adult’s decision as void for lack of capacity’.<sup>1147</sup>

7.200 There was some support in submissions for relocating the requirement of voluntariness.<sup>1148</sup>

7.201 Queensland Advocacy Incorporated suggested that it was more appropriate for any concerns about an adult’s ability to make decisions with a sufficient degree of independence to be addressed in the General Principles:<sup>1149</sup>

The emphasis should be on ensuring an adult is free to make their decisions without unfair interference. If unfair influence is demonstrated, then the decision and not the adult’s right to make decisions is what should be overturned. Given the expense of invalidating decisions through the courts, it is important the Tribunal is properly equipped to invalidate decisions on the basis of unfair and improper influence. ...

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1144 Submission 179.

1145 Submission 71.

1146 Submission 90.

1147 Submission 70.

1148 Submissions 34A, 93.

1149 Submission 34A.

The requirement that a decision be freely and voluntarily made should be removed from the definition of capacity and replaced in the General Principles with an admonition emphasising that decision-making support given to an adult must be free from unfair and improper influence that can invalidate the decision. Stress should be placed in this inclusion upon removing sources of improper and unfair influence and supporting the adult to make their decision free from this interference. Prominence must be given to an adult's right to seek advice and information to help them make their decisions. It should also be made clear that decision makers are required to give appropriate advice and information and that adults are free to follow that advice if it is appropriate. It should also be emphasised that adults are free to delegate decision-making authority to another when that delegation is made free from improper influence.

7.202 Queensland Advocacy Incorporated also suggested that the guardianship legislation should 'empower the Tribunal to overturn decisions on the basis of improper influence'.

7.203 A few submissions addressed the issue of whether criteria, or some other form of guidelines, should be included in the legislation to assist in the assessment of voluntariness.<sup>1150</sup>

7.204 The former Public Advocate strongly supported the development of criteria to assist deliberations about voluntariness and suggested the following concepts as relevant:<sup>1151</sup>

- All people are subject to influence from people close to them — the fact that an adult seeks input or listens to the views of others before making a decision, does not of itself suggest that a decision is not made freely and voluntarily;
- A decision will not be made freely and voluntarily by an adult when the adult is overborne by the will of another person as a result of, for example,
  - (1) ... the forcefulness of the manner in which the views are expressed by the other;
  - (2) threats or perceived threats of the other person to withdraw the adult's care and/or support, or make other arrangements that the adult does not want to occur if the decision is made contrary to their wishes,
  - (3) threats of violence if the decision is made contrary to the wishes of the other person.
- If an adult is dependent on another person for meeting their personal needs and the adult lives an isolated life, there is greater possibility of an adult perceiving that they should decide in a particular manner, irrespective of overt threats of a carer/support person.

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1150 Submissions 5, 70, 91, 93.

1151 Submission 91.

7.205 Another respondent, who supported separating the issues of capacity and voluntariness, considered the use of guidelines ‘to help distinguish coercion from decision-making support would be helpful to decision-makers, and useful to the Tribunal in assessing whether coercion had occurred’.<sup>1152</sup>

7.206 The development of separate criteria was also supported by Disability Services Queensland.<sup>1153</sup>

7.207 However, the Queensland Law Society rejected the use of specific criteria for voluntariness, arguing that criteria ‘may function to limit the application of the element’. They did suggest that examples of what may constitute involuntary decision making may be usefully included in guidelines.<sup>1154</sup>

### ***The Commission’s view***

7.208 The Commission considers that the definition of ‘capacity’ under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should continue to include the second limb — the capacity to make decisions freely and voluntarily. This approach was generally supported in the submissions and was considered to be of practical benefit.

7.209 The inclusion of the voluntariness element in the definition of capacity is a distinctive feature of Queensland’s guardianship legislation. In contrast, some other jurisdictions deal with issues relating to voluntariness in decision-making as part of the assessment of the person’s cognitive function.<sup>1155</sup>

7.210 However, the Commission considers the inclusion of the second limb in the definition of capacity to be an important legislative safeguard. The second limb requires an assessment of the adult’s ability to make independent decisions free from the influence of another person. This ability is arguably a useful indicator of the person’s capacity to exercise decision-making power in his or her own interests. This is especially important in the circumstances where a vulnerable person, such as an elderly person with dementia, is susceptible to the influence of another person or may not have sufficient support for making decisions. This is an increasingly common scenario in an ageing population.

7.211 The inclusion of the second limb in the definition also has the advantage that it enables the issue of voluntariness to be dealt with in the Tribunal rather than the Court.

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1152 Submission 5.

1153 Submission 93.

1154 Submission 70.

1155 Eg Department for Constitutional Affairs (UK), *Mental Capacity Act 2005 Code of Practice* [4.21]–[4.22] <<http://www.justice.gov.uk/guidance/mca-code-of-practice.htm>> at 30 September 2010 New South Wales Attorney General’s Department, *Capacity Toolkit* (2008) <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_s5\\_1](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5_1)> at 30 September 2010.

7.212 The Commission also considers it unnecessary for the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) to be amended to include criteria for determining whether a person has the capacity to make decisions freely and voluntarily. These matters are more appropriately dealt with in guidelines for assessing capacity.

### **Ability to communicate the decisions in some way: paragraph (c)**

7.213 The third limb of the definition of capacity in the guardianship legislation concerns the person's ability to communicate his or her decisions in some way. The *Guardianship and Administration Act 2000* (Qld) also provides (in a later provision relating to declarations about capacity) that, in deciding whether a person can communicate decisions in some way, the Tribunal 'must investigate the use of all reasonable ways of facilitating communication, including, for example, symbol boards or signing'.<sup>1156</sup>

7.214 In South Australia and the United Kingdom, the inability to communicate forms a residual category of incapacity.<sup>1157</sup> In South Australia, the legislation generally refers to an inability to communicate wishes or intentions in any manner whatsoever, while in the United Kingdom, the incapacity is more specifically described as an inability to communicate decisions, whether by talking, using sign language or any other means.

7.215 In many situations, people who have a limited ability to communicate may have developed special ways of communicating their wishes to others. However, in limited circumstances, a person may have no ability to communicate his or her decisions to others. This situation may arise if a person is unable to make a decision and communicate it (for example, because of unconsciousness or delirium) or understands enough to make a decision but cannot communicate it (for example, because of a severe stroke).<sup>1158</sup> In some cases, it may be unclear whether the person is incapable of decision-making or merely of communicating.

7.216 It is noted that physical disability alone is insufficient to attract the need for a substitute decision-maker. It is only when such a disability causes an inability to communicate at all that a person is regarded as not being able to make decisions.

7.217 One question that arises for consideration is whether the definition of capacity should include the requirement of an ability to communicate decisions. The advantage of taking this ability into account is that it acknowledges that the unavoidable consequence of having an inability to communicate is the loss of decision-making autonomy. The disadvantage of including communicative ability in

<sup>1156</sup> *Guardianship and Administration Act 2000* (Qld) s 146(3).

<sup>1157</sup> *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'mental incapacity' para (b)); *Mental Capacity Act 2005* (UK) s 3(1)(d). In Ireland, the *Mental Capacity and Guardianship Bill 2008* (Ireland), which was introduced into the Irish Parliament on 19 February 2008, provides that where a decision requires the act of a third party in order to be implemented, a person is to be treated as not having capacity if he or she is unable to communicate by any means: s 7(2).

<sup>1158</sup> B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 64–5.

the definition is that it may raise concerns about making a finding of impaired capacity where an insufficient effort is made to understand a person or where a person's communication of a decision is misunderstood, interfered with or obstructed by others.<sup>1159</sup>

7.218 Another question is whether the current reference to the ability to communicate 'in some way' in the definition of capacity under the guardianship legislation is sufficient. As noted above, in deciding whether a person can communicate decisions in some way, the Tribunal must investigate the use of all reasonable ways of facilitating communication, including, for example, symbol boards or signing.<sup>1160</sup> This appears to be consistent with article 12(3) of the United Nations Convention which provides for access by persons with disabilities to the support they may require in exercising their legal capacity.

### **Discussion Paper**

7.219 In its Discussion Paper, the Commission sought submissions about whether the definition of 'capacity' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should include the ability to communicate in some way.<sup>1161</sup> The Commission also sought submissions in relation to whether the requirement for a person to have the capacity to communicate 'in some way' raises any problems in practice.<sup>1162</sup>

### **Submissions**

7.220 All of the submissions received by the Commission that addressed this issue strongly supported the inclusion of the ability to communicate a decision as an element of the definition of capacity under the guardianship legislation.<sup>1163</sup>

7.221 Queensland Advocacy Incorporated highlighted the importance of maintaining this element in the definition:<sup>1164</sup>

The ability to communicate a decision is essential. If a person is completely unable to communicate a decision the decision has no effect even where full cognitive capacity remains.

<sup>1159</sup> For example, in some situations, cultural factors may operate so that a person, when asked to give a view about a matter to another person, gives their view in a way that appears to concur with the other person's view, regardless of whether the person holds that view: D Eades, *Aboriginal English and the Law* (1992) 51; Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, Report (1996) 21. This characteristic is known as 'gratuitous concurrence'. This may arise, for example, if an 'unsophisticated' Indigenous person, in response to a question, appears to agree with a proposition put to him or her, regardless of whether the person truly agrees with it or even understands the proposition.

<sup>1160</sup> See [7.213] above.

<sup>1161</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 133.

<sup>1162</sup> *Ibid.*

<sup>1163</sup> Submissions 1A, 5, 9, 14, 24, 34A, 50, 70, 71, 74, 90, 91, 93, 179.

<sup>1164</sup> Submission 34A.

7.222 The majority of respondents also agreed that an adult should be permitted to demonstrate his or her ability to communicate ‘in some way’ through a variety of communication methods and techniques.<sup>1165</sup> The Queensland Law Society observed:<sup>1166</sup>

This element allows adults with certain impairments to still be considered as having capacity for decision making. For example the use of sign language to communicate the decisions of hearing impaired adults, the use of brail to communicate the decisions of sight impaired individuals or the use of blinking to communicate the decisions of sufferers of Guillain-Barre syndrome. To deny these people capacity to make their own decisions based on their inability to communicate in a ‘conventional manner’ would be manifestly unjust and would function to undermine the very purpose of the General Principles. Similarly, failing to recognise alternate modes of communication would build a barrier to recognising genuine competency.

7.223 The former Public Advocate considered that the phrase ‘in some way’ should be clarified or further explained to ensure it was given the widest possible interpretation:<sup>1167</sup>

The requirement for a person to have the capacity to communicate ‘in some way’ contains some intrinsic vagueness which should be clarified. For example, persons with conditions which render their bodies and speech out of their control may nevertheless retain cognitive function which they can express through means other than conventional written or spoken communication. The assessor of capacity should be obliged to make efforts to communicate with the adult through alternative methods, including symbol boards or signing, in the event that the person is non-verbal.

7.224 Respondents also agreed that every assistance possible should be afforded to an adult to assist him or her to communicate a decision effectively,<sup>1168</sup> including the presence of a support person.<sup>1169</sup>

7.225 Other respondents highlighted the need for patience and expertise when dealing with an adult with communication difficulties<sup>1170</sup> and expressed concern that inappropriate or insufficient attempts at communication may result in assumptions of impaired capacity.<sup>1171</sup>

7.226 Some respondents noted that an adult may have developed a particular, non-conventional method of communicating with his or her support network and

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1165 Submissions 5, 9, 14, 34A, 70, 71, 74, 90, 91.

1166 Submission 70.

1167 Submission 91.

1168 Submissions 9, 24, 34A, 70, 71.

1169 Submissions 14, 34A, 71, 91.

1170 Submissions 9, 14, 24.

1171 Submissions 5, 34A.

considered it important for this form of communication to be recognised.<sup>1172</sup> Carers Queensland commented:<sup>1173</sup>

This clause must recognise that people close to the adult may develop non-standard ways of communicating with the adult that may not be understood by other people. They are therefore able to communicate and understand the adult when others can not. This communication needs to be acknowledged because it may [be] the only way that the adult is able to express their views and wishes.

7.227 Queensland Advocacy Incorporated raised an additional query of whether the legislation should address the circumstance of a temporary inability to communicate.<sup>1174</sup>

7.228 If the inability is temporary, the adult should be given further opportunity to make the decision when communication is restored. It is important to remember that capacity can be affected by illness, medication or other influences. It should be a requirement that proper investigations be conducted to establish whether any of these temporary and remedial causes are to blame. This applies to an inability to communicate and to the establishment of capacity generally.

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

7.229 The Commission considers that the definition of capacity should continue to include the person's capacity to communicate decisions in some way.

7.230 If a person is able, with appropriate assistance and support, to make his or her decisions known and have them carried into effect, it is unnecessary to have a substitute decision-maker. Conversely, if a person has no ability to communicate decisions, whatever the cause, the person will have no means of carrying his or her decisions into effect. In these circumstances, it will be necessary to have a substitute decision-maker.

7.231 The Commission also considers that the reference in the definition of capacity to the ability to communicate 'in some way' is generally sufficient.

7.232 However, in order to emphasise that a person is not to be treated as unable to communicate his or her decision until all practicable steps have been taken to enable him or her to communicate it, it may be helpful to refer in the definition (by way of a note or an example) to section 146(3) of the *Guardianship and Administration Act 2000* (Qld), which lists some of the different ways in which a person may be able to communicate (for example, talking, using sign language or any other means).

7.233 In addition, the guidelines for assessing capacity that the Commission has recommended should provide information and advice about practical steps that

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1172 Submissions 71, 74.

1173 Submission 71.

1174 Submission 34A.

may be taken to assist and support the person to communicate his or her decisions.

## THE EXCLUSION OF SPECIFIC MATTERS

7.234 A person's authority and responsibility to make his or her own decisions includes the right to make good decisions and bad decisions. There are a myriad of factors which may influence the decisions a particular person makes.<sup>1175</sup> The presence of certain factors such as inexperience, ignorance or unconventional behaviour may not necessarily indicate a lack of capacity.<sup>1176</sup> It has been observed that a person should not be regarded as incapacitated simply because he or she makes a decision which by common standards is thought to be imprudent or unusual, unless there is evidence to the contrary.<sup>1177</sup>

7.235 This approach is consistent with article 12 of the United Nations Convention, which provides that persons with disabilities enjoy legal capacity on an equal basis with others.

7.236 The *Guardianship and Administration Act 2000* (Qld) acknowledges that an adult's right to make decisions 'includes the right to make decisions with which others may not agree'.<sup>1178</sup> This provision reinforces the functional approach to assessing capacity. It also has the effect of discounting the use of the outcome approach in assessing capacity in practice.<sup>1179</sup> The Act does not specifically exclude particular factors from being taken into account in the assessment of capacity.

7.237 The ACT and the Northern Territory specifically exclude certain factors, such as eccentricity or social values, from what may be taken as impaired capacity under their guardianship legislation.<sup>1180</sup>

7.238 The Law Commission of England and Wales, in its review of the law relating to mental incapacity, also considered that a person's decision should not be disregarded because it is inconsistent with the sort of choice usually made by a person of ordinary prudence.<sup>1181</sup> The *Mental Capacity Act 2005* (UK) (which was

1175 See J McNab, 'Assessing Capacity: A practical guide for lawyers' (June 2008) *Law Society Journal* 68, 69.

1176 See Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.9].

1177 *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 113 (Lord Donaldson MR), which concerned the refusal of consent to medical treatment. In that case, Lord Donaldson MR noted:

That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.

1178 *Guardianship and Administration Act 2000* (Qld) s 5(b).

1179 See [7.114] above.

1180 *Guardianship and Management of Property Act 1991* (ACT) s 6A; *Adult Guardianship Act* (NT) s 3(3).

1181 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [3.4], [3.14]. The Law Reform Commission of Ireland, in its review on vulnerable adults and the law, recommended that a person should not be regarded as lacking capacity simply on the basis of making a decision which appears unwise: Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [2.47].

enacted in the United Kingdom following the Law Commission's review) provides that a lack of capacity cannot be established merely by reference to:<sup>1182</sup>

- a person's age or appearance; or
- a condition of the person, or an aspect of the person's behaviour, which might lead others to make unjustified assumptions about the person's capacity.

7.239 On one hand, the inclusion of a provision in the *Guardianship and Administration Act 2000* (Qld) setting out particular factors which are to be disregarded for the purposes of assessing a person's capacity may help safeguard the rights of adults to make valid decisions. The inclusion of such a provision would make it clear that certain factors should not be taken into account when assessing capacity. On the other hand, the current provision acknowledging that adults have a right to make decisions with which others may disagree may be considered adequate for the purposes of the Act.

## Discussion Paper

7.240 In its Discussion Paper, the Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should specify that certain matters should be disregarded for the purposes of assessing capacity under the Act and, if so, what types of matters should be disregarded.<sup>1183</sup>

## Submissions

7.241 The submissions received by the Commission were divided on the necessity for the legislation to specify that certain matters should be disregarded for the purposes of assessing capacity.

7.242 Several respondents considered there was no need for the legislation to include such a provision,<sup>1184</sup> particularly having regard to the current provision which acknowledges that adults have a right to make decisions with which others might not agree.<sup>1185</sup>

7.243 However, many other respondents indicated support for excluding certain matters from the assessment of capacity under the Act.<sup>1186</sup> The former Public Advocate explained that whilst stating matters to be disregarded 'may merely make

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1182 *Mental Capacity Act 2005* (UK) s 2(3).

1183 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 135.

1184 Submissions 1A, 5, 14, 52, 55, 81.

1185 Submissions 5, 19, 52.

1186 Submissions 3B, 9, 20, 24, 50, 53, 67, 70, 90, 91, 95B.

overt what may be understood already, ... clarity will best protect the rights and interests of the adults for whose benefit the guardianship regime operates'.<sup>1187</sup>

7.244 The submissions elicited a variety of opinions on exactly what matters should be disregarded in the assessment of capacity.

7.245 Several respondents considered that it would be useful for the legislation to provide that a person should not be taken to have impaired capacity simply because his or her decisions were 'unusual, strange or unwise decisions'.<sup>1188</sup>

7.246 The Alzheimer's Association of Queensland agreed that the legislation should exclude 'unusual or eccentric decisions', provided such decisions were 'consistent with the adult's habits or unusual modes of thought, and are not materially deleterious'.<sup>1189</sup>

7.247 The Law Society of New South Wales stated that the legislation should clearly outline that an 'unwise' decision is not indicative of impaired capacity.<sup>1190</sup>

7.248 Other respondents supported the approach adopted in the ACT and the Northern Territory, which excludes factors such as social values and eccentricity.<sup>1191</sup>

7.249 Queensland Advocacy Incorporated commented that:<sup>1192</sup>

It is important to remember how varied and colourful the human condition can be. Imprudence or eccentricity is not equivalent to incapacity. No more so is an alternative or bohemian lifestyle. People are entitled to make decisions that are ill-judged or unconventional without an automatic derogation from their capacity to make decisions. The [*Guardianship and Administration Act 2000* (Qld)] at section 5(b) recognises that adults are entitled to make decisions others disagree with. This safeguard could usefully be extended by including in it examples of human conditions and conduct that do not on their own support an assumption of incapacity.

...

Section 5(b) [of the] [*Guardianship and Administration Act 2000* (Qld)] should include illustrative examples of human behaviour and conditions that are not by themselves indicators of incapacity but which can prejudice the judgment of people assessing capacity. Section 5(b) should specifically state that these things are not on their own indicators of incapacity. Such things include eccentric, imprudent or bad decisions, religious or political beliefs, lifestyle including sexual preferences and the use of alcohol or drugs, age or appearance, or any condition of the person, or an aspect of the person's

1187 Submission 91.

1188 Submissions 9, 50, 53, 67.

1189 Submission 9.

1190 Submission 73.

1191 Submissions 20A, 70, 90.

1192 Submission 34A.

behaviour, which might lead others to make unjustified assumptions about the person's capacity.

7.250 The Queensland Law Society considered it important to ensure that 'the personal actions and beliefs of an individual can not be used against them in assessing their capacity' and favoured the inclusion of a provision akin to that found in the legislation in the ACT, which deems that a person is not incompetent due to:<sup>1193</sup>

the Society advocates the approach taken in the ACT which deems that a person is not incompetent due to:

- their eccentricity;
- their political or religious opinion;
- their sexual orientation or expression of their sexual preference;
- their engagement in illegal or immoral conduct; and
- their consumption [of] drugs or alcohol (however the effects of those drugs or alcohol may be considered as a factor).

7.251 The Public Trustee of Queensland also considered that there may be benefit in including a provision similar to the ACT provision.<sup>1194</sup>

7.252 One respondent endorsed the United Kingdom model,<sup>1195</sup> whilst another respondent considered that a person's level of education should be specifically excluded.<sup>1196</sup>

7.253 The former Public Advocate suggested that specifying matters to be disregarded for the purpose of assessing capacity may add some clarity to the assessment process. She suggested that the following matters (some of which are based on the *Mental Health Act 2000* (Qld) model)<sup>1197</sup> might be included in the guardianship legislation:

- the person's age or appearance;
- the person holds or refuses to hold a particular religious, cultural, philosophical or political belief or opinion;
- the person is a member of a particular racial group;
- the person has a particular economic or social status;

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1193 Submission 70.

1194 Submission 90.

1195 Submission 20A.

1196 Submission 95B.

1197 *Mental Health Act 2000* (Qld) s 12(2).

- the person has a particular sexual preference or sexual orientation;
- the person engages in sexual promiscuity;
- the person engages in immoral or indecent conduct;
- the person takes drugs or alcohol;
- the person engages in antisocial behaviour or illegal behaviour;
- the person is or has been involved in family conflict;
- the person's living arrangements including homelessness;
- the person's dependence on others to meet their physical needs.

7.254 A respondent who is a long term Tribunal member suggested that a person should not be taken to have impaired capacity only because of the following factors:<sup>1198</sup>

- eccentric views;
- particular religious or political beliefs;
- criminal history;
- sexual orientation;
- lifestyle decisions including gambling, drug taking or substance abuse;
- age; and
- appearance.

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

7.255 The Commission is of the view that the *Guardianship and Administration Act 2000* (Qld) should not be amended to expressly exclude certain factors from being taken into account in the assessment of capacity. The purpose of excluding certain factors from the assessment of capacity is to ensure that adults are not discriminated against, on the basis of irrelevant personal attributes, when their capacity is being assessed. However, specifying a list of factors in the legislation is not helpful for the following reasons.

7.256 The inclusion of a list of factors in the legislation is an unnecessarily prescriptive approach. It also raises the problem that, on the one hand, the list is unlikely to cover the field and, on the other, some of those matters will sometimes be relevant — for example, 'gambling, drug taking or substance abuse', identified by one of the respondents, may in some cases be relevant to an assessment of

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1198

Submission 179.

capacity. In addition, to the extent that it is necessary to instruct people to avoid prejudice when assessing an adult's capacity, this issue may be adequately addressed by the guidelines for assessing capacity recommended by the Commission later in the chapter.<sup>1199</sup>

## GUIDELINES FOR ASSESSING CAPACITY

7.257 The issue of whether an adult has capacity is a threshold issue in guardianship law.

7.258 The test of capacity is a test at law. The assessment of capacity is often carried out by medical or other health professionals in a clinical setting.<sup>1200</sup> However, others, such as substitute decision-makers or third parties who deal with adults with questionable capacity, may also need to assess an adult's capacity. It is essential that those who assess capacity understand the purpose, applications and limitations of such assessments. The assessment of capacity is a critical issue because a finding of impaired capacity may result in the loss of the adult's decision-making autonomy.<sup>1201</sup>

7.259 An ancillary issue that arises in considering whether an adult has impaired capacity for the purposes of the Queensland guardianship legislation is whether guidelines should be developed for the assistance of persons who assess decision-making capacity.

7.260 The *Mental Capacity Act 2005* (UK) specifically requires the Lord Chancellor to prepare and issue numerous codes of practice,<sup>1202</sup> including a code of practice for the guidance of persons assessing whether a person has capacity in relation to any matter.<sup>1203</sup> The Code explains how the Act will operate on a day-to-day basis and offers examples of best practice to carers and practitioners. A person who is acting in a specified role under the Act in relation to a person who lacks capacity is under a duty to have regard to the Code.<sup>1204</sup>

7.261 In New South Wales, the Attorney General's Department has recently released a comprehensive guide book for assessing capacity called the *Capacity Toolkit*.<sup>1205</sup> The *Capacity Toolkit* is designed to assist government employees,

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1199 See [7.257]–[7.277] below.

1200 Despite the development of specific tests of competence in recent years, there is no standard assessment of capacity: J Devereux and M Parker, 'Competency issues for young persons and older persons', in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 70, 71.

1201 See [7.11]–[7.13] above.

1202 *Mental Capacity Act 2005* (UK) s 42(1)(a).

1203 Department of Constitutional Affairs (UK), *Mental Capacity Act 2005 Code of Practice* <<http://www.justice.gov.uk/guidance/mca-code-of-practice.htm>> at 30 September 2010.

1204 *Mental Capacity Act 2005* (UK) s 42(4).

1205 New South Wales Attorney General's Department, *Capacity Toolkit* (2008) <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_s5\\_1](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5_1)> at 30 September 2010.

community workers, professionals, families and carers in identifying whether an individual has decision-making capacity. It provides ‘information and guidance’ about issues relating to capacity and capacity assessment.<sup>1206</sup>

7.262 The South Australian Advance Directives Review Committee has recently recommended that a proposal be made to the Standing Committee of Attorneys-General that the New South Wales *Capacity Toolkit* be adapted to apply generally across Australian States and Territories.<sup>1207</sup> A similar conclusion was drawn by the Federal Parliamentary Inquiry on *Older people and the law* in 2007, which recommended that a nationally consistent approach to the assessment of capacity be developed and implemented by the Australian Attorneys-General and Health Ministers.<sup>1208</sup> In this regard, the South Australian Advance Directives Review Committee envisaged that ‘a more generalised national version of this document that is not specific to the legislation in any single jurisdiction would be a useful guide to assess capacity’.<sup>1209</sup>

## Discussion Paper

7.263 In its Discussion Paper, the Commission sought submissions on whether the Queensland guardianship legislation should provide for the development of a code of practice (or guidelines) for the assistance of persons who assess decision-making capacity.<sup>1210</sup>

## Submissions

7.264 Nearly all of the respondents who addressed this issue endorsed the use of a resource such as a capacity toolkit or a code of practice to assist people to assess the capacity of an adult to make his or her own decisions.<sup>1211</sup>

7.265 The former Public Advocate advocated strongly for a code of practice:<sup>1212</sup>

A code of practice regarding the assessment of capacity is highly desirable to protect the rights and interests of those adults for whose benefit the regime operates. Many persons interacting with the guardianship regime will need to assess capacity from time to time. Health and allied professionals receive little

1206 Ibid 7.

1207 Advance Directives Review Committee (SA), *Advance Directives Review — Planning ahead: your health, your money, your life: Stage 2 Proposals for implementation and communication strategies*, 42 <[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 30 September 2010.

1208 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law* (2007) [3.88] (Recommendation 19) <<http://www.aph.gov.au/house/committee/laca/olderpeople/report/fullreport.pdf>> at 30 September 2010.

1209 Ibid 42–3.

1210 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 137.

1211 Submissions 1A, 5, 9, 12, 14, 15, 19, 20A, 24, 34A, 42, 50, 52, 53, 55, 56, 63, 64, 68, 70, 71, 73, 81, 90, 91, 93, 95B, 179.

1212 Submission 91.

training about how to do this appropriately. Lay people will generally have had no training about it. If the adult's rights are to be properly respected, it is essential for those assessing capacity to do so as intended under the regime.

7.266 Queensland Advocacy Incorporated noted the advantages of such a resource.<sup>1213</sup>

The Capacity Toolkit and the Code of Practice use examples, case studies and hypothetical scenarios extensively to explain what things mean and how principles and tests should be applied. These are extremely effective educative techniques. They help to bring clarity where confusion exists. They help to illuminate the often murky path substitute decision makers must follow. They are particularly helpful to people unused to legislative interpretation and inexperienced in substitute decision making. A list of factors can enumerate the considerations which must be weighed when making a decision. A case study can dramatise with theatrical clarity how those factors properly considered can produce a better decision.

7.267 The development of guidelines or a code of practice may also help overcome concerns expressed in submissions to the Commission that the test of capacity is not applied uniformly.<sup>1214</sup> Associate Professor Malcolm Parker observed:<sup>1215</sup>

There is a wide range of instruments and informal methods in use to determine the presence or absence of capacity. ... While the health professional assessment of capacity is not the same thing as the legal determination, there need to be strong links made between these two kinds of determination.

... [I]t would also be extremely helpful for the legislation to require a code of practice for guidance of capacity assessors. This would ... help provide for increased consistency between assessments.

7.268 Legal Aid Queensland stated that guidelines or a code of practice could also assist members of the Tribunal with their deliberations on the question of capacity. They considered 'this would ensure greater uniformity and consistency in the Tribunal's approach and decisions in these matters'.<sup>1216</sup>

7.269 Carers Queensland, Disability Services Queensland and Queensland Alliance all agreed that a code of practice would promote consistency across the system.<sup>1217</sup> Queensland Alliance considered that:<sup>1218</sup>

While a code of practice cannot address all possible situations it can provide a structure to the responsibilities of those assessing capacity and reduce any ethical conflicts which may arise. (note omitted)

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1213 Submission 34A.

1214 Submissions 5, 17, 20A, 58, 63, 64, Forum 9.

1215 Submission 5.

1216 Submission 63.

1217 Submissions 64, 71, 93.

1218 Submission 64.

7.270 Several respondents also made suggestions for how a code of practice should be framed, including the use of simple language, checklists and examples.<sup>1219</sup> The Public Trustee of New South Wales, while advocating for the application of a common law test of capacity, observed that:<sup>1220</sup>

Different decisions require different guidelines and the guidelines should contain a list of factors to be taken into account depending on whether the capacity assessment relates to finance, lifestyle, accommodation, or medical treatment. ...

The guidelines should also contain examples of questions to be asked of the client to help in assessing capacity. You are only able to judge whether the client understands the task at hand by asking a series of questions which require some reasoned response rather than questions that demand a 'yes' or 'no' answer. Having examples of such questions would be helpful when making a judgment as to the degree of the client's understanding.

7.271 Carers Queensland also noted that the development of such a resource should involve all relevant stakeholders.<sup>1221</sup>

7.272 Queensland Advocacy Incorporated considered that, if a code of practice were implemented, 'formal decision makers should be legally required to have regard to the Code when making their decisions'. However, while they considered it desirable for informal decision makers to be encouraged to follow the code, they should not be legally required to do so.<sup>1222</sup>

7.273 A few submissions disagreed with the need for the development of a code of practice,<sup>1223</sup> with one respondent arguing that 'another level of complexity such as a Code of Practice may prove to be more invasive and counter productive to the manner in which the person wishes their decisions to be made'.<sup>1224</sup>

### The Commission's view

7.274 Queensland's guardianship legislation covers a wide range of decisions and circumstances. The person who assesses an adult's capacity to make a decision will ordinarily be the person who is directly concerned with the adult at the time the decision needs to be made. The range of persons who may be involved in assessing the adult's capacity includes the adult's carer, family, friends, health provider or legal practitioner.

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1219 Submissions 52, 55, 68.

1220 Submission 68.

1221 Submission 71.

1222 Submission 34A.

1223 Submissions 23, 67.

1224 Submission 67.

7.275 Capacity may be assessed by a variety of professionals and types of assessment. While there are a number of methods used for assessing capacity, there is no widely accepted, standard methodology for assessing capacity.

7.276 To ensure a consistent and best practice approach to such assessments, the Commission considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to require the Minister responsible for administering the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) to prepare and issue guidelines for assessing capacity under the legislation. The guidelines should be contained in subordinate legislation. The preparation of the guidelines should be informed by wide and inclusive consultation with individuals and organisations with qualifications and experience in making capacity assessments. The guidelines should also be reviewed at regular intervals by the Minister to ensure that the information contained in the guidelines continues to satisfy a best practice standard for capacity assessments under the legislation.

7.277 One option for consideration as part of a best practice approach in the development of guidelines is the adoption of a set of principles for making capacity assessments. Because the Queensland guardianship legislation and the area of capacity assessment both involve a 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 adequate and appropriate support in decision-making,<sup>1225</sup> a number of the principles that underpin the guardianship legislation would also be relevant to the development and application of guidelines for assessing capacity.<sup>1226</sup> Accordingly, having regard to the redrafted General Principles recommended by the Commission, the development and application of the guidelines should be informed by a set of principles for making capacity assessments, including:

- the presumption that an adult has capacity for a matter;<sup>1227</sup>
- the principle that in performing a capacity assessment, the assessment must be done in a way that promotes and safeguards the adult's rights, interests and opportunities and in the way least restrictive of the adult's rights, interests and opportunities;
- the importance of preserving, to the greatest extent practicable, the adult's right to make his or her decisions; and
- the adult's right to be given any necessary support and access to information to enable the adult to make or participate in decisions affecting the adult's life.

7.278 The guidelines should provide practical guidance, in the form of information and advice about assessing capacity under the guardianship

<sup>1225</sup> *Guardianship and Administration Act 2000* (Qld) s 6.

<sup>1226</sup> The General Principles and the Health Care Principle are discussed in Chapters 4 and 5 of this Report respectively.

<sup>1227</sup> See also Recommendations 7-2, 7-3 and 15-2 of this Report.

legislation, to the range of persons who may be required to assess an adult's capacity, including those matters mentioned in [7.164]–[7.165], and be supported by examples of best practice. Amongst other things, the guidelines should include information and advice about the situation in which professional involvement in making a capacity assessment may be necessary.

## RECOMMENDATIONS

### *The presumption of capacity*

- 7-1** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, whenever the Tribunal or the Supreme Court makes a determination about an adult's capacity for a matter, the Tribunal or the Court must apply the presumption of capacity.
- 7-2** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, if the Tribunal or the Supreme Court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to apply the presumption that the adult has capacity for that matter.
- 7-3** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that, if the Tribunal or the Supreme Court has made a declaration that the adult has impaired capacity for a matter and no further declaration about the adult's capacity for that matter has been made, another person or entity who performs a function or exercises a power under the guardianship legislation is entitled to rely on the finding that the presumption that the adult has capacity for that matter has been rebutted.
- 7-4** The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should continue to require that, if the Tribunal or the Supreme Court has not made a formal determination that the adult has impaired capacity for a matter, the person or entity must apply the presumption that the adult has capacity for that matter.
- 7-5** Section 11 of the *Guardianship and Administration Act 2000* (Qld) and section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended by deleting the words 'for a matter in relation to an adult with impaired capacity for the matter'.

- 7-6 The presumption of capacity, which is stated in General Principle 1, should continue to be located, along with the other General Principles, in schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

*The approach to defining capacity*

- 7-7 The guardianship legislation should continue to apply the functional approach to defining 'capacity'.

*The definition of 'capacity' generally*

- 7-8 Paragraphs (a)–(c) of the definition of 'capacity' in schedule 4 of the *Guardianship and Administration Act 2000* (Qld) and schedule 3 of the *Powers of Attorney Act 1998* (Qld) should be retained without amendment, subject to Recommendation 7-9.

*Paragraph (c) of the definition of 'capacity: ability to communicate the decisions in some way*

- 7-9 Paragraph (c) of the definition of 'capacity' should be amended only to the extent that it should contain a cross-reference (by way of a note or an example) to section 146(3) of the *Guardianship and Administration Act 2000* (Qld), which lists some of the different ways in which a person may be able to communicate (for example, talking, using sign language or any other means).

*The exclusion of specific matters*

- 7-10 The *Guardianship and Administration Act 2000* (Qld) should not be amended to expressly exclude certain factors from being taken into account in the assessment of capacity.

*Guidelines for assessing capacity*

- 7-11 The *Guardianship and Administration Act 2000* (Qld) should be amended to require the Minister responsible for administering the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) to prepare and issue guidelines for assessing 'capacity' under the legislation. These guidelines should be made in subordinate legislation.
- 7-12 The *Guardianship and Administration Act 2000* (Qld) should be amended to require that the preparation of the guidelines be informed by wide and inclusive consultation with individuals and organisations with qualifications and experience in making capacity assessments.

- 7-13** The *Guardianship and Administration Act 2000* (Qld) should be amended to require that the guidelines be reviewed at regular intervals by the Minister responsible to ensure that the information contained in the guidelines continues to satisfy a best practice standard for capacity assessments under the legislation.
- 7-14** The development and application of the guidelines should be informed by a set of principles for making capacity assessments, including:
- (a) the presumption that an adult has capacity for a matter;<sup>1228</sup>
  - (b) the principle that in performing a capacity assessment, the assessment must be done in a way that promotes and safeguards the adult's rights, interests and opportunities and in the way least restrictive of the adult's rights, interests and opportunities;
  - (c) the importance of preserving, to the greatest extent practicable, the adult's right to make his or her decisions; and
  - (d) the adult's right to be given any necessary support and access to information to enable the adult to make or participate in decisions affecting the adult's life.
- 7-15** The guidelines should provide practical guidance, in the form of information and advice about assessing capacity under the guardianship legislation, to the range of persons who may be required to assess an adult's capacity and be supported by examples of best practice.
- 7-16** The guidelines should contain the following information and advice in relation the assessment of an adult's ability to understand the nature and effect of his or her decision:
- (a) the process of understanding covers the abilities to understand and retain the information relevant to the decision (including its likely consequences) and to use or weigh that information in the process of making the decision;
  - (b) the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision;

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See also Recommendations 7-2, 7-3 and 15-2 of this Report.

- (c) a person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to the person in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means); and
- (d) the fact that a person is able to retain the information relevant to a decision for a short period only does not, of itself, prevent the person from being regarded as able to make the decision.

**7-17** The guidelines should include information and advice about the situation in which professional involvement in making a capacity assessment may be necessary.

# Chapter 8

## Capacity to make an enduring document

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### INTRODUCTION

8.1 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 *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).<sup>1229</sup> The Commission is also specifically required to

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The terms of reference are set out in Appendix 1.

review the law relating to advance health directives and enduring powers of attorney.

8.2 Queensland's guardianship legislation provides a framework for decision-making by and for adults who have impaired decision-making capacity. An important part of this framework is the provision for a person to make certain decisions in advance by executing an 'enduring document' — that is, an enduring power of attorney or an advanced health directive — which will operate if the person's decision-making capacity subsequently becomes impaired.<sup>1230</sup>

8.3 A person must have the requisite capacity to make an enduring document. The nature and assessment of a person's capacity to make an enduring document is therefore a threshold issue in reviewing the law relating to decision-making under the guardianship legislation.

8.4 This chapter outlines the test of capacity for making an enduring document in Queensland,<sup>1231</sup> and in the other Australian jurisdictions. It also makes a number of recommendations for change.

## THE LAW IN QUEENSLAND

### Enduring documents

8.5 The *Powers of Attorney Act 1998* (Qld) provides for adults to formalise future substitute decision-making about certain matters for themselves by making an advance health directive or an enduring power of attorney (an 'enduring document'). A person who makes an enduring document is called a 'principal'.<sup>1232</sup>

8.6 In an advance health directive, a principal may give directions about his or her future health care.<sup>1233</sup> These directions can relate to some or all of the principal's health matters or special health matters.<sup>1234</sup> For example, a principal may give directions about consent to particular treatment or, in certain circumstances, the withholding or withdrawal of a life-sustaining measure.<sup>1235</sup>

<sup>1230</sup> *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'enduring document'). An enduring power of attorney for a financial matter may also operate at another time specified in the document: *Powers of Attorney Act 1998* (Qld) s 33.

<sup>1231</sup> Advance health directives and enduring powers of attorney are considered in Chapters 9 and 16 of this Report.

<sup>1232</sup> *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'principal' para (a)). In some other jurisdictions, the principal is called the 'donor': *Powers of Attorney Act* (NT) s 13; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) s 30; *Instruments Act 1958* (Vic) s 115(1); *Guardianship and Administration Act 1990* (WA) s 104.

<sup>1233</sup> *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

<sup>1234</sup> See [6.14] and [6.18] above as to what constitutes a 'health matter' and a 'special health matter'.

<sup>1235</sup> *Powers of Attorney Act 1998* (Qld) s 35(2). Also see s 36(2) as to the circumstances in which a direction to withhold or withdraw a life-sustaining measure may operate. Advance health directives are considered in Chapter 9 of this Report.

8.7 In an enduring document, a principal may appoint one or more attorneys to make certain decisions for the principal. In an advance health directive, a principal may appoint an attorney to make decisions about the principal's health matters (other than special health matters).<sup>1236</sup> In an enduring power of attorney, a principal may authorise one or more attorneys to exercise power for one or more of the principal's financial or personal matters (including health matters).<sup>1237</sup> The principal can provide terms or information for the exercise of an attorney's power under the enduring document.<sup>1238</sup>

8.8 An advance health directive and, for personal and health matters, an enduring power of attorney, operate only during a period when the principal has impaired capacity for the matter.<sup>1239</sup>

8.9 Power for a financial matter given to an attorney under an enduring power of attorney is exercisable:<sup>1240</sup>

- at the time specified in the enduring power of attorney; or
- if no time is specified, once the enduring power is made; or
- if the adult has impaired capacity for the matter before the time specified in the enduring power of attorney, during any or every period the adult has the impaired capacity.

## Capacity to make an enduring document

8.10 Whenever a person enters into a transaction or executes a document, he or she must be legally competent to do so in order for it to be effective at law. This applies, for example, to entering into contracts, making wills and consenting to medical treatment.<sup>1241</sup> It also applies to the execution of an enduring document.

8.11 One aspect of the principal's competence to make an enduring document in Queensland is that the principal must be an adult (18 years or older).<sup>1242</sup> The other aspect is that the principal must have the requisite mental capacity to execute the document. At common law, the necessary mental capacity to execute a document or enter a transaction is relative to the particular transaction.<sup>1243</sup> It is the capacity to understand the nature and effect of the particular document or

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1236 *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

1237 *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

1238 *Powers of Attorney Act 1998* (Qld) ss 32(1)(b), 35(1)(d).

1239 *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(1)(a), (3).

1240 *Powers of Attorney Act 1998* (Qld) s 33(1)–(3).

1241 *Eg Dalle-Molle (by his next friend Public Trustee) v Manos* (2004) 88 SASR 193, [16] (Debelle J).

1242 *Powers of Attorney Act 1998* (Qld) ss 32, 35; *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'adult').

1243 *Gibbons v Wright* (1954) 91 CLR 423, 438 (Dixon CJ, Kitto and Taylor JJ).

transaction when it is explained.<sup>1244</sup> This common law requirement is mirrored under the *Powers of Attorney Act 1998* (Qld).

8.12 Sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) set out the test of capacity for making an enduring document under that Act. They provide that a principal may make an enduring document only if he or she understands certain matters.<sup>1245</sup>

8.13 For an enduring power of attorney, section 41 provides:

**41 Principal's capacity to make an enduring power of attorney**

- (1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.<sup>41</sup>
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters<sup>42</sup>—
  - (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
  - (b) when the power begins;
  - (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
  - (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;<sup>1246</sup> (note added)
  - (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
  - (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

<sup>1244</sup> Ibid 437–8 (Dixon CJ, Kitto and Taylor JJ). In *Re K* [1988] 1 Ch 310, 316, Hoffmann J accepted the following summary of the matters that should be explained to, and understood by, the principal when making an enduring power of attorney:

First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.

<sup>1245</sup> Also see generally, the discussion of competence and capacity in the Draft Advance Care Directives Framework 2010: Clinical, Technical and Ethical Principal Committee, Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives: Consultation Draft 2010* (2010) 16.

<sup>1246</sup> For some enduring powers of attorney (and for advance health directives) the power will only begin once the principal has lost capacity and the principal is therefore unable able to revoke the power.

- 41 However, under the general principles, a person is presumed to have capacity—  
schedule 1, section 1.
- 42 If there is a reasonable likelihood of doubt, it is advisable for the witness to make a  
written record of the evidence as a result of which the witness considered that the  
principal understood these matters.

8.14 The same test applies if a principal appoints an attorney in an advance  
health directive.<sup>1247</sup>

8.15 If an advance health directive gives directions for the principal's health  
care, the principal must understand a number of other things.<sup>1248</sup>

8.16 Section 42 of the *Powers of Attorney Act 1998* (Qld) provides:

**42 Principal's capacity to make an advance health directive**

- (1) A principal may make an advance health directive, to the extent it does  
not give power to an attorney, only if the principal understands the  
following matters<sup>43</sup> —
- (a) the nature and the likely effects of each direction in the  
advance health directive;
  - (b) a direction operates only while the principal has impaired  
capacity for the matter covered by the direction;
  - (c) the principal may revoke a direction at any time the principal  
has capacity for the matter covered by the direction;
  - (d) at any time the principal is not capable of revoking a direction,  
the principal is unable to effectively oversee the implementation  
of the direction.
- (2) A principal may make an advance health directive, to the extent it gives  
power to an attorney, only if the principal also understands the matters  
necessary to make an enduring power of attorney giving the same  
power.<sup>44</sup>
- 43 If there is a reasonable likelihood of doubt, it is advisable for the witness to make a  
written record of the evidence as a result of which the witness considered that the  
principal understood these matters.
- 44 See section 41 (Principal's capacity to make an enduring power of attorney).

8.17 In Queensland, there is a statutory presumption of capacity: all adults are  
presumed to have capacity to make, or revoke, an enduring document.<sup>1249</sup> The

1247 *Powers of Attorney Act 1998* (Qld) s 42(2).

1248 *Powers of Attorney Act 1998* (Qld) s 42(1).

1249 An adult is presumed to have capacity for a 'matter' which is defined to include a 'special personal matter' which includes a matter relating to 'making or revoking a power of attorney, enduring power of attorney or advance health directive': *Powers of Attorney Act 1998* (Qld) sch 1 s 1, sch 2 s 3(b); *Guardianship and Administration Act 2000* (Qld) sch 1 s 1, sch 2 s 3(b).

Special personal matters are excluded from the types of matters for which an attorney under an enduring power of attorney (or a guardian) can exercise power: *Powers of Attorney Act 1998* (Qld) s 32(1)(a); *Guardianship and Administration Act 2000* (Qld) s 12(1), sch 2 s 2.

presumption of capacity may, however, be rebutted by satisfactory evidence to the contrary.<sup>1250</sup>

### Capacity to revoke an enduring document

8.18 Under the *Powers of Attorney Act 1998* (Qld), a principal may also revoke an enduring document or a power or direction given in an enduring document. Generally, a principal may make a written revocation if he or she has the capacity that would be necessary to make the enduring document.<sup>1251</sup>

### Attesting to the principal's capacity

8.19 Under the *Powers of Attorney Act 1998* (Qld), an enduring document must be witnessed.<sup>1252</sup> The witness must sign a certificate stating that the principal, at the time of signing the document, appeared to the witness to have the capacity necessary to make the enduring document.<sup>1253</sup> The witness's certificate is evidence of the principal's capacity.

8.20 The witness must be a justice of the peace, a commissioner for declarations, a notary public or a lawyer.<sup>1254</sup> The witness must not be:<sup>1255</sup>

- a person who signs the document for the principal;<sup>1256</sup>
- the principal's attorney;
- a relation of the principal or the principal's attorney;<sup>1257</sup> or

<sup>1250</sup> *Re Caldwell* (Unreported, Supreme Court of Queensland, Mackenzie J, 6 August 1999) [13]; *Re LI* [2006] QGAAT 1, [20]; *Re DEM* [2005] QGAAT 59, [117]–[118]. The evidence must be 'relatively contemporaneous with the execution of the Power of Attorney, to raise the issue in a serious way', and the onus is on those who seek to rebut the presumption of capacity: *Re Caldwell* (Unreported, Supreme Court of Queensland, Mackenzie J, 6 August 1999) [13].

<sup>1251</sup> *Powers of Attorney Act 1998* (Qld) ss 47, 48. A principal may revoke an advance health directive to the extent it includes a direction about a health matter or special health matter if the principal has capacity for the relevant matter: *Powers of Attorney Act 1998* (Qld) s 48(1).

<sup>1252</sup> *Powers of Attorney Act 1998* (Qld) s 44(3)(b), (4), (5). The importance of such witnessing requirements is recognised in the Draft Advance Care Directives Framework 2010: Clinical, Technical and Ethical Principal Committee, Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives: Consultation Draft 2010* (2010) 36.

<sup>1253</sup> *Powers of Attorney Act 1998* (Qld) s 44(4)(b), (5)(c). The relevant forms provide for the witness to certify that the principal appeared to understand certain matters. See *Powers of Attorney Act 1998* (Qld) s 44(1), (2), forms 2, 3 and 4 available at <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list#Forms>> at 30 September 2010.

<sup>1254</sup> *Powers of Attorney Act 1998* (Qld) s 31(1)(a).

<sup>1255</sup> *Powers of Attorney Act 1998* (Qld) s 31(1)(b)–(e).

<sup>1256</sup> Under the *Powers of Attorney Act 1998* (Qld), an enduring document must be signed by the principal or, if the principal instructs, by an 'eligible signer' in the principal's presence. An 'eligible signer' must be at least 18 years old and can not be the witness for the enduring document or an attorney for the principal. See *Powers of Attorney Act 1998* (Qld) ss 30 (Meaning of **eligible signer**), 44(3)(a).

- a paid carer or a health provider for the principal (if the document gives power for a personal matter, including a health matter).

8.21 If the document is an advance health directive, the witness must be at least 21 years old and must not be a beneficiary under the principal's will.<sup>1258</sup>

8.22 An advance health directive must also be signed by a doctor.<sup>1259</sup> The doctor must certify that the principal appeared to the doctor at the time of making the document to have the capacity necessary to make the advance health directive.<sup>1260</sup> The doctor must not be:<sup>1261</sup>

- the other witness of the advance health directive or a person who signs the document for the principal;<sup>1262</sup>
- the principal's attorney;
- a relation of the principal or the principal's attorney; or
- a beneficiary under the principal's will.

8.23 A witness's certificate as to the principal's capacity may also need to be signed if an enduring power of attorney is revoked by the principal.<sup>1263</sup>

8.24 The *Powers of Attorney Act 1998* (Qld) also includes a footnote to the effect that, if there is a reasonable likelihood of doubt about the principal's capacity to make an enduring document, it is 'advisable for the witness to make a written

1257 A 'relation' is defined as a spouse, a person related by blood, marriage, adoption or certain other relationships, a person on whom the first person is completely or mainly dependent (or vice versa) and a person who is a member of the same household: *Powers of Attorney Act 1998* (Qld) sch 3.

1258 *Powers of Attorney Act 1998* (Qld) s 31(1)(f). The requirement for the witness to be at least 21 years old was included in the Act as an additional safeguard to help ensure the witness's 'maturity and life experience': Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1019 (Elizabeth Cunningham).

1259 This requirement was inserted in the legislation to ensure that medical advice from an independent source is received: Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1021–2 (Denver Beanland).

1260 *Powers of Attorney Act 1998* (Qld) s 44(6). The relevant form provides for the doctor to certify that he or she has discussed the document with the principal and that, in his or her opinion, the principal 'is not suffering from any condition that would affect his/her capacity to understand the things necessary to make this directive, and he/she understands the nature and likely effect of the health care described in this document': see *Powers of Attorney Act 1998* (Qld) s 44(2), form 4 available at <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list#Forms>> at 30 September 2010.

1261 *Powers of Attorney Act 1998* (Qld) s 44(7).

1262 See n 1256 above.

1263 *Powers of Attorney Act 1998* (Qld) s 49(4)(b), (5)(c). If the principal signs the revocation himself or herself, the revocation 'may' include a witness's certificate; if the revocation is signed by a person for the principal, the revocation 'must' include a witness's certificate.

record of the evidence' by which the witness considered that the principal had the required understanding.<sup>1264</sup>

8.25 The capacity provisions for enduring documents under the *Powers of Attorney Act 1998* (Qld) also include a footnote to the effect that a principal is presumed to have capacity under the General Principles.<sup>1265</sup>

### Guidelines for witnesses

8.26 The Office of the Adult Guardian has produced a set of guidelines to assist witnesses to make assessments of a principal's capacity to make an enduring power of attorney.<sup>1266</sup> The Queensland Law Society has produced a set of guidelines in substantially the same terms.<sup>1267</sup>

8.27 These guidelines explain the importance of conducting a private interview with the principal to determine his or her level of understanding. They suggest using open-ended rather than closed questions and that, if a principal does not understand something at first, the witness should explain the matter and ask the person about it later in the interview. The guidelines also advise that, if the principal has difficulty answering questions, it may be appropriate to seek a medical assessment for additional information about the principal's capacity. Witnesses are also advised to take notes of the steps they have taken to assess the principal's understanding. In addition, the guidelines include a list of behaviours that may indicate impaired capacity.

8.28 There are also guidelines for witnessing enduring powers of attorney in the handbooks produced for justices of the peace and commissioners for declarations. These guidelines explain that:<sup>1268</sup>

Because [enduring powers of attorney] are so complex and deal with such critical matters as the power to make decisions about someone's personal life, extra safeguards have been built into the process.

<sup>1264</sup> *Powers of Attorney Act 1998* (Qld) ss 41(2) (Principal's capacity to make an enduring power of attorney) n 42, 42(1) (Principal's capacity to make an advance health directive) n 43, 44(3)(b) (Formal requirements) n 48. A similar statement is included on the relevant forms: *Powers of Attorney Act 1998* (Qld) s 44(1), (2), forms 2, 3 and 4 available at <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list#Forms>> at 30 September 2010.

<sup>1265</sup> *Powers of Attorney Act 1998* (Qld) s 41(1) (Principal's capacity to make an enduring power of attorney) n 41.

<sup>1266</sup> Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (June 2005) <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list#Guidelines>> at 30 September 2010.

<sup>1267</sup> Queensland Law Society, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney*.

<sup>1268</sup> Department of Justice and Attorney-General, *The Duties of Justices of the Peace (Qualified)* (4th ed, April 2007) 43–4. See also Department of Justice and Attorney-General, *The Administrative Duties of Commissioners for Declarations*. See also Department of Justice and Attorney-General, 'Witnessing Enduring Powers of Attorney (EPA) and Advance Health Directive (AHD) documents' *Technical Bulletin* (June 2009) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0020/8336/bulletin-witnessing-epa-and-ahd-documents.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/8336/bulletin-witnessing-epa-and-ahd-documents.pdf)> at 30 September 2010. The importance of guidelines for witnesses is noted in the Draft Advance Care Directives Framework 2010: Clinical, Technical and Ethical Principal Committee, Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives: Consultation Draft 2010* (2010) 33.

To ensure there is no undue influence or pressure from anyone, including those accompanying the principal, the assessment of the principal's capacity is best done in private.

Anyone over 18 years of age may make an [enduring power of attorney] at any time provided that they have the capacity to understand the contents and the effect of the document. If you have any doubts about the principal's decision-making capacity, you should refuse to witness the document.

...

To check [the principal's] understanding, you may need to question the principal closely. If you do so, keep a detailed record of the questions and answers in case the [enduring power of attorney] is ever disputed. As this could occur many years later, it is essential that you keep accurate records to refresh your memory.

8.29 Similar guidelines are provided in the justice of the peace and commissioner for declarations handbooks for advance health directives.

### Disputes about capacity and validity

8.30 Under the *Powers of Attorney Act 1998* (Qld), the Supreme Court and the Tribunal have power to make a declaration about a person's capacity.<sup>1269</sup>

8.31 The Supreme Court and the Tribunal also have power to declare that an enduring document is invalid.<sup>1270</sup> One of the grounds for declaring an enduring document invalid is that the principal 'did not have the capacity necessary to make it'.<sup>1271</sup> If an enduring document is declared invalid, it is taken to be void from the start<sup>1272</sup> and the Court or Tribunal may itself appoint an attorney or attorneys for the principal.<sup>1273</sup>

8.32 In making its decision, the Court or Tribunal may have regard to written reports by the Adult Guardian or the Public Trustee on a matter in the proceeding.<sup>1274</sup> It may also make its decision on the information it has before it without receiving all relevant material if urgent or special circumstances justify it or if all the participants agree.<sup>1275</sup>

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1269 *Powers of Attorney Act 1998* (Qld) ss 109A, 111.

1270 *Powers of Attorney Act 1998* (Qld) ss 109A, 113.

1271 *Powers of Attorney Act 1998* (Qld) s 113(1), (2)(a). The other grounds on which an enduring document can be found invalid are that it does not comply with the other requirements of the Act (such as other formal requirements); or that it is invalid for another reason, for example, the principal was induced to make it by dishonest or undue influence: *Powers of Attorney Act 1998* (Qld) s 113(2)(b), (c).

1272 *Powers of Attorney Act 1998* (Qld) s 114.

1273 *Powers of Attorney Act 1998* (Qld) s 113(3).

1274 *Powers of Attorney Act 1998* (Qld) s 121.

1275 *Powers of Attorney Act 1998* (Qld) s 120.

## THE POSITION IN OTHER JURISDICTIONS

8.33 In each of the other Australian jurisdictions, a person may appoint an attorney under an enduring power of attorney to exercise power in relation to the person's financial matters<sup>1276</sup> and, in some jurisdictions, for certain personal or health care matters<sup>1277</sup> if he or she subsequently loses decision-making capacity.

8.34 In addition, the legislation in New South Wales, South Australia, Tasmania, Victoria and Western Australia 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 in the future.<sup>1278</sup> This is similar to the provision in Queensland allowing an attorney to be appointed under an enduring document for health matters.

8.35 A person may execute such an enduring document only if he or she has the mental capacity to understand the nature or effect of the document.<sup>1279</sup> This is a principle of Australia's common law. In the ACT, Tasmania and Victoria, the relevant legislation mirrors the common law principle by providing that a person may make an enduring power of attorney only if he or she 'understands the nature and effect' of the document.<sup>1280</sup> In Western Australia, the legislation provides that a person may create an enduring power of attorney if he or she 'has reached 18 years of age and has full legal capacity'.<sup>1281</sup>

8.36 In addition, in the ACT, New South Wales, South Australia, Tasmania, Victoria and Western Australia, it is a condition for the effectiveness of an enduring document that it is signed by one or two witnesses who certify that the person making the enduring power of attorney appeared to the witness to understand the nature and/or effect of the document.<sup>1282</sup> The legislation in Victoria also includes a

1276 *Powers of Attorney Act 2006* (ACT) s 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.

1277 *Powers of Attorney Act 2006* (ACT) s 13(2); *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).

1278 *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; *Guardianship and Administration Act 1990* (WA) s 110B.

1279 *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ). See also eg *Dalle-Molle (by his next friend Public Trustee) v Manos* (2004) SASR 193, [16] (Debelle J).

1280 *Powers of Attorney Act 2006* (ACT) s 13(1) n 2; *Powers of Attorney Act 2000* (Tas) s 30(2)(a); *Instruments Act 1958* (Vic) s 118(1). A similar requirement to understand the nature and effect of the document or to be of sound mind applies in relation to the making of a 'living will' giving directions about the withdrawal or withholding of life-sustaining measures: see *Medical Treatment (Health Directions) Act 2006* (ACT) s 7(3)(b); *Natural Death Act* (NT) s 4(1); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7(1); *Medical Treatment Act 1988* (Vic) s 5(1).

1281 *Guardianship and Administration Act 1990* (WA) s 104(1a).

1282 *Powers of Attorney Act 2006* (ACT) s 22(1)(b), (2)(d); *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(i), (ii); *Guardianship Act 1987* (NSW) s 6C(1)(d), (e); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(2); *Consent to Medical Treatment and Palliative Care Regulations 2004* (SA) reg 4 sch 1; *Guardianship and Administration Act 1993* (SA) s 25(2)(c), sch; *Guardianship and Administration Act 1995* (Tas) s 32(2)(a), (c), sch 3 form 1; *Instruments Act 1958* (Vic) ss 123(3), (4), 125A(1)(b), 125A(2)(d); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c), sch 4 form 1; *Guardianship and Administration Act 1990* (WA) ss 104(2), 110E(1)(c), 110Q(1)(c).

note to the effect that '[i]t is advisable for the witness to make a written record of the evidence' by which he or she considers that the principal has the required understanding.<sup>1283</sup>

8.37 The legislation in the ACT, Tasmania and Victoria dealing with enduring powers of attorney also specifies certain criteria by which a person is taken to have the required level of understanding.<sup>1284</sup> These criteria are the same as those used in the Queensland legislation. For example, section 30(3) of the *Powers of Attorney Act 2000* (Tas) provides:

**30 Creation and effect of enduring powers of attorney**

...

- (3) For the purposes of subsection (2)(a), a donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:
- (a) that the donor may, in the enduring power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
  - (b) when the power begins;
  - (c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
  - (d) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;
  - (e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity;
  - (f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.

8.38 In addition, the ACT legislation states that, in the absence of evidence to the contrary, a person making an enduring power of attorney is presumed to have the required level of understanding.<sup>1285</sup> The Queensland legislation also includes a presumption of capacity.<sup>1286</sup>

<sup>1283</sup> *Instruments Act 1958* (Vic) s 118, n.

<sup>1284</sup> *Powers of Attorney Act 2006* (ACT) s 17; *Powers of Attorney Act 2000* (Tas) s 30(3); *Instruments Act 1958* (Vic) s 118(2).

<sup>1285</sup> *Powers of Attorney Act 2006* (ACT) s 18.

<sup>1286</sup> *Powers of Attorney Act 1998* (Qld) sch 1 s 1.

## SELECTED ISSUES FOR CONSIDERATION

8.39 Enduring documents are intended to afford people a simple, inexpensive way to plan for their future.<sup>1287</sup> However, because such documents pass decision-making power to third parties, there is an obvious potential for such mechanisms to be abused.<sup>1288</sup> The current measures in the Queensland guardianship legislation to address such abuse include safeguards in relation to the execution of enduring documents which are aimed at ensuring that principals understand the nature and effect of the document they are executing.<sup>1289</sup> One of these measures is not merely a requirement that the principal have capacity, but a requirement for the principal to actually have achieved a particular level of understanding. A related measure is the requirement for a witness to attest that the principal appeared to have the necessary understanding. However, these measures may be of limited effect unless the witness clearly understands his or her role in testing the principal's understanding.<sup>1290</sup>

8.40 The inclusion of these matters in the *Powers of Attorney Act 1998* (Qld) raises a number of issues for consideration — some relate to the test of capacity for making an enduring document; others relate to the witnessing requirements:

- what level of understanding should be required to appoint an attorney;
- what relationship the test should have to the definitions of 'impaired capacity' and 'capacity';
- who should witness the document and attest to the principal's capacity; and
- what steps the witness should take.

1287 Eg 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.

1288 Ibid 85. See also eg the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686 (Denver Beanland, Attorney-General and Minister for Justice); Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.50]–[3.51]. Queensland research has also indicated that elderly people with enduring powers of attorney are no more protected from financial abuse than elderly people without enduring powers of attorney: 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. As part of a wider research program, the authors analysed a sample of cases in which administration orders were made by the Queensland Guardianship and Administration Tribunal, and found that it was more likely that an enduring power of attorney was in place where suspected financial abuse had occurred, particularly where close family members acted as attorneys: 28.

1289 These safeguards are specific to the execution of enduring documents. The guardianship legislation also contains measures designed to address the misuse of an enduring document after its execution. See eg *Powers of Attorney Act 1998* (Qld) ss 60, 66, 73, 116; *Guardianship and Administration Act 2000* (Qld) ss 180, 195.

1290 Queensland research indicates that enduring documents are sometimes executed by principals who do not have capacity: B White and L Willmott, 'Solicitors and enduring documents: Current practice and best practice' (2008) 16 *Journal of Law and Medicine* 466, 473. Over a 12 month period, the authors examined 34 matters reviewed by the Tribunal where doubt had been raised about the capacity of the principal at the time he or she completed an enduring document. In the majority of the matters examined, the enduring powers of attorney were held to be invalid on the basis of incapacity of the principal: [473].

## THE LEVEL OF UNDERSTANDING REQUIRED TO APPOINT AN ATTORNEY

8.41 Section 41 of the *Powers of Attorney Act 1998* (Qld) sets out the test of capacity for making an enduring power of attorney.<sup>1291</sup> Section 41(1) provides that a principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney. Section 41(2) sets out an inclusive list of specific matters which the principal must understand when making an enduring power of attorney. Section 42(1) also sets out a list of specific matters which the principal must understand to make an advance health directive.<sup>1292</sup> The particular matters listed in section 41(2) and 42(1) describe the salient features of these enduring documents. Section 41(2) requires, for example, that the principal must understand that, once the power for an attorney begins, the attorney will have full control over the matter, subject to the terms of the power.<sup>1293</sup>

8.42 The test of capacity to make an enduring document for the appointment of an attorney requires a balance:<sup>1294</sup>

While there is an obvious need to protect the donor from unscrupulous exploitation, much of the potential advantage of an enduring power could be eroded if too high a standard of capacity were to be imposed for its valid execution.

8.43 A test that is too high may reduce the availability of enduring documents as a self-help expedient, especially to people who experience partial or fluctuating mental incapacity.<sup>1295</sup> It may be especially important, for example, to allow a person whose mental capacity is only beginning to deteriorate, or who experiences fluctuating capacity, to take advantage of the opportunity to make advance appointments before his or her mental capacity further declines.<sup>1296</sup> This approach would accord respect for individual autonomy and be consistent with a functional or issue-specific model of capacity. It would also accord with article 12 of the United Nations Convention which provides that appropriate measures should be taken 'to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.<sup>1297</sup>

1291 *Powers of Attorney Act 1998* (Qld) s 41 is set out at [8.13] above.

1292 *Powers of Attorney Act 1998* (Qld) s 42 is set out at [8.16] above.

1293 At common law, see *Re K* [1988] 1 Ch 310, 316 (Hoffmann J). See n 1244 above.

1294 P Cooper, 'Enduring Powers of Attorney' (1991) *The Queensland Lawyer* 144, 148. See also 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, 96.

1295 Eg South Australia Government, *Planning Ahead: Your Health, Your Money, Your Life*, Issues Paper (2007) 9. Also see FMB Reynolds, *Bowstead and Reynolds on Agency* (17th ed, 2001) [10-009].

1296 Eg R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 94; M Brown and S Jarrad, 'Putting "the powers" in place: Barriers for people with memory loss in planning for the future' (2008) 15 *Journal of Law and Medicine* 530, 530.

1297 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(3). It would also accord with the recognition of older persons' rights of autonomy and dignity as evident in the United Nations, *Principles for Older Persons*, GA Res 46/91, 16 December 1991.

8.44 On the other hand, a test that is too low may allow a principal to be pressured or lulled into executing an enduring document when he or she does not really understand the significance of doing so. The importance of ensuring that measures relating to the exercise of legal capacity are ‘free of conflict of interest and undue influence’ is recognised in article 12 of the Convention.<sup>1298</sup>

8.45 A lower threshold may also lead to more complexity in assessments of a person’s level of understanding if he or she experiences periods of partial or fluctuating mental incapacity.<sup>1299</sup>

8.46 Apart from the test of capacity, there are other measures in the *Powers of Attorney Act 1998* (Qld) to help ensure that a person does not inappropriately take advantage of an enduring document which the principal was pressured or lulled into making. One such safeguard is the requirement for enduring documents to be witnessed (and in the case of an advanced health directive, for a doctor to certify as to the principal’s capacity). Dishonest inducement or undue influence is also a ground for finding an enduring document invalid.<sup>1300</sup> Another measure is the offence of dishonestly inducing a person to make an enduring document.<sup>1301</sup> However, the effectiveness of these measures may depend on a number of factors, including whether the witness (or the doctor) takes sufficient steps to establish the principal’s capacity.<sup>1302</sup>

8.47 A question that arises is whether the matters currently listed in the legislation are appropriate and, in particular:

- what matters the *Powers of Attorney Act 1998* (Qld) should require the principal to understand when making an enduring document; and
- whether any list of matters that must be understood should be expressed as an inclusive or an exhaustive list.

<sup>1298</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12(4).

<sup>1299</sup> Eg B White and L Willmott, ‘Solicitors and enduring documents: Current practice and best practice’ (2008) 16 *Journal of Law and Medicine* 466, 486; Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.78].

<sup>1300</sup> *Powers of Attorney Act 1998* (Qld) s 113(2)(c).

<sup>1301</sup> *Powers of Attorney Act 1998* (Qld) s 61.

<sup>1302</sup> See eg 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. Despite these measures, Queensland research indicates that enduring documents are sometimes executed by principals who do not have capacity: B White and L Willmott, ‘Solicitors and enduring documents: Current practice and best practice’ (2008) 16 *Journal of Law and Medicine* 466, 473. Over a 12 month period, the authors examined 34 matters reviewed by the Tribunal where doubt had been raised about the capacity of the principal at the time he or she completed an enduring document. In the majority of the matters examined, the EPAs were held to be invalid on the basis of incapacity of the principal: [473].

### What matters the principal must understand to make an enduring document

8.48 In *Gibbons v Wright*,<sup>1303</sup> the High Court of Australia set out the common law test of mental capacity necessary to execute a document or enter into a transaction:<sup>1304</sup>

The mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of the transaction when it is explained.

8.49 The standard of capacity required under this test is not static but 'requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation'.<sup>1305</sup>

8.50 The Court also observed that, sometimes, the standard of capacity required will extend beyond a broad understanding of the instrument and require understanding of the wider transaction given effect to by the instrument:<sup>1306</sup>

Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of the wider transaction which the instrument is a means of carrying out.

8.51 As the law in this area has developed, it seems that it is the understanding of the wider transaction that is critical to the mental capacity required to make a valid enduring power of attorney.<sup>1307</sup>

8.52 In the context of section 41(1) of the *Powers of Attorney Act 1998* (Qld), 'understanding' the nature and effect of an enduring power of attorney includes an understanding of the matters listed in section 41(2). Because section 41(2) is an inclusive provision, the matters that must be understood by the principal may extend beyond the statutory list.

8.53 Since the decision in *Gibbons v Wright*, two differing approaches have been taken as to the level of mental capacity needed to execute an enduring power of attorney.

8.54 At present in Queensland, and in some other Australian jurisdictions, the statutory test of capacity to execute an enduring document for the appointment of

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1303 (1954) 91 CLR 423.

1304 Ibid 437–8 (Dixon CJ, Kitto and Taylor JJ).

1305 Ibid.

1306 Ibid 439.

1307 B Collier, C Coyne and K Sullivan (eds), *Mental capacity: powers of attorney and advance health directives* (2005) 42.

an attorney reflects the common law test in the English decision of *Re K*<sup>1308</sup> — that is, the principal must understand the nature and effect of executing the instrument but need not understand the details of the decisions that might be made under the instrument. To satisfy this common law test, it is sufficient if the principal understands that:<sup>1309</sup>

- the attorney will have full control over the principal's affairs;
- the attorney will be able to do anything with the principal's property that the principal could have done;
- the attorney's authority will continue after the principal has lost the capacity to make his or her own decisions; and
- if he or she does lose the capacity to make his or her own decisions, the principal will not be able to revoke the attorney's power.

8.55 This test means that a person who experiences partial or fluctuating mental incapacity may nevertheless be able to validly execute an enduring document. It recognises that mental capacity is not always lost totally or suddenly.<sup>1310</sup> In *Re K*, Hoffman J explained that:<sup>1311</sup>

there is no logical reason why, though unable to exercise her powers, she could not confer them upon someone else by an appropriate juristic act. The validity of that act depends on whether she understood its nature and effect and not on whether she would hypothetically have been able to perform all the acts which it authorised.

...

In practice it is likely that many enduring powers will be executed when symptoms of mental incapacity have begun to manifest themselves. These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs.

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[1988] 1 Ch 310, 315–16 (Hoffmann J). Also eg *Re W* [2001] Ch 609, [20] (Sir Christopher Staughton); *Re 'Tony'* [1990] 5 NZFLR 609, [38]–[40], [44] (Judge Inglis); and *Re EW* (1993) 11 FRNZ 118, 120 (Judge MD Robinson). In *Re 'Tony'* [1990] 5 NZFLR 609, [39]–[40], [44], Judge Inglis held:

When [the principal] executed the enduring power of attorney what he was doing was recognising that the management of his property affairs ought to be in the hands of someone who was capable of managing them for him. He was not managing his property affairs: he was delegating their management.

...

all that was required of 'Tony' when he executed his enduring power of attorney was capacity to understand the broad essentials of an enduring power of attorney, including the understanding that he was placing his property in safe hands.

See also R Creyke, 'Privatising Guardianship — The EPA Alternative' (1993) 15 *Adelaide Law Review* 79, 94. However, the Tribunal has given s 41(2) a wider construction: see [8.61] below.

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*Re K* [1988] 1 Ch 310, 316 (Hoffmann J). These factors are reflected in s 41(2)(c)–(e) of the *Powers of Attorney Act 1998* (Qld).

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This is also recognised, for example, in the context of a person's capacity to execute a will: *Banks v Goodfellow* (1870) 5 LR QB 549, 560, 566; *Jenkins v Morris* (1880) 14 Ch D 674, 680 (Hall VC).

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[1988] 1 Ch 310, 315.

But ... she may execute the power with full understanding and with the intention of taking advantage of the Act to have her affairs managed by an attorney of her choice rather than having them put in the hands of the Court of Protection.

8.56 In *Ranclaud v Cabban*,<sup>1312</sup> the Supreme Court of New South Wales applied a different test of capacity. In that case, Young J suggested in dicta that the principal must be able to understand not just the nature of the power in general terms but to understand 'what sort of things the attorney could do without further reference to [the principal]'.<sup>1313</sup> This has been interpreted as a 'more stringent', and 'unrealistic', test requiring the principal to understand all the activities the attorney might undertake.<sup>1314</sup> However, on another view, the requirement that the principal must be able to understand the sort of things the attorney could do without further reference to him or her, may not add significantly to the requirement under section 41(2)(c) that the principal must understand that, once the power for a matter begins, the attorney has power to make decisions about, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney.

8.57 The Victorian Supreme Court in *Ghosn v Principle Focus Pty Ltd (No 2)*<sup>1315</sup> has recently applied the test in *Ranclaud v Cabban*. *Ghosn v Principle Focus Pty Ltd (No 2)* concerned enduring powers of attorney which were executed by an elderly adult in the attorney's favour while the adult was confined to hospital in Lebanon.<sup>1316</sup> The attorney subsequently transferred the principal's company shares into his own name and sold the principal's trust properties. The attorney sought a declaration as to the validity of the powers of attorney under Victorian law and the delivery up of documents from the principal's former solicitors and accountants.

1312 (1988) NSW ConvR ¶55-385, 57 548. In *Ranclaud v Cabban*, the Court was considering the donor's capacity to make a general power of attorney. The documents in question were made over three years after amendments to the *Conveyancing Act 1919* (NSW), which enabled a donor to provide for the power's continuation after the donor's loss of capacity through unsoundness of mind. The editors of *Mental Capacity: Powers of Attorney and Advance Health Directives* suggest that, while the judgment in *Ranclaud v Cabban* does not refer to this fact directly, the document in question would seem to have contained such a provision. This was because the evidence established that by the time the application was brought, Mrs Ranclaud had lost capacity. Consequently, without such an enduring clause the document would have been revoked by operation of law: B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers Of Attorney And Advance Health Directives* (2005) 43, n 65.

1313 Ibid 57 548.

1314 Eg R Munday, 'The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight?' (1989) 13 *New Zealand Universities Law Review* 253, 258–60; Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report, Enduring Powers of Attorney*, Report No 47 (1988) [17]; R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 2 *Western Australia Law Review* 122, 131. See also the first instance decision cited in *Re K* [1988] 1 Ch 310, 315 (Hoffmann J). However, the Victorian Law Reform Commission did not consider there to be a significant difference between the two tests: Law Reform Commission of Victoria, *Enduring Powers of Attorney*, Discussion Paper No 18 (1990) [7].

1315 [2008] VSC 574, [78].

1316 Ibid [101], in which the powers of attorney executed in favour of the applicant nephew were described as 'enduring powers'.

8.58 The Court initially discussed the test of mental capacity set out in *Gibbons v Wright*.<sup>1317</sup>

In *Gibbons v Wright*, Dixon CJ, Kitto and Taylor JJ said as follows:

that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained ... Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out.

*Gibbons* stands for the proposition [Counsel for the principal and attorney] argued, that the Court need only be satisfied that Mr Moussi at the time of execution of each of the relevant Powers of Attorney had an understanding of the general purport of the relevant Power of Attorney and no more. However, the qualification contained in the closing words means that the rule is not without exceptions.

8.59 The Court observed that different approaches as to the level of mental capacity required to execute an enduring power of attorney have been taken in *Re K* and *Ranclaud v Cabban*. It also noted with approval the proposition made by Collier, Coyne and Sullivan, in *Mental Capacity: Powers Of Attorney And Advance Health Directives*, that the application of the test in *Ranclaud v Cabban* requires specific considerations to be taken into account when determining whether the donor could understand the sorts of things the attorney could do without reference to the principal.<sup>1318</sup>

It has been suggested that if the *Ranclaud v Cabban* test is to be applied, it necessitates the following considerations:

- the nature and extent of the assets to be managed (at least in a broad sense);
- the decisions likely to be made on the donor's behalf; and
- the ability of the attorney to carry out the tasks involved.<sup>1319</sup> (note added, note omitted)

8.60 The Court held that the common law test of capacity to execute an enduring power of attorney included specific understanding of actions potentially

<sup>1317</sup> Ibid [69]–[70].

<sup>1318</sup> B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers Of Attorney And Advance Health Directives* (2005) 44.

<sup>1319</sup> The Court's reference in *Ghosn v Principle Focus Pty Ltd (No 2)* [2008] VSC 574, [70] to 'the ability of the attorney to carry out the tasks involved' was made in the context of the scope of the attorney's powers (that is, the attorney's ability to transfer the principal's property) rather than the financial acumen of the attorney.

entered into by the attorney in addition to an understanding of the general effect of an enduring power of attorney:<sup>1320</sup>

In my view, the *Ranclaud* test should be accepted. It is consistent with *Re K* in requiring more than just an appreciation of the purport of a Power of Attorney and is not inconsistent with what was said in *Gibbons* particularly in the light of the reference to *In the Estate of Park*.<sup>1321</sup> Each instrument and its execution is to be examined in accordance with the accompanying circumstances. Indeed, the facts of this case demonstrate amply why the *Ranclaud* test should be applied in relation to complex matters. The two properties which have been sold are the property of two trustee companies which owe fiduciary obligations to the beneficiaries. As Mr Moussi was the sole director of the companies, he in a practical sense was the trustee. Application of the *Ranclaud* test means, I think, that it must be proved that Mr Moussi knew that when he executed the Powers of Attorney, he was giving Mr Abi Ghosn control over trust properties in a real, if not legal, sense. He did not, in my view, need to understand all the intricate parts of the transactions that Mr Abi Ghosn was about to enter into. But given that there were significant assets, it was necessary that he understood at the time of the execution of the Powers of Attorney that Mr Abi Ghosn would have the ability to transfer the shareholdings and the directorship of the trust companies to others (including himself) and to effect the sale of the properties which were the subject of the trust deed at a price determined by Mr Abi Ghosn. (note added)

8.61 The Tribunal in Queensland has also referred with approval to *Ranclaud v Cabban*<sup>1322</sup> in the recent decisions of *Re HAA*,<sup>1323</sup> *Re FAA*,<sup>1324</sup> *Re GAE*,<sup>1325</sup> *Re DEM*,<sup>1326</sup> and *Re LAD*<sup>1327</sup> (which considered a principal's capacity to make an enduring power of attorney under the *Powers of Attorney Act 1998* (Qld)). In *Re HAA* and *Re FAA*, the Tribunal held that section 41(2) incorporated other matters, in addition to those specified in the statutory list, that the principal must be able to understand when making an enduring power of attorney.<sup>1328</sup> For example, in *Re FAA*, the Tribunal stated that:<sup>1329</sup>

1320 *Ghosn v Principle Focus Pty Ltd (No 2)* [2008] VSC 574, [77]–[78].

1321 In *Gibbons v Wright*, the High Court referred to the following comment by Hodson LJ in *In the Estate of Park*:

One cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case.

1322 (1988) NSW ConvR ¶55-385, 57 548 (Young J).

1323 [2007] QGAAT 6.

1324 [2008] QGAAT 3.

1325 [2009] QGAAT 47, [20].

1326 [2005] QGAAT 59, [121].

1327 [2009] QGAAT 77, [54].

1328 *Re HAA* [2007] QGAAT 6, [16]; *Re FAA* [2008] QGAAT 3, [43]. See also *Re LCG* [2003] QGAAT 15, [92] in which the Tribunal considered 'that one of the important elements in relation to executing an [enduring power of attorney] is an understanding by the adult of the extent of the assets to which the [enduring power of attorney] relates'.

1329 [2008] QGAAT 3, [43].

An Enduring Power of Attorney is essentially an appointment of an agent with the special character that it does not lapse on the loss of capacity of the principal. To make a valid appointment, the person must be able to understand the statutory requirements of section 41(2) of the *Powers of Attorney Act 1998* which also include the elements involved, at common law, in the appointment of an agent such as —

- (i) The nature and extent of the assets to be managed
- (ii) The decisions likely to be made on the principal's behalf
- (iii) The ability of the attorney to carry out the tasks involved.

(*Ranclaud v Cabban* (1988) NSW Conv R 55-383)

8.62 The additional matters referred to in *Re HAA* and *Re FAA* are the same as those referred to by the Court in *Ghosn v Principle Focus Pty Ltd (No 2)*.

8.63 A question for consideration is whether the matters currently listed in section 41 and 42 of the *Powers of Attorney Act 1998* (Qld) are appropriate, or whether should they be changed or clarified in any way. In particular, the application of the test in *Ranclaud v Cabban* raises the question of whether there any other matters, in addition to those listed in section 41(2) of the *Powers of Attorney Act 1998* (Qld), that the principal should be required to understand when making an enduring document for the appointment of an attorney.

### An inclusive or exhaustive list

8.64 As mentioned above, section 41(2) of the *Powers of Attorney Act 1998* (Qld) provides that the factors the principal must understand when appointing an attorney under an enduring document include those matters in the list. The legislation leaves it open, therefore, to require the principal to understand other things that are not included in the list. This is similar to the legislation in the ACT and Victoria.<sup>1330</sup> In contrast, the list of matters in section 42(1) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand when giving directions under an advance health directive is not introduced by the word 'includes'.

8.65 While an exhaustive, or closed, list may provide greater certainty for persons wishing to make an enduring document, those advising them and witnesses who must certify that the principal has the required level of understanding, an inclusive list of matters provides for a more flexible test of capacity. For example, there might be matters which cannot be foreseen in advance that should form part of the test in a particular case. It is noted that the common law test recognises that the requisite mental capacity to enter a transaction is relative to the nature of the transaction.<sup>1331</sup>

<sup>1330</sup> *Powers of Attorney Act 2006* (ACT) s 17; *Instruments Act 1958* (Vic) s 118(2).

<sup>1331</sup> *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ). Also see eg *Crago v McIntyre* [1976] 1 NSWLR 729, 749–50 (Holland J) in which it was held that a higher test of mental capacity was required for the execution of a *general* power of attorney containing special terms which had been executed in aid of a deed of settlement for the transfer of assets that was executed at the same time.

## Discussion Paper

8.66 In the Discussion Paper, the Commission sought submissions on whether the matters currently listed in sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) are appropriate, or should be changed or clarified in any way.<sup>1332</sup>

8.67 The Commission also sought submissions on whether there any other matters, in addition to those listed in section 41(2) of the *Powers of Attorney Act 1998* (Qld), that the principal should be required to understand when making an enduring document for the appointment of an attorney, including any of the following matters:<sup>1333</sup>

- the nature and extent of the assets to be managed (where power is conferred for financial matters);
- the decisions likely to be made on the principal's behalf and, if so, whether the principal should be required to understand the decisions to the extent that the principal would be able to make those decisions himself or herself at the time of executing the document;
- the ability of the attorney to carry out the tasks involved; or
- any other matter.

8.68 Further, the Commission sought submissions on whether:<sup>1334</sup>

- the principal should be required to understand those additional matters in each case, or only to the extent the enduring document contains specific instructions for the exercise of an attorney's power;
- those additional matters should be specifically included in the legislation.

8.69 Alternatively, the Commission sought submissions on whether any of those matters should be specifically excluded from the legislation.<sup>1335</sup>

8.70 The Commission also sought submissions on whether the lists of factors that the principal must understand in sections 41(2) (for the appointment of attorneys) and 42(1) (for giving directions in an advance health directive) of the *Powers of Attorney Act 1998* (Qld) should be inclusive or exhaustive.<sup>1336</sup>

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<sup>1332</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 154.

<sup>1333</sup> Ibid.

<sup>1334</sup> Ibid.

<sup>1335</sup> Ibid.

<sup>1336</sup> Ibid 155.

## Submissions

### *Are the matters listed in sections 41 and 42 appropriate?*

8.71 Most submissions that addressed this issue generally considered that the matters currently listed in sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) are appropriate.<sup>1337</sup>

8.72 However, one respondent, who is a lawyer, suggested that the mental capacity required to make an enduring power of attorney should be similar to that required for ordinary powers.<sup>1338</sup> He also considered that, for a power of attorney to be valid at common law the donor must be able to understand, at the time the power is created, the general nature of the acts or transactions which the power purports to authorise. This respondent also suggested that *Re K* does not reflect the traditional common law test and that the statutory test of capacity in section 41 of the *Powers of Attorney Act 1998* (Qld) should be clarified accordingly and, to reflect the flexibility in the common law test, should be non-exhaustive. In addition, the respondent proposed that the Act should adopt a provision similar to section 17 of the *Powers of Attorney Act 2003* (NSW), which provides that a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given.<sup>1339</sup>

### *Additional matters for inclusion in section 41*

8.73 A number of submissions supported the inclusion in section 41(2) of the following additional matters that the principal should be required to understand when making an enduring power of attorney:

- the nature and extent of the assets to be managed (where power is conferred for financial matters);<sup>1340</sup>

<sup>1337</sup> Submissions 5, 13, 14, 15, 73, 91.

<sup>1338</sup> Submission 57.

<sup>1339</sup> Section 17 of the *Powers of Attorney Act 2003* (NSW) provides:

**17 Initial mental incapacity**

(1) Subject to this Act, a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given.

(2) However, a power of attorney does not authorise an attorney to do any such act unless it is authorised by or under this Act.

Note. Division 3 of Part 5 contains provisions that enable the Supreme Court to confirm the operation of a power of attorney despite the mental incapacity of the principal at the time the power is given.

<sup>1340</sup> Submissions 5, 19, 13, 14, 15, 55, 179. Submission 55 commented that it should only be necessary for the principal to have a general understanding of the nature and extent of the assets to be managed.

- the decisions likely to be made on the principal's behalf;<sup>1341</sup> and
- the ability of the attorney to carry out the tasks involved.<sup>1342</sup>

8.74 The Public Trustee also commented that the criticism that these particular requirements are too stringent or are unrealistic is misplaced:<sup>1343</sup>

The 'nature and effect' of an Enduring Power of Attorney in respect to financial matters must vary contingent upon the nature and extent of the assets which might be managed by the attorney and the decisions as a consequence that will need to be made.

The type of approach propounded by the Tribunal in Queensland and by the English Courts do not call for a capacity on behalf of the adult executing the attorney to make the decisions themselves or even an appropriate decision in an objective sense, rather [they] call for an appreciation of the types of decisions which will need to be made which of themselves bear upon the nature and extent of the assets to be managed.

This type of approach is consistent by analogy with the type of test required for a person to make a will — broadly requiring a person to understand the nature and effect of a will and the nature and extent of the estate. Courts have consistently applied that type of test in the context of holding that by understanding these matters (and also the persons who might have a claim on the estate) as constituting a requirement to understand the nature and effect of a will.

8.75 Disability Services Queensland (now part of the Department of Communities) suggested that, in order to ensure that the principal is fully aware of all the effects and consequences of making an enduring document, section 41 should include the following additional matters:<sup>1344</sup>

They have capacity (as defined under the *Powers of Attorney Act 1998* [PAA]) to make the enduring document;

They can appoint 1 or more attorneys and that the attorneys' power can be prioritised or restricted (for example, jointly, severally or in a particular hierarchy);

They still have power to exercise control over their affairs (notwithstanding the making of an enduring document);

When and how an enduring documents ends (apart from revocation);

Particularise the type of matters an attorney can be given power over and that the principal understands the nature of those matters.

<sup>1341</sup> Submissions 5, 9, 13, 14, 15, 55, 179. Submission 5 considered that it should only be necessary for the principal to have a general understanding of the decisions to be made.

<sup>1342</sup> Submissions 5, 9, 13, 14, 15, 179.

<sup>1343</sup> Submission 90.

<sup>1344</sup> Submission 93.

8.76 Another respondent suggested that the principal should be required to have knowledge of who the attorney is and to understand: why the attorney has been chosen over other possible attorneys; whether, and what, the principal is gifting the attorney; the benefits and problems associated with appointing more than one attorney; and the attorney's role.<sup>1345</sup>

### The Commission's view

8.77 Section 41(1) of the *Powers of Attorney Act 1998* (Qld) provides that a principal may make an enduring power of attorney only if the principal 'understands the nature and effect of the enduring power of attorney'.

8.78 In the context of the level of 'understanding' required to satisfy section 41(1), section 41(2) specifically refers to particular matters which the principal is required to understand when making the document. These particular matters reflect the test in *Re K*. This approach enables a person whose mental capacity is only beginning to deteriorate, or who experiences fluctuating capacity, to make an enduring power of attorney before his or her mental capacity further declines.

8.79 However, the word 'includes' in section 41(2) means that the list of matters in that subsection that the principal is required to understand when making an enduring power of attorney is not intended to be exhaustive. The wording of this subsection leaves open the possibility that other matters, in addition to those in the statutory list, may also be relevant to the assessment of a principal's capacity in a particular case. This interpretation is consistent with the application of the test in *Ranclaud v Cabban*, which requires that the principal understands not only that he or she is authorising the attorney to look after his or her affairs but also what sorts of things the attorney can do without further reference to him or her. For example, in *Re HAA* and *Re FAA*, the Tribunal referred to three specific considerations relevant to the level of understanding required to satisfy the statutory test in section 41(2) (that is, the nature and extent of the assets to be managed; the decisions which are likely to be made on the principal's behalf; and the scope of the attorney's power). These are all types of matters which may be relevant to the principal's understanding of the nature and effect of the enduring power of attorney. As observed by the Victorian Supreme Court in *Ghosn v Principle Focus Pty Ltd (No 2)*, these matters may be particularly relevant where the adult has significant or complex financial and property affairs.

8.80 The Commission considers that the matters currently listed in section 41(2) of the *Powers of Attorney Act 1998* (Qld) are appropriate and need not be amended. As mentioned above, the matters listed in that subsection prescribe the minimum level of understanding required to execute an enduring power of attorney, and are consistent with the test in *Re K*. However, the inclusive wording of section 41(2) allows other matters, in addition to those listed in section 41(2), to be taken into account when appropriate. This approach enables the question of the principal's capacity to be determined in the context of the principal's particular circumstances. The maintenance of a flexible approach in the statutory test of

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Submission 81.

capacity is essential in balancing the need for an accessible mechanism for advance planning and the need for safeguards against abuse.

8.81 The Commission is also of the view that the particular matters currently listed in section 42(1) of the *Powers of Attorney Act 1998* (Qld) (for the capacity to make an advance health directive) are appropriate and do not require any amendment. The matters concern the nature and likely effect of each direction, when the direction will operate and what will be the consequences if the principal loses capacity.

8.82 For the reasons explained above, the Commission considers that the list of factors in sections 41(2) of the *Powers of Attorney Act 1998* (Qld) should continue to be inclusive. For reasons of flexibility, and to ensure a consistent approach between sections 41(2) and 42(1) of the Act, the Commission considers that section 42(1) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide, amongst other things, that a principal has the capacity necessary to make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the nature and effect of the advance health directive. Section 42(1) should also be amended so that the current list of matters that a principal must understand in order to make an advance health directive is inclusive rather than exhaustive. This flexibility is important because there may be matters which cannot be foreseen in advance that are relevant to a determination of such capacity.

## RELATIONSHIP TO THE DEFINITIONS OF ‘IMPAIRED CAPACITY’ AND ‘CAPACITY’

8.83 The guardianship legislation deals with substitute decision-making in two main ways. One is to provide a scheme for adults to make their own arrangements for decision-making by executing an enduring document. The other is to provide for the Tribunal to appoint a substitute decision-maker for an adult who is found to have impaired decision-making capacity for the relevant matter.<sup>1346</sup>

8.84 These two approaches start from different bases:<sup>1347</sup>

A prerequisite to setting up an [enduring power of attorney] arrangement is that the principal is competent. Criteria, therefore, are to test competence, not incompetence. The reverse is generally the case in guardianship where the absence of, or decline in, mental faculties is the trigger for formal hearings. The statutory test is, therefore, to determine whether the person is incapable.

8.85 At the time of *making* an enduring document, the question is not one of impaired capacity but of capacity. The question of impaired decision-making capacity arises when it is a trigger for the enduring document’s commencement.

<sup>1346</sup>

A related method of providing for substitute decision-making is the provision for a statutorily authorised person to make health decisions for an adult who has impaired decision-making capacity for the matter (statutory health attorneys): *Powers of Attorney Act 1998* (Qld) s 62. As to the range of substitute decision-makers provided for under the guardianship legislation, see generally *Guardianship and Administration Act 2000* (Qld) s 9.

<sup>1347</sup>

R Creyke, ‘Privatising Guardianship — The EPA Alternative’ (1993) 15 *Adelaide Law Review* 79, 92–3.

As noted above, some enduring documents will only come into operation during a period when the principal has impaired capacity for the matter.<sup>1348</sup>

8.86 As described earlier, sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) require the principal to understand the nature and effect of the enduring document, and set out a list of matters the principal must understand in order to meet this test.

8.87 Both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) also include a test of ‘impaired capacity’. This test applies, among other things, in determining whether a guardian or an administrator should be appointed for an adult.<sup>1349</sup> It also applies in determining whether an enduring document, that operates only when the principal has impaired capacity, has commenced.<sup>1350</sup>

8.88 Impaired capacity, for a person for a matter, is defined to mean that ‘the person does not have capacity for the matter’.<sup>1351</sup> Capacity is then defined as follows:<sup>1352</sup>

**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.

8.89 There appears to be some uncertainty about how this definition of capacity, which applies in determining impaired capacity, relates to the test for making an enduring document. Sections 41 and 42 do not include a specific requirement that the principal have ‘capacity’ as defined elsewhere in the legislation.<sup>1353</sup> Nor is the general capacity definition referred to in section 113(2). That section provides that one of the grounds for finding that an enduring document is invalid is if the principal did not have ‘the capacity necessary to make it’. It includes a cross-reference to sections 41 and 42, but not to the general capacity definition.<sup>1354</sup>

8.90 One view, therefore, is that the general definition of capacity is not relevant for the making of an enduring document. This approach has been adopted

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1348 See [8.8] above.

1349 *Guardianship and Administration Act 2000* (Qld) s 12(1)(a).

1350 *Powers of Attorney Act 1998* (Qld) ss 33(3), (4), 36(1)(a), (3).

1351 *Powers of Attorney Act 1998* (Qld) sch 3; *Guardianship and Administration Act 2000* (Qld) sch 4. The legislation contains a presumption of capacity: see n 1249 above.

1352 *Powers of Attorney Act 1998* (Qld) sch 3; *Guardianship and Administration Act 2000* (Qld) sch 4.

1353 The heading of the sections includes the word ‘capacity’. Section 41(1) also includes a footnote referring to the presumption of capacity in General Principle 1.

1354 *Powers of Attorney Act 1998* (Qld) s 113(2)(a), n 82.

in some of the Tribunal's decisions.<sup>1355</sup> For example, the Tribunal stated in *Re TGD*:<sup>1356</sup>

In order to execute an enduring power of attorney a principal must have capacity to understand the nature and effect of an enduring power of attorney and the relevant test for capacity in this regard is contained in section 41 of the *Powers of Attorney Act 1998*.

8.91 An alternative view, however, is that the general capacity definition applies *in addition* to sections 41 and 42. It has been argued, for example, that the effect of section 42 is to provide a non-exhaustive list of matters that an adult must understand when making an advance health directive in order to satisfy the first limb of the general definition of capacity.<sup>1357</sup> This interpretation would avoid any potential awkwardness from having two separate tests of capacity. The Tribunal has also taken this approach in some of its decisions.<sup>1358</sup> For example, in *Re FAA*, the Tribunal stated the following:<sup>1359</sup>

Essential to the application for an order about an Enduring Power of Attorney, namely its validity, is the determination of the capacity of FAA (the principal) on 3 March 2006, the day it was made.

In this respect, Schedule 3 of the *Powers of Attorney Act 1998* defines capacity in the same terms as the *Guardianship and Administration Act 2000*.

The *Powers of Attorney Act 1998* also sets out what constitutes an understanding of the nature and effect of an Enduring Power of Attorney.

8.92 On this view, all three elements of the general definition of capacity would have to be satisfied in addition to the test in sections 41 and 42 to make an enduring document. One of those elements is that the principal must be capable of freely and voluntarily making decisions about the matter. However, this element seems to be provided for already in the context of making an enduring document.<sup>1360</sup> It is a ground for finding an enduring document invalid if the

<sup>1355</sup> Eg *Re AED* [2004] QGAAT 9, [15]; *Re TGD* [2005] QGAAT 16, [58]; *Re SR* [2005] QGAAT 19, [8]–[10]; *Re HAA* [2007] QGAAT 6, [6]–[8]; *Re PAG* [2009] QGAAT 59, [10]; *Re BAA* [2009] QGAAT 2, [19]. As to the Commission's two recommended tests of capacity for making an enduring document and for the appointment of a guardian or an administrator, see *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 96–7, 174, 180 and vol 2 (Draft Legislation) cl 13(1), 34(1), 36, 76(1), 79, 117(1)(c), sch 1 pt 1.

<sup>1356</sup> [2005] QGAAT 16, [58].

<sup>1357</sup> L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 218. The authors suggest that the alternative interpretation that s 42 is the only provision that is relevant to the question of a principal's capacity to make an advance health directive 'would result in the legislation containing two different tests for capacity, an outcome unlikely to have been intended by the legislature'.

<sup>1358</sup> Eg *Re FAA* [2008] QGAAT 3, [16]–[18]. Also see eg *Re HVG* [2005] QGAAT 33, [69]; *Re MV* [2005] QGAAT 46, [56] in which the Tribunal applied the 'freely and voluntarily' test.

<sup>1359</sup> [2008] QGAAT 3, [16]–[18].

<sup>1360</sup> The Tribunal has generally considered the 'freely and voluntarily' aspect of the definition of 'capacity' in the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) in the context of the adult's susceptibility to another person's influence. However, the Tribunal has also held that the effect of a delusional disorder may cause an inability to make decisions freely and voluntarily: *Re DFS* [2005] QGAAT 75, [41].

principal was induced to make an enduring document by dishonesty or undue influence.<sup>1361</sup> This is expressed as a separate ground to the ground that the principal did not have the capacity necessary to make the enduring document. It is also an offence under section 61 of the *Powers of Attorney Act 1998* (Qld) to dishonestly induce a person to make an enduring document.

## Discussion Paper

8.93 In the Discussion Paper, the Commission sought submissions about the following issues:<sup>1362</sup>

- whether the relationship between the general definition of capacity for a matter which applies for the test of impaired capacity, and the test for making an enduring document in sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) should be clarified and, if so, what that relationship should be;
- whether, in addition to the level of understanding the principal must have under sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld), there should be a requirement that the principal must have ‘capacity’ within the meaning of the general definition of capacity; and
- if so, how this requirement should relate to the matters in sections 41 and 42 of that Act? For example, whether sections 41 and 42 should apply as specific matters the principal must understand in order to satisfy the first limb of the general definition of capacity.

## Submissions

8.94 The majority of the submissions that addressed this issue supported achieving consistency between the two definitions of capacity.<sup>1363</sup>

8.95 The Public Trustee of Queensland considered it desirable that the *Powers of Attorney Act 1998* (Qld) should clarify that the test of capacity to make an enduring document also includes a specific requirement that the principal have ‘capacity’ within the meaning of the general definition in the Act:<sup>1364</sup>

To the Public Trustee’s mind the requirement to understand the nature and effect of the decision to make an enduring power of attorney is that which is spoken to in sections 41(2) and 42(1) but there is a need to incorporate the requirements of voluntariness and communication.

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1361 *Powers of Attorney Act 1998* (Qld) s 113(2)(c).

1362 Queensland Law Reform Commission, *Shaping Queensland’s Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 158.

1363 Submissions 5, 50, 52, 55, 73, 90, 91, 93. Submission 5 included the qualification that the voluntariness criterion in the general definition of capacity should be removed to another part of the legislation.

1364 Submission 90.

Capacity then to make an enduring power of attorney would be contingent upon understanding the nature and effect of the decision which is then explained in greater detail in section 41 or section 42 (in the case of an advance health directive).

8.96 The former Public Advocate also considered that ‘for the sake of cohesiveness, and to avoid different tests for different types of decisions’, the adult making an enduring document should have ‘capacity’ within the meaning of the guardianship regime to execute the document:<sup>1365</sup>

The argument that one tests competence to execute the enduring document and the other is intended to be applied to consider whether a person has impaired capacity, seems fraught. A person who has impaired capacity for making decisions about enduring documents should pass neither of the tests. Potentially, a principal could satisfy one and not the other—this would create an anomalous and unsatisfactory situation. It seems the most cohesive system for the matters set out in sections 41 and 42 to be the specific matters the principal must understand in order to satisfy the first element of the general definition of capacity.

8.97 The Queensland Law Society also considered it important, when dealing with capacity, that there is consistency between the definitions of capacity between the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld):<sup>1366</sup>

The current three limbed test for capacity within the legislation contains the threshold issues needed for making informed decisions and is appropriate to achieving the ends for which it was enacted. We note that section 42 of the *Powers of Attorney Act 1998* (Qld) also provides for additional matters that should be taken into consideration when assessing capacity.

In this regard the Society would recommend consideration of amendments to bring greater standardisation of the tests of capacity for both Guardianship and Powers of Attorneys matters as at present the common law is not congruent on this point. Although the *Guardianship and Administration Act 2000* (Qld) states that it will prevail in the event of any inconsistency with the *Powers of Attorney Act 1998* (Qld) and that both pieces of legislation should be run as a scheme, it is important to note that uncertainty arises when more than one test exists for the same subject matter.

8.98 The Public Trustee of New South Wales, while advocating for a common law test of capacity, noted that guidelines may be needed to help determine capacity in each instance.<sup>1367</sup>

### The Commission’s view

8.99 The *Powers of Attorney Act 1998* (Qld) includes two tests of capacity: the general definition of capacity set out in the third schedule to the Act and the test of

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1365 Submission 91.

1366 Submission 70.

1367 Submission 68.

capacity for making an enduring document under sections 41 or 42 of the Act. The general definition of capacity relates to the determination of impaired capacity when the question is whether or not an attorney's power to decide for the adult is enlivened, while the test of capacity for making an enduring document under sections 41 or 42 of the Act relates to the formal requirements for validly executing an enduring document. If the general definition of capacity applies to the tests of capacity in sections 41 and 42 for making an enduring document, it raises the issue of what difference this would make in relation to the tests articulated in sections 41 and 42 of the Act.

8.100 Sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld) both require that the principal *actually* understands the matters set out in those provisions. This level of understanding is higher than that set out in the general definition of capacity, which requires that the principal is *capable* of understanding these matters. If the principal meets the requirements of section 42(1) (and section 42(2) where the principal has appointed an attorney under the advance health directive), the principal will automatically satisfy the first limb of the definition of capacity, which requires that the adult 'is capable of understanding the nature and effect of decisions about the matter'.

8.101 The second limb of the general definition of capacity requires that the adult 'is capable of making decisions about the matter freely and voluntarily'. In this context, the application of the second limb would ensure that an enduring document may be made by an adult only if the adult is capable of making the decision to make an advance health directive freely and voluntarily.

8.102 The third limb of the general definition of capacity requires that the adult 'is capable of communicating the decisions in some way'. If the adult is capable of signing the enduring document or instructing an eligible signer to sign the document for the adult, as required by section 44(3)(a) of the Act, the adult will automatically satisfy the third limb of the definition of capacity.

8.103 The practical effect of applying the definition of 'capacity' to the tests of capacity for making an enduring document under sections 41 and 42 of the Act is that it is only the second limb of the definition of 'capacity' that will add anything to the tests of capacity for making an enduring document. At present, the Supreme Court or the Tribunal may declare that an enduring document is invalid if it is satisfied that the principal did not have the capacity to make it or it is invalid for another reason, for example, the principal was induced to make it by dishonesty or undue influence.<sup>1368</sup>

8.104 Given the inherent difficulties in proving that the principal was induced to make an enduring document by dishonesty or undue influence — particularly at a later time when the principal may have lost capacity, the Commission considers that sections 41 and 42 of the Act should be amended to provide that a principal has capacity to make an enduring power of attorney or an advance health directive (as the case may be) only if, in addition to understanding the nature and effect of

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*Powers of Attorney Act 1998* (Qld) s 113(2)(a), (c).

the enduring document, the principal is capable of making the enduring power of attorney or advance health directive (as the case may be) freely and voluntarily.

8.105 The incorporation of this requirement into the test of capacity in sections 41 and 42 also provides an additional legislative safeguard for the principal. In this regard, section 44(4)(b) and 44(5)(c) of the Act require the person who witnesses the enduring document to certify that the principal appeared to have the capacity necessary to make the enduring document.

8.106 This additional requirement is consistent with article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*, which specifies that the provision of safeguards to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, and are free of conflict of interest and undue influence.<sup>1369</sup>

8.107 In order to resolve any potential confusion arising from having two tests of capacity under the *Powers of Attorney Act 1998* (Qld), the Commission is also of the view that the Act should be amended to provide that the general definition of capacity in the third schedule to the Act does not apply either to section 41 or 42 of the Act.

8.108 In this section and the preceding part of this chapter, the Commission has made several recommendations in relation to the test of capacity to make an enduring document under sections 41 and 42 of the *Powers of Attorney Act 1998* (Qld). The following provisions are model versions of sections 41 and 42 which reflect the those recommendations:

**41 Principal's capacity to make an enduring power of attorney<sup>1370</sup>**

- (1) A principal has the capacity necessary to make an enduring power of attorney only if the principal:
  - (a) understands the nature and effect of the enduring power of attorney;<sup>41</sup> and
  - (b) is capable of making the enduring power of attorney freely and voluntarily.
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters<sup>42</sup>—
  - (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
  - (b) when the power begins;

<sup>1369</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, art 12.

<sup>1370</sup> The current form of s 41(2)(c) appears to omit the words 'decisions about' after the word 'make' in that subsection. This would appear to be a drafting oversight. The words 'decisions about' have been inserted in s 41(2)(c) of the model draft to correct this error.

- (c) once the power for a matter begins, the attorney has power to make decisions about, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
  - (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
  - (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
  - (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.
- (3) To remove any doubt, the definition of capacity in schedule 3 of this Act does not apply to this section.

41 However, under the general principles, a person is presumed to have capacity—schedule 1, section 1.

42 If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

#### **42 Principal's capacity to make an advanced health directive**

- (1) A principal has the capacity necessary to make an advance health directive, to the extent it does not give power to an attorney, only if the principal:
- (a) understands the nature and effect of the advanced health directive;<sup>43</sup> and
  - (b) is capable of making the advanced health directive freely and voluntarily.
- (2) Understanding the nature and effect of the advance health directive includes the following matters:
- (a) the nature and the likely effects of each direction in the advance health directive;
  - (b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;
  - (c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;
  - (d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.
- (3) A principal has the capacity necessary to make an advance health directive, to the extent it gives power to an attorney, only if the principal has the capacity necessary to make an enduring power of attorney giving the same power.<sup>44</sup>

- (4) To remove any doubt, the definition of capacity in schedule 3 of this Act does not apply to this section.
- 43 However, under the general principles, a person is presumed to have capacity—schedule 1, section 1.
- If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.
- 44 See section 41 (Principal's capacity to make an enduring power of attorney).

## WITNESSING THE PRINCIPAL'S CAPACITY TO MAKE AN ENDURING DOCUMENT

8.109 The *Powers of Attorney Act 1998* (Qld) requires enduring documents to be signed by an 'eligible witness'.<sup>1371</sup> The witness is required to certify that the principal appeared to have the capacity necessary to make the enduring document. The witness is also required to witness the principal's signature. Similar requirements apply in most of the other Australian jurisdictions.

8.110 The witnessing requirements are intended as an important safeguard against exploitation of the principal.<sup>1372</sup> In particular, the requirement for an independent witness is considered a critical safeguard.<sup>1373</sup> However, such requirements, if too strict, may act as a barrier to the use of enduring documents.<sup>1374</sup> There is a tension between minimising the expense and complexity of making an enduring document and protecting principals who may be vulnerable to pressure from others.<sup>1375</sup>

### Witness qualifications and training

8.111 An eligible witness must be a person who is a justice of the peace, commissioner for declarations, notary public or lawyer.<sup>1376</sup> This requirement was included in the legislation in Queensland to ensure the involvement of 'a completely

1371 *Powers of Attorney Act 1998* (Qld) ss 33, 44(3)(b).

1372 See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686 (Denver Beanland, Attorney-General and Minister for Justice).

1373 Eg 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, 105; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 98. Also see the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686–7 (Denver Beanland, Attorney-General and Minister for Justice).

1374 Hon RD Nicholson, 'Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability' (1995) 2 *Journal of Law and Medicine* 270, 282.

1375 R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *Western Australian Law Review* 122, 134.

1376 *Powers of Attorney Act 1998* (Qld) s 33. See the exceptions noted in s 33 as to when a person is not eligible to be a witness.

independent and qualified person'.<sup>1377</sup> It also emphasises the serious nature of an enduring document and its legal consequences.<sup>1378</sup>

8.112 The persons who are currently eligible as witnesses are accustomed to witnessing legal documents. The choice of witness may have a bearing on the costs of executing an enduring document. The involvement of a lawyer may increase the costs of executing an enduring document. In some cases, it may be difficult for a person to access or afford such legal services.<sup>1379</sup> In contrast, justices of the peace and commissioners for declarations do not charge for their services.

8.113 It has been suggested that both lawyers<sup>1380</sup> and justices of the peace<sup>1381</sup> may sometimes take insufficient steps, or lack appropriate training, to adequately assess a person's capacity to make an enduring document. However, this may be more of an educative issue than a legislative one.

8.114 The requirement that the witness should have particular qualifications also applies in many of the other jurisdictions.<sup>1382</sup>

8.115 In New Zealand, there is no requirement for the witness to an enduring power of attorney to have a particular qualification.<sup>1383</sup> The Law Commission of New Zealand recommended, however, that in certain circumstances a solicitor should witness an enduring power of attorney, namely, if the attorney is not the principal's spouse or de facto partner, if the principal is 68 years or older, or if the principal is a patient or resident in a 'hospital, home or other institution'.<sup>1384</sup> It considered that:<sup>1385</sup>

<sup>1377</sup> See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3686–7 (Denver Beanland, Attorney-General and Minister for Justice).

<sup>1378</sup> Eg 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, 106.

<sup>1379</sup> Eg R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *Western Australian Law Review* 122, 134–5.

<sup>1380</sup> B White and L Willmott, 'Solicitors and enduring documents: Current practice and best practice' (2008) 16 *Journal of Law and Medicine* 466, 480–1. See also eg *Re TGD* [2005] QGAAT 16, [22], [38]; *Re DEM* [2005] QGAAT 59, [52], [58]; *Re RJE* [2005] QGAAT 4, [57](f); and *Re EW* (1993) 11 FRNZ 118, 123–4 (Judge MD Robinson).

<sup>1381</sup> Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.92]; South Australian Government, *Planning Ahead: Your Health, Your Money, Your Life*, Issues Paper (2007) 31.

<sup>1382</sup> Eg *Powers of Attorney Act 2006* (ACT) s 21(3); *Powers of Attorney Act 2003* (NSW) s 19(2); *Guardianship Act 1987* (NSW) s 5 (definition of 'eligible witness' para (a)); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(2), 4 (definition of 'authorised witness'); *Guardianship and Administration Act 1993* (SA) ss 25(2)(c), 3(1) (definition of 'authorised witness'); *Powers of Attorney and Agency Act 1984* (SA) s 6(2)(a); *Instruments Act 1958* (Vic) s 125(3); *Medical Treatment Act 1988* (Vic) s 5A(2)(a); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c)(iv).

<sup>1383</sup> *Protection of Personal and Property Rights Act 1988* (NZ) s 95(1).

<sup>1384</sup> Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [27]. The Law Commission of New Zealand noted that, in practice, problems associated with a lack of understanding or inability to resist pressure from others had not arisen frequently where the attorney is the principal's spouse (including de facto partner): [19]. In relation to the choice of 68 years as the age limit, the Law Commission of New Zealand commented, at [22], that:

Limiting the circumstances in which the procedure will be required should catch most donors needing the protections that we propose, while avoiding such expense as would otherwise be incurred were that protection to be imposed in situations not in the defined class.

### A minimum age requirement

8.116 The *Powers of Attorney Act 1998* (Qld) provides that, if the document is an advance health directive, the witness must be at least 21 years old. This appears to have been included in the legislation to help ensure the witness has an appropriate level of ‘maturity and life experience’.<sup>1386</sup> However, the present requirement for the witness to be a justice of the peace, a commissioner for declarations, a notary public or a lawyer may be sufficient in this regard.<sup>1387</sup>

### The role of doctors in making advance health directives

8.117 There is currently no requirement for an enduring power of attorney to include a doctor’s certification of the principal’s capacity. In contrast, an advance health directive must be witnessed by a lawyer or justice of the peace *and* include a certificate signed by a doctor stating that the principal, at the time of making the advance health directive, appeared to have the capacity necessary to make it.<sup>1388</sup>

8.118 The legislation in the ACT, Tasmania and Victoria provides for two independent witnesses (although neither witness is required to be a medical practitioner).<sup>1389</sup> In Ireland, both a solicitor and a medical practitioner must witness an enduring power of attorney.<sup>1390</sup> Making provision for more than one witness may provide added protection against exploitation. On the other hand, a

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Whatever age we propose is likely to attract taunts that we are purporting to impose an age of statutory senility, but under our proposed regime there does need to be certainty. We think that 68 years is an appropriate age. Speaking generally most people at this age still retain their mental faculties but by that age are likely to have been led, as a result of such lifestyle changes as retirement and of the intimations of mortality inseparable from the ageing process, to make testamentary and other arrangements including, under the current practice, the grant of enduring powers of attorney.

1385 Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [22].

1386 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1019 (Elizabeth Cunningham).

1387 To qualify to hold office as a justice of the peace, commissioner for declarations or lawyer, a person must be at least 18 years and must also meet other requirements (such as having attained certain qualifications or undertaken particular training): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(1); *Legal Profession Act 2007* (Qld) s 30(1). Generally, a notary public in Queensland will be a legal practitioner: see P Zablud, *Principles of Notarial Practice* (2005) 31; *Halsbury’s Laws of Australia* (at 12 August 2008) Legal Practitioners, ‘Notaries’ [250-1735]; *Bailleau v The Victorian Society of Notaries* [1904] P 180, 184–5.

1388 *Powers of Attorney Act 1998* (Qld) s 44(6).

1389 *Powers of Attorney Act 2006* (ACT) s 19(2); *Powers of Attorney Act 2000* (Tas) s 30(2)(b); *Guardianship and Administration Act 1995* (Tas) s 32(2)(c); *Instruments Act 1958* (Vic) s 123(3); *Medical Treatment Act 1988* (Vic) s 5A(2)(a); *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c).

1390 *Powers of Attorney Act 1996* (Ireland) s 5; *Enduring Powers of Attorney Regulations 1996* (Ireland) reg 3. The Law Reform Commission of Ireland recommended that the requirement for an enduring power of attorney to be witnessed by a registered medical practitioner should continue to apply: Law Reform Commission of Ireland, *Vulnerable Adults and the Law*, Report No 83 (2006) [4.12].

requirement for two independent witnesses, both with particular qualifications, may be a significant barrier to the availability of enduring documents.<sup>1391</sup>

8.119 While the legislation provides for the doctor to attest to the principal's understanding when making an advance health directive, the relevant form for making an advance health directive provides, in slightly different terms, for the doctor to certify that he or she has discussed the document with the principal and that, in the doctor's opinion, the principal 'is not suffering from any condition that would affect his/her capacity to understand the things necessary to make this directive, and he/she understands the nature and likely effect of the health care described in this document'.<sup>1392</sup>

8.120 The current requirement suggests that the doctor's role is to provide a medical opinion of the principal's capacity. It has been argued, however, that such a requirement should not be mandatory. While it may be a wise precaution in circumstances in which the principal's capacity is in some doubt, a mandatory requirement for a doctor's certificate as to the principal's capacity may involve unwarranted expense and an affront to the principal's dignity.<sup>1393</sup> It has also been suggested that it may be an unnecessary burden to require a professional medical judgment of the principal's capacity in every case.<sup>1394</sup>

8.121 An informal approach in seeking a professional opinion of the principal's capacity is consistent with the various guidelines for witnessing enduring documents.<sup>1395</sup> It is also consistent with the current Queensland legislation, which includes a footnote to the effect that, if there is doubt about the principal's capacity, it is advisable for the witness to make a record of the evidence on which his or her assessment was based.<sup>1396</sup> This could include the opinion of a doctor. This may lend weight to the witness's statement as evidence of the principal's capacity.

1391 Eg 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, 106, 108. Also note that the Law Commission (England and Wales) specifically considered but rejected the possibility of requiring both a lawyer and a doctor to witness a 'continuing power of attorney' on the basis of concerns raised by respondents that such a requirement 'would present practical difficulties and force donors to incur extra costs': Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.27]. Doctors may also be reluctant to perform this role because such a consultation would take considerable time and may involve expense for the patient which may not be rebateable under Medicare.

1392 See *Powers of Attorney Act 1998* (Qld) s 44(2), form 4 available at <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list#Forms>> at 30 September 2010.

1393 Eg Law Reform Commission of Hong Kong, *Enduring Powers of Attorney*, Report (2008) [3.7]–[3.8], [3.14]; Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [3.18]; Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Report No 88 (2003) [53]. The Law Reform Commission of Hong Kong recommended that the requirement for an enduring power of attorney to be signed by a registered medical practitioner be removed from the legislation in that jurisdiction. Both the Scottish Law Commission and the Alberta Law Reform Institute specifically rejected the inclusion of a requirement for a doctor's certification of the principal's capacity to make an enduring power of attorney. The Law Commission (New Zealand) similarly rejected such a requirement: Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [25].

1394 Eg Hon RD Nicholson, 'Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability' (1995) 2 *Journal of Law and Medicine* 270, 282.

1395 See [8.26]–[8.29] above.

1396 See [8.13], [8.16] above.

8.122 A requirement for a doctor to attest to the principal's capacity may also seem to confuse the doctor's proper role in making an advance health directive.

8.123 In its original 1996 report, the Queensland Law Reform Commission considered whether the legislation should require a certificate from a medical practitioner to the effect that the principal had discussed the content of the directive with the doctor. The Commission considered a mandatory requirement to this effect would introduce too much complexity and should not apply.<sup>1397</sup> It said, however, that:<sup>1398</sup>

the advantage of such a requirement would be to promote communication between patients and practitioners about future health care in the event of a patient's loss of decision-making capacity and to help ensure that patients are aware of the medical implications of the instructions they have given. Further, knowledge that the contents of the directive had been discussed with a practitioner would be likely to increase the willingness of other health care providers to comply with the directive.

8.124 The current requirement was included in the legislation to provide for the involvement of medical advice. When the inclusion of this requirement was debated in Parliament, the then Attorney-General stated that it 'was always intended that a person making an advance health directive should consider the desirability of doing so in consultation with his or her doctor'.<sup>1399</sup>

8.125 This has special importance in the context of an advance health directive because the principal, in such a document, may give specific directions about his or her health care including such matters as the withdrawal or withholding of life-sustaining measures. To give such directions, the principal would need to have an understanding of what treatment options are available and what they would involve. This is consistent with the obligation of a doctor to inform his or her patient when seeking consent to treatment.<sup>1400</sup> It would also be consistent with the Australian Medical Association's position statement that, when engaged in developing an advance care plan, the doctor should ensure the patient is fully informed and has had 'an adequate opportunity to receive advice on various health care options'.<sup>1401</sup>

8.126 At present, the legislation requires the doctor to certify the principal's understanding of all of the matters listed in section 42(1) of the *Powers of Attorney Act 1998* (Qld). This includes 'the nature and likely effects of each direction', but it also includes other matters about the operation of the directive itself (such as when the principal may revoke a direction). It has been suggested, however, that a doctor may not be in the best position to assess a principal's understanding of legal

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1397 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, 356–7.

1398 Ibid 356.

1399 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1021 (Denver Beanland, Attorney-General and Minister for Justice).

1400 Eg *Rogers v Whitaker* (1992) 175 CLR 479.

1401 Australian Medical Association, *The Role of the Medical Practitioner in Advance Care Planning* (2006) [3.6].

matters.<sup>1402</sup> This raises the question of whether the doctor's involvement in witnessing an advance health directive should be clarified. That is, it may be more appropriate for a doctor to certify that he or she has discussed the content of the document with the principal, rather than also to certify that the principal has the necessary capacity to make the directive.

8.127 Another consideration is whether the legislation should provide for a doctor's involvement in relation to any other enduring documents. Such a requirement may be appropriate for an enduring power of attorney that deals with health matters. As well as empowering an attorney to make decisions about the principal's health care, a principal may include information or terms for the exercise of the attorney's power.<sup>1403</sup> In those circumstances, a doctor's involvement in explaining the effect of such matters may be prudent.

## Discussion Paper

8.128 In the Discussion Paper, the Commission sought submissions in relation to whether there are any difficulties with the current witnessing requirements for enduring documents.<sup>1404</sup>

8.129 The Commission also sought submissions on the following issues:<sup>1405</sup>

- whether the current requirement for enduring documents to be witnessed by a justice of the peace, a commissioner for declarations, a notary public or a lawyer should:
  - continue to apply in all circumstances; or
  - be changed so that it applies in particular circumstances only (and, if so, in what circumstances); or
  - be removed altogether;
- whether the current requirement for a witness to an advance health directive to be at least 21 years old should:
  - continue to apply for advance health directives;
  - be extended to apply to an enduring power of attorney that deals with health matters; or

<sup>1402</sup> Eg see the comments referred to in South African Law Reform Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.59]; and Scottish Law Commission, *Incapable Adults*, Report No 151 (1995) [3.18].

<sup>1403</sup> *Powers of Attorney Act 1998* (Qld) ss 32(1)(b), 35(1)(d).

<sup>1404</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 164.

<sup>1405</sup> *Ibid.*

- be extended to apply to all enduring powers of attorney; or
- be removed altogether;
- whether the current requirement for a doctor to attest to the principal's capacity should continue to apply to advance health directives, and if so, what the doctor should be required to do; and
- whether a requirement for witnessing by a doctor should be extended to apply to an enduring power of attorney that deals with health matters.

## Submissions

8.130 A substantial number of submissions raised concerns about the execution of enduring powers of attorney in circumstances where the principal has questionable or impaired capacity.<sup>1406</sup> In particular, several respondents described the situation in which a relative had made an enduring power of attorney in circumstances where it was apparent that the person's capacity was in doubt.<sup>1407</sup>

8.131 A number of submissions expressed satisfaction with the existing witnessing requirements.<sup>1408</sup> The Public Trustee also commented that concerns about witnesses sometimes taking insufficient steps, or lacking appropriate training, to assess a person's capacity to make an enduring document adequately, is an educative issue, and does not necessarily sound in a legislative solution.<sup>1409</sup>

8.132 However, other submissions expressed concerns about the efficacy of the current witnessing requirements.<sup>1410</sup>

8.133 For example, Carers Queensland commented that:<sup>1411</sup>

higher [witness] qualifications represent greater practical difficulties for people (eg access issues, increased costs etc) in establishing such documents. This may discourage people from making such arrangements. It is important for people to have access to a simple and affordable mechanism to formalise future decision-making arrangements, with appropriate safeguards.

8.134 Carers Queensland also commented that the requirement that a witness must have legal, medical or other qualifications does not necessarily give the witness the expertise to make an assessment of capacity.<sup>1412</sup>

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<sup>1406</sup> Submissions C3, C4, C38, 50, 55, 69, 72, 75, 78, 81, 99, 115A, 138.

<sup>1407</sup> Submissions 50, 55.

<sup>1408</sup> Submissions 5, 9, 13, 14, 15, 20, 90.

<sup>1409</sup> Submission 90.

<sup>1410</sup> Submissions 71, 72, 91.

<sup>1411</sup> Submission 71.

<sup>1412</sup> Ibid.

8.135 However, the former Public Advocate considered that, while, 'in many cases, there may not be any real question about capacity and current witnessing requirements ... the arguments in favour of more stringent witness requirements in circumstances where there is more likely to be an issue about capacity appear to have considerable merit'.<sup>1413</sup> Accordingly, the former Public Advocate proposed that additional witnessing requirements may be justified when:

- the attorney appointed is not the husband or wife or (after a qualifying period) de facto partner of the principal;
- the principal is resident either permanently or temporarily in a hospital, a group home, or a facility; or
- the principal is over a particular age.

### ***Witness qualifications and training***

8.136 Some submissions raised concerns about justices of the peace and commissioners for declarations acting as witnesses for enduring documents. Several submissions suggested that justices of the peace and commissioners of declarations may not have the necessary skills to determine capacity or that some did not fulfil their duties.<sup>1414</sup>

8.137 The Law Society of New South Wales considered it would be desirable to narrow the categories of witnesses to persons who have undertaken a 'prescribed course addressing the issues associated with enduring documents'.<sup>1415</sup>

Given the propensity to challenge documents the field of witnesses should be narrowed rather than enlarged. The prescribed witnesses should be limited to [a] solicitor, barrister, registrar of an appropriate court or branch manager of a trustee company or Public Trustee office.

The document in question is a legal document. If certification is to be provided as to any explanation of the document it would seem to follow, logically that the person giving the explanation should at least, prima facie be considered as having the expertise to understand the documents, give an explanation thereof and provide the necessary certification.

8.138 The Queensland Police Service considered that solicitors should be the only eligible witnesses.<sup>1416</sup> However, several respondents raised concerns about situations in which lawyers have witnessed enduring power of attorneys where the adult has doubtful capacity.<sup>1417</sup>

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1413 Submission 91.

1414 Submissions 52, 56, 61, 69, 138.

1415 Submission 81.

1416 Submission 173.

1417 Submissions 50, 55.

8.139 A number of submissions suggested that doctors should have a role witnessing enduring documents.<sup>1418</sup> One submission supported a requirement that a witness to an enduring document should be either a doctor or a lawyer.<sup>1419</sup> Several submissions suggested that an enduring power of attorney that deals with health matters should be witnessed by a doctor, in addition to a justice of the peace or a lawyer.<sup>1420</sup> One respondent considered that, in situations where the principal who is executing an enduring document has a medical condition, it may be desirable for a doctor to witness the enduring document in order to help avoid future challenges to the validity of the document.<sup>1421</sup>

8.140 The Watchtower Bible and Tract Society of Australia opposed a requirement that witnesses have legal or medical qualifications.<sup>1422</sup>

Enduring documents should be an effective and simple way to see that decisions concerning health care are carried out at a time when the principal is unable to express those wishes. The present requirement to have an advance health directive witnessed by a doctor, in addition to a lawyer, or other prescribed witness, can increase the complexity of completing an enduring document and unnecessarily increase the burden of trying to complete such a document.

8.141 On the other hand, another respondent suggested that a doctor 'does not necessarily have the skills or ability to determine capacity for the adult to enter into legal relationships.'<sup>1423</sup>

8.142 Disability Services Queensland (now part of the Department of Communities) suggested that it may be desirable to expand the categories of witnesses to include medical and allied health practitioners, magistrates or court officials, guardians (employed by the office of the Adult Guardian) and the Public Trustee.<sup>1424</sup>

It is important to keep the use of enduring documents as accessible as possible. At the same time, the integrity of the process in making an enduring document needs to be preserved by having witnesses in accountable roles who have an understanding of the requirements under the guardianship legislation.

8.143 The Watchtower Bible and Tract Society of Australia also considered that the legislation should include other responsible members of the community to make it easier for an adult to have the document witnessed.<sup>1425</sup>

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1418 Submissions 52, 55, 56, 60, 81.

1419 Submission 7.

1420 Submissions 50, 61.

1421 Submission 20.

1422 Submission 72.

1423 Submission 81.

1424 Submission 93.

1425 Submission 72.

8.144 Several submissions considered that there should be at least two witnesses for enduring documents.<sup>1426</sup> In some cases, it was considered that one of the witnesses should be a doctor.<sup>1427</sup>

8.145 However, the Watchtower Bible and Tract Society of Australia opposed the current requirement for a doctor to attest to the principal's capacity to make an advance health directive.<sup>1428</sup>

The need for a principal to make an appointment with both a doctor and then a lawyer, or other prescribed person, to witness an advance health directive is an onerous requirement which, for many persons, can be an obstacle to completing the document. Such a requirement can be costly and cause practical difficulties. Moreover, some medical practitioners have been hesitant to witness the form because of the time and effort involved.

### ***The role of doctors in making advance health directives***

8.146 There was support for the continued involvement of doctors in advance health directives.<sup>1429</sup> Several submissions supported a requirement for the doctor to attest to the principal's capacity to make the advance health directive.<sup>1430</sup>

8.147 On the other hand, the Christian Science Committee on Publication for Queensland considered that the requirement that a doctor certify that a principal has capacity to make an advance health directive may diminish the usefulness of advance health directives as an inexpensive method of advance planning and infringe on the principle's religious beliefs.<sup>1431</sup>

We feel it is important and appropriate to retain flexibility, particularly for those who do not typically interact, and may prefer not to interact, with medical doctors. We have no objection with a legislative scheme that seeks to encourage medical certification. However, a mandatory requirement not only would add further formality to what is intended to be a simple, inexpensive method of advance planning and potentially lead to an unwarranted intrusion into private affairs, but most importantly, infringe upon the individual's religious beliefs.

8.148 Alternatively, a number of submissions supported a requirement that the doctor must certify that he or she had a discussion with the principal about the content of the directive.<sup>1432</sup> The Watchtower Bible and Tract Society of Australia considered it is appropriate for the doctor to make a record of the evidence on

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1426 Submissions 20, 50, 61.

1427 Ibid.

1428 Submission 72.

1429 Submissions 5, 7, 9, 13, 14, 24.

1430 Submissions 5, 9.

1431 Submission 151.

1432 Submissions 5, 9, 14, 24.

which his or her assessment of the principal's capacity is based.<sup>1433</sup> Two submissions supported extending the application of this requirement to an enduring power of attorney that deals with health matters,<sup>1434</sup> while another submission was opposed to making any change to the current requirement.<sup>1435</sup>

### **Minimum age**

8.149 A number of submissions supported a minimum age requirement of at least 21 years old for a witness for an enduring power of attorney.<sup>1436</sup> However, a number of other submissions, including the former Public Advocate and Disability Services Queensland (now part of the Department of Communities), considered that the minimum age requirement should be removed altogether on the basis that the other eligibility requirements for being a witness are likely to indicate sufficiently that the person has experience and maturity to carry out the role.<sup>1437</sup>

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

8.150 A substantial number of submissions received by the Commission raised concerns about enduring documents (in particular, enduring powers of attorney) being made in circumstances where there is doubt about the principal's capacity. This raises questions not only about whether the legislative provisions governing the witnessing of enduring documents are adequate but also about whether there are deficiencies in the procedures adopted by witnesses in practice. These concerns are also reflected in recent research findings about the witnessing practices of Queensland solicitors when certifying the capacity of principals to complete enduring documents.<sup>1438</sup> These research findings indicate that, amongst other things, there is sometimes a failure by the witness to consider the elements of capacity and to ask probing questions to gauge how well the person understands the process being undertaken and the statutory requirements for making an enduring document. The Commission has made recommendations below to address these issues.

### **The witness's qualifications and training**

8.151 The requirement for an enduring document to be witnessed by an 'eligible witness' constitutes an important protection for the principal.

8.152 One of the current requirements for eligibility is that the witness must be a justice of the peace, commissioner for declarations, notary public or lawyer. Each of these persons has qualifications and training in relation to the execution of legal

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1433 Submission 72.

1434 Submissions 7, 14.

1435 Submission 5.

1436 Submissions 9, 13, 14, 24.

1437 Submissions 5, 91, 93.

1438 B White and L Willmott, 'Solicitors and enduring documents: Current practice and best practice' (2008) 16 *Journal of Law and Medicine* 466, 487.

documents. However, while justices of the peace (magistrates court) and justices of the peace (qualified) are required to attain a particular level of competence in carrying out their duties, there are no such requirements imposed on commissioners for declarations.

8.153 An enduring document is a significant legal document. In order to ensure that the witnessing requirements for enduring documents are sufficiently rigorous, the Commission considers that the definition of ‘eligible witness’ in section 31(1)(a) of the *Powers of Attorney Act 1998* (Qld) should be amended to omit the reference to a commissioner for declarations. By virtue of section 29(5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which provides that a justice of the peace (commissioner for declarations) is limited to the exercise of the powers of a commissioner for declarations, a justice of the peace (commissioner for declarations) will not be able to witness an enduring document.<sup>1439</sup>

8.154 The requirement that a witness to an enduring document must be a justice of the peace (magistrates court), justice of the peace (qualified), notary public or lawyer should apply only to an enduring document made after the commencement of the legislation that gives effect to this recommendation. If the requirement applied to all enduring documents, any enduring documents that have been witnessed by a justice of the peace (commissioner for declarations) or a commissioner for declarations would be invalidated on the ground that they have not satisfied the formal requirements for making an enduring document.

8.155 Although it is not necessary to amend the *Powers of Attorney Act 1998* (Qld) to exclude a justice of the peace (commissioner for declarations) as an eligible witness for an enduring document, it would be useful to clarify in the approved form for making an enduring document that a justice of the peace (commissioner for declarations) is not an eligible witness for an enduring document.

8.156 The Commission does not consider that the *Powers of Attorney Act 1998* (Qld) should be amended to require an enduring document to be witnessed by more than one eligible witness. Given that the Commission has recommended more rigorous witnessing requirements for enduring documents, the current requirement under the Act for an enduring document to be witnessed by one eligible witness is a sufficient legislative safeguard. A requirement for more than one eligible witness would unnecessarily complicate the process of executing an enduring document. Section 44(3)(b) of the Act should therefore be retained without amendment.

### **Minimum age**

8.157 One of the eligibility requirements under the *Powers of Attorney Act 1998* (Qld) for the witness of an enduring document is that the witness must hold office as a justice of the peace, commissioner for declarations, a notary public or a lawyer. In each case, the minimum age requirement for holding such an office is

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*Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5) provides that a justice of the peace (commissioner for declarations) is limited to the exercise of the powers of a commissioner for declarations. See s 42 of that Act in relation to the office of a justice of the peace (commissioner for declarations).

18 years. A justice of the peace, a notary public or a lawyer must also hold certain qualifications or have completed particular training that may help to ensure that they have an appropriate level of maturity and skill to witness enduring documents. Where the enduring document is an advance health directive, the eligibility requirements under the *Powers of Attorney Act 1998* (Qld) specify that the witness must be at least 21 years old.

8.158 As mentioned above, the Commission has recommended that a justice of the peace (other than a justice of the peace (commissioner for declarations)), a notary public or a lawyer should continue to be eligible to witness an enduring document. This will ensure that enduring documents are witnessed only by witnesses with the requisite knowledge and skill in the execution of legal documents. Given this recommendation, the Commission considers that the current requirement for a witness to an advance health directive to be at least 21 years is unnecessary and should be removed.

### ***The role of doctors in making advance health directives***

8.159 In the Commission's view, the *Powers of Attorney Act 1998* (Qld) should continue to require a doctor to certify that, at the time of making the advance health directive, the principal appeared to have the capacity to execute the document. However, the Act should not be amended to require a certificate from the doctor to the effect that the principal had discussed the content of the directive with the doctor. The current requirement for the doctor to certify as to the principal's capacity would be difficult to fulfil without the doctor having a discussion about the content of the directive with the principal. A mandatory requirement for the doctor to certify to this effect would seem unnecessary and would introduce additional complexity to the process.

8.160 The Commission also considers that the requirement for a doctor to attest to the principal's capacity when making an advance health directive should not be extended to apply to an enduring power of attorney that deals with health matters. The effectiveness of the scheme for enduring powers of attorney depends on it being relatively simple and accessible. A general requirement for a doctor to attest to the principal's capacity when making an enduring power of attorney would complicate the scheme for enduring powers of attorney and impose an additional burden on the adult. It would also be inappropriate for a doctor to act as the witness because the task of witnessing an enduring document requires knowledge and skill in the execution of legal documents. As suggested in the guidelines for witnessing capacity, if there is any doubt about a principal's capacity, it may be desirable for the witness to seek a medical opinion verifying the principal's capacity.

### **STEPS THE WITNESS SHOULD TAKE**

8.161 In Queensland, the *Powers of Attorney Act 1998* (Qld) requires the witness to sign a certificate stating that the principal, at the time of signing the document, appeared to the witness to have the capacity necessary to make the

enduring document.<sup>1440</sup> The Act does not presently require a witness to explain the import of the enduring document to the principal. However, the approved form for an advance health directive requires a doctor to certify that he or she has discussed the document with the principal.<sup>1441</sup>

8.162 The guidelines produced by the Office of the Adult Guardian and the Queensland Law Society and those included in the handbooks for commissioners of declarations and justices of the peace also advise that the witness should interview the principal to determine the principal's capacity.<sup>1442</sup> They also suggest that if the principal is at first unable to answer questions about the document correctly, the witness should give an explanation and ask about the matters later in the interview.<sup>1443</sup>

8.163 In New South Wales, an enduring power of attorney must include a certificate signed by a witness to the effect that the witness explained the effect of the document to the principal and that the principal appeared to understand its effect.<sup>1444</sup> In Scotland and Ireland, the witnessing solicitor is to certify that 'after interviewing' the principal, the solicitor is satisfied the principal understood the relevant matters to make the enduring power of attorney.<sup>1445</sup> Similarly, in the United Kingdom, the witness must confirm that he or she has discussed the

1440 *Powers of Attorney Act 1998* (Qld) s 44(4)(b), (5)(c). The relevant forms provide for the witness to certify that the principal appeared to understand certain matters. See *Powers of Attorney Act 1998* (Qld) s 44(1), (2), forms 2, 3 and 4 available at <<http://www.justice.qld.gov.au/justice-services/guardianship/forms-and-publications-list#Forms>> at 30 September 2010.

1441 *Powers of Attorney Act 1998* (Qld) s 44(2), form 4 available at <[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 30 September 2010.

1442 Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (June 2005) 2 <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0009/7569/capacityguidelines.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0009/7569/capacityguidelines.pdf)> at 30 September 2010; Queensland Law Society, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney*; Department of Justice and Attorney-General, *The Duties of Justices of the Peace (Qualified)* (4th ed, April 2007) 43–4. See also Department of Justice and Attorney-General, *The Administrative Duties of Commissioners for Declarations*. See also Department of Justice and Attorney-General, 'Witnessing Enduring Powers of Attorney (EPA) and Advance Health Directive (AHD) documents' *Technical Bulletin* (June 2009) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0020/8336/bulletin-witnessing-epa-and-ahd-documents.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/8336/bulletin-witnessing-epa-and-ahd-documents.pdf)> at 30 September 2010.

1443 Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (June 2005) 3 <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0009/7569/capacityguidelines.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0009/7569/capacityguidelines.pdf)> at 30 September 2010; Queensland Law Society, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* 4; Department of Justice and Attorney-General, *The Duties of Justices of the Peace (Qualified)* (4th ed, April 2007) 43–4. See also Department of Justice and Attorney-General, *The Administrative Duties of Commissioners for Declarations*. See also Department of Justice and Attorney-General, 'Witnessing Enduring Powers of Attorney (EPA) and Advance Health Directive (AHD) documents' *Technical Bulletin* (June 2009) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0020/8336/bulletin-witnessing-epa-and-ahd-documents.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/8336/bulletin-witnessing-epa-and-ahd-documents.pdf)> at 30 September 2010.

1444 *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(i), (ii).

1445 *Adults with Incapacity (Scotland) Act 2000* (Scotland) ss 15(3)(c)(i)(ii), 16(3)(c)(i)(ii); *Powers of Attorney Act 1996* (Ireland) s 5; *Enduring Powers of Attorney Regulations 1996* (Ireland) reg 3.

contents of the 'lasting power of attorney' with the principal and has done so without the attorney being present.<sup>1446</sup>

## Discussion Paper

8.164 In the Discussion Paper, the Commission raised the issue of whether the *Powers of Attorney Act 1998* (Qld) should be changed to include an express requirement for the witness to an enduring document to:<sup>1447</sup>

- give an explanation to the principal of the matters he or she must understand to execute the enduring document; or
- interview the principal about the matters he or she must understand to execute the enduring document.

## Submissions

8.165 The majority of submissions that addressed this issue supported the amendment of the legislation to include an express requirement for the witness to an enduring document to give an explanation to, or interview, the principal about the matters he or she must understand to execute the enduring document.<sup>1448</sup>

8.166 One respondent suggested that the legislation should provide for the witness to certify that he or she has discussed the guidelines with the principal and that the principal understands 'what giving an enduring power of attorney actually entails'.<sup>1449</sup> Two other respondents, one of whom is a long-term Tribunal member, considered that witnesses should be required to make a written record of their reasons for deciding the person has capacity to execute an enduring document.<sup>1450</sup> The respondent who is a long-term Tribunal member also considered that the witness should also be required to confirm that he or she has discussed the contents of the enduring power of attorney with the principal and has done so without the attorney being present.<sup>1451</sup>

<sup>1446</sup> *Mental Capacity Act 2005* (UK) s 9(2)(b), sch 1 pt 1 cl 1(1)(a); *The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) reg 5, sch 1 pt 1 form LPA PA. The Law Commission (New Zealand) also recommended that in those circumstances in which a solicitor is required to witness an enduring power of attorney, the solicitor should be required to certify that he or she advised the principal on the matters of which the principal must understand. This was considered an appropriate safeguard given concerns that, in practice, principals were not always being advised about certain matters: Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [21], [27].

<sup>1447</sup> Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 166.

<sup>1448</sup> Submissions C87, 12, 20, 50, 52, 55, 56, 68, 73, 81, 179.

<sup>1449</sup> Submission 61.

<sup>1450</sup> Submissions 60, 179.

<sup>1451</sup> Submission 179.

8.167 The Queensland Police Service suggested that the legislation should require the witness to be satisfied that both the principal and the attorney understand the requisite matters.<sup>1452</sup>

8.168 Several submissions supported the development of guidelines for witnesses.<sup>1453</sup> In its submission, the Council on the Aging recommended that a 'capacity toolkit' should be developed to aid witnesses in determining a person's capacity.<sup>1454</sup>

8.169 On the other hand, the Public Trustee submitted that it was unnecessary to include legislative requirements in relation to the matters to which the witness must attend in certifying the principal's capacity. Instead, it considered that the guidelines produced by the Queensland Law Society and the Office of the Adult Guardian are sufficient. The Public Trustee also noted that the inclusion of a legislative requirement in the *Powers of Attorney Act 1998* (Qld) may tend to qualify the nature and extent of the obligations upon a witness rather than to ensure appropriate explanation of and attendance to the task of certifying.<sup>1455</sup>

### The Commission's view

8.170 The practices adopted by witnesses for enduring documents are important for several reasons. Firstly, an enduring document is a significant legal document. The execution of an invalid document may have serious consequences for the principal, attorney and third parties. Secondly, it may be some time after an enduring document has been made — usually after the principal has lost capacity — that the question of validity will be raised. The practices adopted by witnesses and others involved in making an enduring document are therefore very important in an evidentiary sense. Recent research in Queensland suggests that there is a gap between best practice and current practice as to how solicitors witness enduring documents.<sup>1456</sup> To address this gap, it has been suggested that '[s]teps need to be taken to promote greater understanding of and adherence to, best practice by solicitors in relation to enduring documents'.<sup>1457</sup>

8.171 The issue of the witness taking insufficient steps, or lacking appropriate training, to assess a person's capacity to make an enduring document adequately is generally an educative issue rather than a legislative one. This should be specifically addressed in professional development and training programs for eligible witnesses to ensure that they have the knowledge and skills necessary to perform their roles.

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1452 Submission 173.

1453 Submissions 60, 61, 68.

1454 Submission 60.

1455 Submission 90.

1456 B White and L Willmott, 'Solicitors and enduring documents: Current practice and best practice' (2008) 16 *Journal of Law and Medicine* 466, 487.

1457 Ibid.

8.172 Consequently, the Commission considers that the *Powers of Attorney Act 1998* (Qld) should not be amended to include an express requirement for the witness to an enduring document to give an explanation to the principal of, or to interview the principal about, the matters he or she must understand to make the enduring document. Rather than impose such requirements in the legislation, the application of these requirements should remain within the witness's discretion, having regard to the guidelines developed by the Adult Guardian, the Queensland Law Society or the Justices of the Peace Branch of the Department of Justice and Attorney-General. The Commission also considers, however, that the witnessing sections of the approved forms for making an enduring document should be amended to refer to these guidelines and recommend their use.

8.173 Earlier in this chapter, the Commission recommended that, in addition to having the level of understanding required to make an enduring document, the principal must also have the capacity to make the enduring document freely and voluntarily. If that recommendation is implemented, the approved forms and the guidelines should be amended to refer to this additional requirement.

8.174 The guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General all draw specific attention to the matters noted above and to the importance of the interview process and, in particular, the questioning technique that should be used as a matter of good practice, that is, the use of open-ended questions rather than close-ended questions. The latter practice, in particular, can be a useful indicator of the principal's capacity. Another matter of critical importance is that the witness should always keep a written record of all the steps he or she has taken in assessing the principal's capacity.

8.175 Inadequate witnessing practices may have adverse consequences for a witnessing solicitor who does not comply with the Queensland Law Society's Guidelines. These consequences include negative comments in a public forum such as the Supreme Court of Queensland or the Tribunal, referral to the Legal Services Commission or being found guilty of unsatisfactory professional conduct.<sup>1458</sup> For example, in *Legal Services Commissioner v Ford*<sup>1459</sup> (which concerned disciplinary proceedings in the Supreme Court of Queensland against a solicitor in relation to the preparation and execution of a will and an enduring power of attorney for an elderly client in a nursing home), not following the guidelines was one element in a finding of unsatisfactory professional conduct against the solicitor.

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1458 Ibid.

1459 [2008] LPT 12, 23–4.

**RECOMMENDATIONS*****The level of understanding required to make an enduring document*<sup>1460</sup>**

- 8-1 Subject to Recommendations 8-3 and 8-4 below, the current list of the matters in sections 41(2) and 42(2) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand to make an enduring document are appropriate and do not require amendment.
- 8-2 The current list of the matters in section 41(2) of the *Powers of Attorney Act 1998* (Qld) that the principal must understand to make an enduring power of attorney should continue to be expressed as an inclusive list.
- 8-3 Section 42(1) of the *Powers of Attorney Act 1998* (Qld) should be amended to provide, amongst other things, that a principal has the capacity necessary to make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the nature and effect of the advance health directive.
- 8-4 Section 42(1) of the *Powers of Attorney Act 1998* (Qld) should be amended so that the current list of matters that a principal must understand to make an advance health directive is inclusive rather than exhaustive.

***Relationship to the definitions of 'impaired capacity' and 'capacity'*<sup>1461</sup>**

- 8-5 Section 41 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a principal has capacity to make an enduring power of attorney only if, in addition to understanding the nature and effect of the enduring document, the principal is capable of making the enduring document freely and voluntarily.
- 8-6 Section 42 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that a principal has capacity to make an advance health directive only if, in addition to understanding the nature and effect of the enduring document, the principal is capable of making the enduring document freely and voluntarily.
- 8-7 The *Powers of Attorney Act 1998* (Qld) should be amended to provide that the general definition of capacity in the third schedule to the Act does not apply either to section 41 or 42 of the Act.

1460 See the model provisions which reflect these recommendations at [8.108] above.

1461 Ibid.

***Witnessing the principal's capacity to make an enduring document***

- 8-8 The definition of 'eligible witness' in section 31(1)(a) of the *Powers of Attorney Act 1998* (Qld) should be amended to omit the reference to a commissioner for declarations.
- 8-9 The requirement that a witness to an enduring document must be a justice of the peace (magistrates court), justice of the peace (qualified), notary public or lawyer, as recommended in Recommendation 8-8 above, should apply only to an enduring document made after the commencement of the legislation that gives effect to that recommendation.
- 8-10 The approved forms for an enduring power of attorney and an advance health directive should be amended to clarify that a justice of the peace (commissioner for declarations) is not an eligible witness for an enduring document.
- 8-11 The current requirement under section 31(1)(f) of the *Powers of Attorney Act 1998* (Qld) for a witness to an advance health directive to be at least 21 years should be omitted.

***Steps the witness should take***

- 8-12 If Recommendations 8-5 and 8-6 above are implemented, the approved forms and the guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General should be amended to refer to these additional requirements.
- 8-13 The approved forms under the *Powers of Attorney Act 1998* (Qld) for making an enduring document should specifically refer to the guidelines developed by the Adult Guardian, the Queensland Law Society and the Justices of the Peace Branch of the Department of Justice and Attorney-General, and recommend their use in witnessing the document.