

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—¹

- (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.

¹

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,]² 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,]³ 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 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,]⁴ 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,]⁵ 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.

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,⁶ 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,]⁷ for a health matter or a special health matter⁸ 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,]⁹ 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;

⁷ 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).

⁸ 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).

⁹ 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.

