

**Queensland  
Law Reform Commission**

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

**Report**

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

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

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

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



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# Chapter 21

## Tribunal proceedings

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### INTRODUCTION

21.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including the extent to which the current powers and functions of bodies

established under the legislation provide a comprehensive investigative and regulatory framework.<sup>1</sup>

21.2 This chapter gives an overview of the relevant provisions of the *Guardianship and Administration Act 2000* (Qld) and the QCAT Act which deal with various aspects of Tribunal proceedings. It also raises selected issues for consideration including a number of issues about Tribunal proceedings which the Commission indicated in its 2007 report on confidentiality would be considered in this stage of the review.

21.3 In this chapter, a reference to 'the Tribunal', in relation to guardianship proceedings commenced from 1 December 2009, is a reference to the Queensland Civil and Administrative Tribunal. However, a reference to 'the Tribunal', in relation to guardianship proceedings commenced before 1 December 2009, is a reference to the Guardianship and Administration Tribunal. In addition, a reference in this chapter to a 'Tribunal proceeding' is a reference to the Tribunal when exercising jurisdiction in a guardianship proceeding.

## BRIEF OVERVIEW OF TRIBUNAL PROCEEDINGS

21.4 In its original 1996 report, the Commission recommended the establishment of an independent statutory tribunal. The Commission considered that a tribunal structure was appropriate 'to develop procedures which are easier than the court system for ordinary members of the community to understand and to use, and which involve minimum cost and delay, whilst at the same time ensuring that the rights and interests of people with a decision-making disability are protected'.<sup>2</sup>

21.5 Consistent with that approach, the Tribunal is conferred with a broad discretion in relation to its control over the conduct of proceedings and the manner in which it receives evidence. Although not bound by formal legalistic procedures, the Tribunal generally must apply the principle of open justice and the requirements of natural justice.

21.6 Various aspects of the Tribunal's proceedings are outlined below.

### The commencement of proceedings

21.7 An application may be made under the *Guardianship and Administration Act 2000* (Qld) for a declaration, order, direction, recommendation or advice in relation to an adult about something in or related to the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).<sup>3</sup> An

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<sup>1</sup> The terms of reference are set out in Appendix 1.

<sup>2</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (2006) vol 1, 218.

<sup>3</sup> *Guardianship and Administration Act 2000* (Qld) s 115(1).

application must contain particular information and certain applications must also be accompanied by a report by a health provider about the adult.<sup>4</sup>

21.8 The Tribunal is required to notify certain persons of the hearing of an application.<sup>5</sup>

21.9 There is no filing fee for making an application.<sup>6</sup>

### The parties to a proceeding

21.10 The parties to a Tribunal proceeding are called 'active parties'. They are the adult concerned in the application, the applicant (if not the adult), any current or proposed guardian, administrator or attorney for the adult, the Adult Guardian, the Public Trustee and any other person joined as party by the Tribunal.<sup>7</sup>

### The constitution of the Tribunal

21.11 When exercising its jurisdiction in guardianship proceedings, the Tribunal must be constituted by three members unless the President considers it appropriate for the proceeding to be heard by two members or a single member.<sup>8</sup>

### Natural justice

21.12 The Tribunal must observe the rules of natural justice.<sup>9</sup> The term 'natural justice' captures the common law requirement of procedural fairness, which imposes a set of procedural standards on decision-makers to ensure a fair hearing

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<sup>4</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 110(2), 111(2), 113(2). These rules provide that certain applications must also include, for example, by attaching a report, information about the adult relevant to the application that is provided by a health provider. These applications are: an application for the appointment a guardian or an administrator; an application for a declaration of capacity; and an application for consent for special health care.

<sup>5</sup> *Guardianship and Administration Act 2000* (Qld) s 118.

<sup>6</sup> *Guardianship and Administration Act 2000* (Qld) s 114B(1). Section 114B(1) does not apply in relation to an appeal to the Appeal Tribunal under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 8 div 1.

<sup>7</sup> *Guardianship and Administration Act 2000* (Qld) s 119.

<sup>8</sup> *Guardianship and Administration Act 2000* (Qld) s 102. In the year 2007–08, 56 per cent of finalised applications were heard by a single member, 36 per cent were heard by three members, and 8 per cent were heard by two members: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 39. In that Report, the Tribunal indicated that a significant number of the single-member hearings were non-contentious reviews of existing appointments, for example, where there was no dispute about the issues of capacity and need or where an administrator had been managing the adult's finances for some time and all relevant contactable people (adult, family and caregivers) were happy with the appointment: at 38.

<sup>9</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(a). Prior to the commencement of the Queensland Civil and Administrative Tribunal, the Guardianship and Administration Tribunal was required to observe the rules of procedural fairness: *Guardianship and Administration Act 2000* (Qld) s 108(1). Section 108(1) was repealed by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446.

and determination for the persons affected by the decision.<sup>10</sup> The requirements of natural justice or procedural fairness are based on two rules.<sup>11</sup>

21.13 The first rule is that the parties to a proceeding must be given an adequate opportunity to present their case (the hearing rule).<sup>12</sup> This rule involves three aspects: adequate prior notice; adequate disclosure of material; and an opportunity to respond to that material.

21.14 The second rule is that the decision-maker must be impartial or free from bias (the bias rule).<sup>13</sup> This rule requires that the decision-maker approach the task with an open mind, free from prejudice and without any interest, pecuniary or otherwise, in the outcome.

21.15 The requirements of natural justice will depend on the circumstances of each case.

### Access to documents

21.16 The active parties to a proceeding have a statutory right to access specified documents on the Tribunal file before, during and after the hearing.<sup>14</sup> A person the Tribunal considers to have a sufficient interest in the proceeding may also access specified documents but only after the hearing has ended.<sup>15</sup> The right to access a document or other information may be displaced by a confidentiality order.<sup>16</sup> Such an order, which permits the Tribunal to withhold a document or information from an active party or another person, may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person.<sup>17</sup>

### Informality

21.17 Tribunal proceedings must be conducted with as little formality and technicality and with as much speed as the requirements of the QCAT Act and a proper consideration of the matters before the Tribunal permit.<sup>18</sup>

<sup>10</sup> WB Lane and S Young, *Administrative Law in Australia* (2007) [2.235]; JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [7.1], [7.4].

<sup>11</sup> *Ibid.* See, for a discussion of the principle of open justice and the requirements of procedural fairness in the guardianship system: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [3.23]–[3.57].

<sup>12</sup> JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [7.1], [7.4]. And see [21.69] below.

<sup>13</sup> JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [7.3].

<sup>14</sup> *Guardianship and Administration Act 2000* (Qld) s 103(1)–(2).

<sup>15</sup> *Guardianship and Administration Act 2000* (Qld) s 103(2).

<sup>16</sup> *Guardianship and Administration Act 2000* (Qld) s 103(5).

<sup>17</sup> *Guardianship and Administration Act 2000* (Qld) s 109(1).

<sup>18</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(d).

## Openness

21.18 Generally, Tribunal hearings must be held in public.<sup>19</sup> However, the presumption of openness in Tribunal proceedings may be displaced in limited circumstances.

21.19 The Tribunal may make an adult evidence order which permits the Tribunal to speak with the adult in the absence of others.<sup>20</sup> The Tribunal may also make a closure order which permits the Tribunal to close a hearing or part of a hearing to all or some members of the public, or to exclude a particular person (including an active party) from a hearing or part of a hearing.<sup>21</sup> These orders can be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person. An adult evidence order can also be made if it is necessary to obtain relevant information the Tribunal would not otherwise receive.<sup>22</sup>

## Evidence

21.20 The Tribunal is not bound by the rules of evidence but may inform itself on a matter in a way that it considers appropriate.<sup>23</sup> The Tribunal's decision must be based upon some evidence even though it may not be admissible in a court.<sup>24</sup> While the Tribunal is not bound by the rules of evidence, considerations of fairness and reliability on which the rules are based are relevant in the fact-finding process.<sup>25</sup> These considerations may affect the weight and significance given to the evidence.<sup>26</sup>

21.21 The Tribunal has specific powers to inform itself in particular circumstances, for example, to inquire as to the appropriateness and competence of a particular person to be appointed as a guardian or an administrator.<sup>27</sup> In addition to these powers to undertake inquiries, the legislation also imposes a duty on the Tribunal to inquire. The Tribunal must 'ensure, as far as it considers it

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19 *Guardianship and Administration Act 2000* (Qld) s 105.

20 *Guardianship and Administration Act 2000* (Qld) s 106.

21 *Guardianship and Administration Act 2000* (Qld) s 107.

22 *Guardianship and Administration Act 2000* (Qld) s 106(1).

23 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(b)–(c).

24 JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [12.43], [12.54], [12.63]; Administrative Review Council, 'Decision-making: Evidence facts and findings', *Best Practice Guide 3* (2007) 3.

25 JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [12.44]; Administrative Review Council, 'Decision-making: Evidence, facts and findings', *Best Practice Guide 3* (2007) 6.

26 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 52–3.

27 *Guardianship and Administration Act 2000* (Qld) ss 18, 30. The *Guardianship and Administration Act 2000* (Qld) also includes other provisions that permit the Tribunal to seek further information or inform itself in specific circumstances: ss 76 (Health providers to give information), 80P (Health providers to give information), 134 (Report by tribunal staff), 148 (Application for entry and removal warrant) and 153 (Records and audit). See also s 122 of the *Powers of Attorney Act 1998* (Qld) which is in similar terms to s 153 of the *Guardianship and Administration Act 2000* (Qld), although it relates to both the Supreme Court and the Tribunal exercising powers under that Act: *Powers of Attorney Act 1998* (Qld) s 109A.

practicable, it has all the relevant information and material'.<sup>28</sup> It may, for example, request or order a person to provide it with information or material.<sup>29</sup> However, if the Tribunal considers urgent or special circumstances justify it doing so, it may proceed to decide a matter on the information before it without receiving further information.<sup>30</sup> Other powers that permit the Tribunal to receive its own evidence include specific powers to call its own witnesses and to seek particular documents.<sup>31</sup>

21.22 The Tribunal is required when making a decision to be 'satisfied' as to its decision and there is no burden of proof placed on a party by the *Guardianship and Administration Act 2000* (Qld).<sup>32</sup> In the absence of the parties' responsibility to prove a particular case, the Tribunal may need to make further inquiries before it can be 'satisfied' of the particular matters necessary for a decision.<sup>33</sup>

28 *Guardianship and Administration Act 2000* (Qld) s 130(1). The *Guardianship and Administration Act 2000* (Qld) also includes other provisions that impose a duty on the Tribunal to inquire in specific circumstances: ss 80D(3) (Whether sterilisation is in child's best interests), 118(2)(c)(ii) (Tribunal advises persons concerned of hearing), 146(3) (Declaration about capacity), sch 1 s 12 (Health care principle).

29 *Guardianship and Administration Act 2000* (Qld) s 130(2)–(4). A person must comply with such a request or order unless he or she has a reasonable excuse. It is a reasonable excuse for a person to fail to give information or material because giving the information or material might tend to incriminate the person: s 130(5). Subject to a person having a reasonable excuse, a request or order made under s 130 of the Act overrides any restriction, in an Act or the common law, about the disclosure or confidentiality of information and any claim of confidentiality or privilege, including a claim based on legal professional privilege.

30 *Guardianship and Administration Act 2000* (Qld) s 131(1). If all the active parties in a proceeding agree, the Tribunal may also proceed to decide a matter in the proceeding on the information before it when the agreement was reached without receiving further information: s 131(2). However, before the active parties agree, the Tribunal must ensure they are aware of the material on which the matter will be decided: s 131(3). See also s 120 of the *Powers of Attorney Act 1998* (Qld) which is in virtually identical terms, although it relates to both the Supreme Court and the Tribunal exercising powers under that Act: *Powers of Attorney Act 1998* (Qld) s 109A.

31 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 97–98. The *Guardianship and Administration Act 2000* (Qld) also empowers the Tribunal to seek particular documents or documents in a specific situation: *Guardianship and Administration Act 2000* (Qld) ss 18 (Inquiries about appropriateness and competence), 49 (Keep records), 153 (Records and audit).

32 The following provisions of the *Guardianship and Administration Act 2000* (Qld) provide that the Tribunal must be 'satisfied' as to a relevant matter: ss 12(1) (appointing a guardian or an administrator), 13(1) (appointing a guardian or an administrator six months in advance of the adult turning 18), 31(2)–(3) (reviewing the appointment of a guardian or an administrator), 69–73 (making a range of decisions about special health matters such as sterilisations and terminations), 80C(2) (whether sterilisation of a child is in his or her best interests), 80J(3) (reducing time for notice of a hearing in relation to the sterilisation of a child), 106 (making an adult evidence order), 107 (making a closure order), 108 (making a non-publication order), 109 (making a confidentiality order), 114A (permitting publication of information about a proceeding), 129(1) (making an interim order), 149(1) (issuing a warrant for removal of adult), sch 2 s 13(3) (approving clinical research).

The *Powers of Attorney Act 1998* (Qld) also contains references to the Tribunal being 'satisfied' as to certain matters: ss 18(2) (confirming the operation of a power of attorney when the principal becomes 'incommunicate'), 113(2) (declaration about validity of a power of attorney, enduring power of attorney or advance health directive), 123(1) (dismissing an application as frivolous, trivial or vexatious). Those provisions of the *Powers of Attorney Act 1998* (Qld) also apply to the Supreme Court: *Powers of Attorney Act 1998* (Qld) s 109A.

The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) does not expressly state the standard of proof to be applied in Tribunal hearings. Previously, the Guardianship and Administration Tribunal has applied the civil or balance of probabilities standard: *Re HEM* [2005] QGAAT 27. See also *McDonald v Director-General of Social Security* (1984) 1 FCR 354; N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 32.

33 This does not mean, however, that there is not a practical onus on a party to prove his or her case: N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 59 citing, for example, *McDonald v Director-General of Social Security* (1984) 1 FCR 354.



## Other matters about Tribunal proceedings

### *Special provisions supporting accessible, fair and informal proceedings*

21.23 Sections 28 and 29 of the QCAT Act support the Act's objective to provide Tribunal services that are accessible, fair and informal.

21.24 Section 28 sets out the general requirements for Tribunal practices and procedures, including the requirement to comply with the rules of natural justice. Generally, the tribunal is to operate in a more pro-active, inquisitorial manner than what is expected of a traditional court. The primary object is to provide the parties with substantive justice as expeditiously and economically as possible, without the tribunal being bound by formal rules of evidence or procedure.<sup>34</sup>

21.25 Section 29 imposes an obligation on the Tribunal to take all reasonable steps to ensure that a party to a proceeding understands particular matters about the proceeding and requires the Tribunal to take into account, and be responsive to, the individual needs of the party. Section 29 provides:

#### **29 Ensuring proper understanding and regard**

- (1) The tribunal must take all reasonable steps to—
  - (a) ensure each party to a proceeding understands—
    - (i) the practices and procedures of the tribunal; and
    - (ii) the nature of assertions made in the proceeding and the legal implications of the assertions; and
    - (iii) any decision of the tribunal relating to the proceeding; and
  - (b) understand the actions, expressed views and assertions of a party to or witness in the proceeding, having regard to the party's or witness's age, any disability, and cultural, religious and socioeconomic background; and
  - (c) ensure proceedings are conducted in a way that recognises and is responsive to—
    - (i) cultural diversity, Aboriginal tradition and Island custom, including the needs of a party to or witness in the proceeding who is from another culture or linguistic background or is an Aboriginal person or Torres Strait Islander; and
    - (ii) the needs of a party to, or witness in, the proceeding who is a child or a person with impaired capacity or a physical disability.

- (2) The steps that can be taken for ensuring a person understands something mentioned in subsection (1)(a) include, for example—
- (a) explaining the matters to the person; or
  - (b) having an interpreter or other person able to communicate effectively with the person give the explanation; or
  - (c) supplying an explanatory note in English or another language.

### **Dispute Resolution**

21.26 The QCAT Act contains general dispute resolution provisions which apply to active parties in Tribunal proceedings.<sup>35</sup> These include compulsory conferencing and mediation provisions.

21.27 The Tribunal or the Principal Registrar may direct the parties to a proceeding to attend a compulsory conference.<sup>36</sup> The purposes of a compulsory conference are to identify and clarify the issues in dispute in a proceeding, to promote a settlement of the dispute, to identify questions of fact and law to be decided by the Tribunal, to make orders and give directions about the conduct of the proceeding and to make orders and give directions to resolve the dispute.<sup>37</sup>

21.28 The Tribunal or the Principal Registrar may refer the subject matter, or part of the subject matter, of a proceeding to mediation.<sup>38</sup> The purpose of mediation is to promote the settlement of the dispute which is the subject of the proceeding.<sup>39</sup>

21.29 There are various models of mediation, including facilitative, evaluative and transformative mediation. Because the focus of a guardianship proceeding is on the adult and the outcome that best represents the adult's interests (in contrast to a traditional legal dispute where the aim of the proceedings is to settle a

<sup>35</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 div 2 (compulsory conferences), div 3 (mediation). In addition to a Tribunal member, the mediation may be conducted by a Tribunal member, an Adjudicator, the Principal Registrar, a member of the Tribunal Registry or a mediator under the *Dispute Resolution Centres Act 1990* (Qld): *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 79.

<sup>36</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 67.

<sup>37</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 69.

<sup>38</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 75. The National Alternative Dispute Resolution Advisory Council defines 'mediation' as a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted: National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* <[http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR\\_GlossaryofADRTerms\\_GlossaryofADRTerms](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms)> at 30 September 2010.

<sup>39</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 77. An Australian research study about the effectiveness of mediation in guardianship proceedings has indicated that, in some cases, mediation may be helpful 'to determine if some or all of the differences between the parties can be resolved in a way that best meets the needs of the adult': R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75, 92. See, for example, *Re WFM* [2006] QGAAT 54; *Re WAE* [2007] QGAAT 72.

disagreement between two parties), it has been suggested that a facilitative model of mediation is suitable for the mediation of guardianship disputes.<sup>40</sup>

### **Ending a proceeding early**

21.30 If the Tribunal considers that a proceeding, or part of a proceeding, is frivolous, vexatious or misconceived, lacks substance or otherwise is an abuse of process, the Tribunal may:<sup>41</sup>

- if the party who brought the proceeding or part before the Tribunal is the applicant for the proceeding, order the proceeding or part to be dismissed or struck out; or
- for a part of a proceeding brought before the Tribunal by a party other than the applicant for the proceeding:
  - make its final decision in the proceeding in the applicant's favour; or
  - order that the party who brought the part before the Tribunal be removed from the proceeding.

21.31 In addition, the Tribunal has power to order costs against the party who brought the proceeding or part before the Tribunal.<sup>42</sup>

21.32 The Tribunal may also exercise similar powers if it considers a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding.<sup>43</sup>

### **Costs**

21.33 Generally, each party in a proceeding is to bear the party's own costs of the proceeding.<sup>44</sup> However, in exceptional circumstances, including, for example, if the Tribunal considers the application is frivolous or vexatious, the Tribunal may order an applicant to pay both an active party's costs and the Tribunal's costs.<sup>45</sup>

21.34 In limited circumstances, the Tribunal may also order costs against a party's representative in the interests of justice.<sup>46</sup>

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40 R Carroll and A Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (Paper presented at the Australian Guardianship and Administration Conference, Brisbane, 19–20 March 2009, 29–30 <<http://www.agac.org.au/conference-papers/52-2009-conference-papers>> at 30 September 2010.

41 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 47(1), (2)(a)–(b).

42 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 47(1), (2)(c).

43 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 48.

44 *Guardianship and Administration Act 2000* (Qld) s 127(1).

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

46 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 103.

### **Offences and contempt**

21.35 The QCAT Act provides for various offences in relation to Tribunal proceedings. For example, the Act makes it an offence for a person, without reasonable excuse, to contravene a decision of the Tribunal.<sup>47</sup> It is also an offence, for example, to give a false or misleading document to the Tribunal or to make a false or misleading statement (for example, in documentation supporting an application for a guardianship or an administration order).<sup>48</sup>

### **Publication of proceedings**

21.36 Consistent with the legislative presumption of openness, the *Guardianship and Administration Act 2000* (Qld) permits the publication of information about Tribunal proceedings, provided that the publication does not lead to identification of the adult.<sup>49</sup> However, in limited circumstances, the Tribunal may make a non-publication order which permits the Tribunal to prohibit the publication of information about Tribunal proceedings to the public, or a section of the public.<sup>50</sup> A non-publication order may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person.

## **MAKING AN APPLICATION**

21.37 Section 115(1) of the *Guardianship and Administration Act 2000* (Qld) provides that an application may be made, as provided under the QCAT Act, to the Tribunal for a declaration, order, direction, recommendation or advice in relation to an adult about something in or related to the Act or the *Powers of Attorney Act 1998* (Qld).

### **Procedural requirements for making an application**

21.38 An application must be in writing, signed by the applicant and filed with the Tribunal.<sup>51</sup> It must also include the reasons for the application.<sup>52</sup> To enable the Tribunal to give notice of the hearing, the application must also include, to the best

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47 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1). A maximum penalty of 100 penalty units (\$10 000) applies: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

48 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 216. A maximum penalty of 100 penalty units (\$10 000) applies: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 216(1)–(2); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

49 *Guardianship and Administration Act 2000* (Qld) s 114A(1)–(2).

50 *Guardianship and Administration Act 2000* (Qld) s 108.

51 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 33(2)(a), (c).

52 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 33(2)(b).

of the applicant's knowledge, the name and address or contact details for the following people:<sup>53</sup>

- the applicant;
- if the applicant is not the adult concerned in the application — the adult;
- the adult's family members;
- any primary carer of the adult; and
- all current guardians, administrators and attorneys for the adult.

21.39 Some types of application also require the inclusion of additional information. For example, an application for the appointment of a guardian or an administrator must include the following information:<sup>54</sup>

- the proposed appointee's written agreement to the appointment;
- details of the matter;
- a detailed description of the adult's alleged impaired capacity for the matter;
- why the appointment is necessary;
- details of any enduring document made by the adult;
- for an application for appointment of a guardian — a summary of the adult's financial position;
- for an application for appointment of an administrator:
  - details of the adult's income, living expenses, assets and liabilities; and
  - details of the current arrangements for management of the adult's financial matters;
- the name, address and telephone number of the proposed guardian or administrator;
- whether the adult has been informed of the application;

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53 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 109(1). A person must not state anything to an official (including a Tribunal member, Principal Registrar, Registrar, Adjudicator or a registry staff member) that the person knows is false or misleading in a material manner: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 216. The maximum penalty is 100 penalty units (\$10 000): *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 216(1)–(2); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

54 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 110(1).

- a description of how the person communicates and information about the type of assistance, if any, the adult might need at the hearing; and
- if urgent action is required — an explanation of the urgency.

21.40 Various types of application must also include information about the adult relevant to the application that is provided by a health provider.<sup>55</sup>

21.41 The Principal Registrar of the Tribunal also has a general power to accept an application, with or without conditions, or to reject an application.<sup>56</sup> This is similar to the position in the Victorian Civil and Administrative Tribunal.<sup>57</sup>

21.42 The information required under the legislation is to be provided to the Tribunal on the relevant approved form. As mentioned above, the QCAT Act requires that an application for the appointment of a guardian or an administrator or the review of an appointment must include, to the best of the applicant's knowledge, information about the members of the adult's family and any primary carer of the adult, as well as any current guardians, administrators or attorneys for the adult. The application form, in a section entitled 'The Adult's Primary contacts', asks the applicant for information about who may be interested in the application and refers to the examples of siblings, children, service providers and advocates.<sup>58</sup> The application form also includes a warning that the applicant must not withhold information from the Tribunal about the names of people who may have an interest in the application. However, the way in which the questions which seek to elicit information are framed may suggest that the applicant need not provide information about the adult's family or any primary carer of the adult unless the applicant perceives for himself or herself that the person may have an interest in the application.<sup>59</sup>

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

21.43 The Commission considers that the application form should be reworded to reflect more clearly the legislative requirement that the applicant must provide

<sup>55</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 110(2), 111(2), 113(2). These rules provide that certain applications must also include, for example, by attaching a report, information about the adult relevant to the application that is provided by a health provider. These applications are: an application for the appointment a guardian or an administrator; an application for a declaration of capacity; and an application for consent for special health care.

<sup>56</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 36. The Principal Registrar may reject an application on certain grounds including that the application was made by a person who is not authorised to make it or does not comply with a requirement under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the rules made under that Act or the *Guardianship and Administration Act 2000* (Qld).

<sup>57</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 71.

<sup>58</sup> Queensland Civil and Administrative Tribunal, *Application for administration/guardianship appointment or review — Guardianship and Administration Act 2000 (Form 10, Version 1)* <[http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10\\_Ap\\_admin.g\\_app\\_rw.pdf](http://www.qcat.qld.gov.au/Formsfinalcanbesaved/F10_Ap_admin.g_app_rw.pdf)> at 30 September 2010. See Question 3.

<sup>59</sup> In the section of the application form entitled 'The Adult's Primary Contacts', the applicant is required to respond to two statements about who may be an interested person for the adult: the first statement is 'there is nobody who may be interested in the application (eg siblings, children, service providers, advocates etc)'; the second statement is that 'the following people may have an interest in this application (include people already mentioned in this application)'.

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.

21.44 The Commission also considers that the application form should 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. This would put the Tribunal on notice that, in these circumstances, it may be necessary to make further inquiries about other persons who may be interested in the application.

### Who may make an application

21.45 A person's entitlement to make an application in a legal proceeding is sometimes referred to in terms of the person's 'standing' to apply.

21.46 Section 115(2) of the *Guardianship and Administration Act 2000* (Qld) sets out the particular persons who have standing to make an application to the Tribunal. It provides that an application may be made by:

- the adult concerned; or
- unless the Act or the *Powers of Attorney Act 1998* (Qld) states otherwise<sup>60</sup> — another interested person.<sup>61</sup>

### Interested persons

21.47 An 'interested person' is defined under the *Guardianship and Administration Act 2000* (Qld) as follows:<sup>62</sup>

**interested person**, for a person, means a person who has a sufficient and continuing interest in the other person.

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See eg *Guardianship and Administration Act 2000* (Qld) ss 12 (Applications for the appointment of a guardian or administration), 13A (Advance appointment of a guardian for restrictive practices), 29(1)(a)–(b) (Applications for the review of the appointment of a guardian or an administrator), 29(1)(c) (Applications for the review of a guardian for a restrictive practice matter under chapter 5B), 74(3) (Change to appointment order for special health care), 80ZA (Review by Tribunal of containment or seclusion), 76(5) (Application for orders that a health provider give information), 80H (Who may apply for consent to the sterilisation of a child with an impairment), 80ZL (Application for orders to give information to the adult guardian), 80ZP (Who may apply for appointment of guardian for restrictive practice matter), 106 (Adult evidence order), 107 (Closure order), 108 (Non-publication order), 109 (Confidentiality order), 138A (Dismiss frivolous applications), 146(2) (Declaration of capacity), 153(3) (Records and audit), 154(3) (Ratification or approval of exercise of power by informal decision maker), 241(3) (Transfer of proceeding), 243(2) (Interim appointed decision maker if Supreme Court proceeding).

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See eg *Guardianship and Administration Act 2000* (Qld) ss 13(8) (Advance appointment of a guardian for a personal matter of administrator), 39(2) (Act together with joint guardians or administrators), 74(3) (change to appointment order for special health care), 80ZO (Application for containment or seclusion approval), 115 (Application for a declaration, order, direction, recommendation or advice), 146(2) (Declaration of capacity), 160(1) and 161(1) (Application for review of registrar's decision), 243 (Interim appointed decision maker if Supreme Court proceeding), 193 (Report after investigation or audit). See also eg *Powers of Attorney Act 1998* (Qld) ss 80(2) (Act together for joint persons), 110(3) (Apply to the court to do something under chapter 6 about a power of attorney, enduring power of attorney or an advance health direction), 122 (Apply to the court for an order requiring records and audit), 123(1) (Court may dismiss an application if frivolous, vexatious, lacking in substance etc).

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

21.48 The definition of ‘interested person’ under the *Powers of Attorney Act 1998* (Qld) is in virtually the same terms.<sup>63</sup>

21.49 The definition of interested person focuses on the nature of the person’s interest in an adult with impaired capacity. Consequently, a person with no real interest in the adult would not have standing to make an application under the *Guardianship and Administration Act 2000* (Qld).

21.50 The Tribunal has power to decide whether a person is an ‘interested person’ for another person under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).<sup>64</sup>

21.51 In *Re EEP*,<sup>65</sup> the Tribunal dismissed an application for the appointment of an administrator on the basis that the applicant was not an interested person. The applicant was the director of a company which had brought an action in the District Court against the adult over the sale of property. The applicant argued that he had a sufficient and continuing interest in the adult as they were engaged in litigation. The applicant’s argument was not accepted as the Tribunal considered that the applicant’s interest was limited to the resolution of litigation between the applicant and the adult, and was ‘not an interest necessarily connected with the adult’s proper care and protection and is not a continuing interest’.

21.52 Similarly, in *Re MAD*,<sup>66</sup> the Tribunal considered whether the applicant had standing as an ‘interested person’ to bring an application for a declaration of capacity about the adult concerned in the proceeding. The applicant was a solicitor who was acting under the instructions of a medical defence fund for two doctors who were the defendants in a personal injuries action in the Supreme Court commenced by the adult. The applicant sought a declaration about the adult’s capacity to conduct litigation on his own behalf. The Tribunal held that the applicant did not have a sufficient and continuing interest in the adult because he did not have an ‘ongoing concern for the welfare of the adult’.<sup>67</sup>

<sup>63</sup> *Powers of Attorney Act 1998* (Qld) sch 3. The Act provides that an ‘**interested person**, for another person, means a person who has a sufficient and continuing interest in the other person’.

<sup>64</sup> *Guardianship and Administration Act 2000* (Qld) s 126(1). If the Tribunal decides a person is not an interested person for the other person and the person asks for the Tribunal’s reasons, the Tribunal must give the person written reasons for its decision: 126(2). Section 126 does not limit the Supreme Court’s power to decide whether a person is an interested person for another person under the *Powers of Attorney Act 1998* (Qld): s 126(3).

<sup>65</sup> [2005] QGAAT 45, [15]. In that case, the Presiding Member also noted at [15], in respect to the applicant’s interest in the adult, that:

His interest is tainted as he is in a position of conflict. Confidential Information, which may become known to him during the course of this application, may advantage his company, for example the medical reports. During the course of the hearing of the application Mr JA as attorney for Mr EP would if he wished to show how he was adequately protecting Mr EP’s interests would [sic] be required to show how he had performed his duties in respect of the litigation and this disclosure may also advantage the applicant.

<sup>66</sup> [2007] QGAAT 56.

<sup>67</sup> *Ibid.*



21.53 The decisions of *Re EEP* and *Re MAD* suggest that it is unlikely that an insurer of a tortfeasor or the insurer's solicitor will have standing to make an application under the Act.<sup>68</sup> However, having the question of capacity clarified in this circumstance, regardless of whether the application was brought by a representative from the opposing side in litigation involving the adult, may be in the adult's interests.

21.54 The legislation in several other jurisdictions provides for a similar concept to an 'interested person'.<sup>69</sup> For example, in New South Wales, the legislation provides that 'any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person' has standing to make an application.<sup>70</sup> In *Bovaird v Guardianship Tribunal*,<sup>71</sup> the New South Wales Supreme Court identified the following three requirements which must be satisfied in order to prove that a person has a 'genuine concern' for the welfare of the adult concerned in the proceeding:<sup>72</sup>

- the applicant is bringing to the Tribunal's attention a fact situation in which the adult's interests may require the Tribunal's intervention;
- the applicant is sincere in seeing the situation as one that may call for the Tribunal's intervention in the interests of the adult; and
- the application is motivated by a desire to advance the welfare of the person.

21.55 The Supreme Court also noted that, in relation to the third of these requirements, the applicant must be primarily motivated by the adult's welfare:<sup>73</sup>

The third requirement does not necessarily mean that the applicant is only focussed on the interests of the person. The intertwined lives of the person the subject of an application, their family, service providers and others around them will often mean that an applicant has a focus in their own interests or the interests of third parties as well as those of the person the subject of the application. However, for the person to have a genuine concern, the interests of the person must be their primary motivation for the application.

21.56 A wide range of applications under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) may be made by an interested person.<sup>74</sup> One type of application that is often made by an interested

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68 See C Endicott, 'Injuries where an injured claimant has impaired capacity' (Paper presented at Queensland Law Society and Australian Insurance Law Association Insurance Intensive, 7 May 2010) 9.

69 *Guardianship Act 1987* (NSW) s 9(1)(d); *Adult Guardianship Act* (NT) s 8; *Guardianship and Administration Act 1993* (SA) ss 33(1), 37(1).

70 *Guardianship Act 1987* (NSW) s 9(1)(d).

71 [2009] NSWSC 452.

72 *Ibid* [21].

73 *Ibid*.

74 See n 61 above.

person is an application for an order for the appointment of a guardian or an administrator.<sup>75</sup> In some circumstances, it may be that an application for an appointment order for an adult is made by the adult's service provider; for example, the manager of a residential care facility at which the adult resides.<sup>76</sup> Although the issue of whether a person has standing as an interested person will depend on the circumstances of the particular case, a service provider who provides regular or ongoing services for the adult's welfare would arguably have a sufficient and continuing interest in the adult.

### **Discussion Paper**

21.57 In the Discussion Paper, the Commission noted that, although it had not previously sought submissions about the standing of an interested person to make an application under the *Guardianship and Administration Act 2000* (Qld), it had received a number of submissions at an earlier stage of the review which addressed this issue.<sup>77</sup> In particular, several submissions raised concern that, in particular instances, some service providers have acted in their own interests rather than, or in addition to, the adult's interests in making an application for guardianship or administration for an adult.<sup>78</sup> For example, Legal Aid Queensland submitted that the application process has been used by some service providers in order to enforce debts against the adult.<sup>79</sup>

Our experience in these cases is that the respondents to the guardianship orders exhibited very sound decision-making capacity when they refused to pay for services that were not delivered or did not meet reasonable standards. However, in many cases their conduct was interpreted as non-compliant and uncooperative rather than an appropriate exercise of their legal rights. There is a risk that where these applications are entertained by the GAAT they are effectively encouraging an abuse of process by these agencies. These cases are of even greater concern when legal representation for respondents is not generally available. There should be some restriction on the circumstances in which applications for guardianship can be made where they rely primarily on the non-payment by the respondent of a debt.

21.58 The Commission commented that, on the one hand, it is arguable that the current definition is sufficiently clear on its face. An advantage of retaining the current definition might also be that it is flexible enough to cater for the broad range of circumstances in which it may be appropriate for a person to make an application. On the other hand, it noted that it may be desirable to clarify that the definition is focussed on the *welfare* of the adult. Additionally, or alternatively, the Commission suggested that it might be helpful if the definition contained some additional guidance as to what constitutes a sufficient and continuing interest in the

<sup>75</sup> *Guardianship and Administration Act 2000* (Qld) s 12(3).

<sup>76</sup> However, a paid carer for an adult is ineligible for appointment as a guardian or an administrator for the adult: *Guardianship and Administration Act 2000* (Qld) s 14(1)(a), sch 4 (definition of 'paid carer').

<sup>77</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.52], referring to Submissions C3, C20, C24, C25, C27A, C51, C65, C114, C132, C141, C148, C150, 41, 45, 63, 71, 93, 94.

<sup>78</sup> Submissions C24, C65, C114, 41, 63.

<sup>79</sup> Submission 63.

adult. This might include, for example, a requirement that the primary motivation of the person in making the application is the person's interest in the adult's welfare. This approach would be consistent with the focus of the guardianship system on promoting and safeguarding the adult's rights and interests.<sup>80</sup>

21.59 The Commission sought submissions on whether:<sup>81</sup>

- the definition of 'interested person' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) is appropriate or should be changed in some way, for example, to provide that the person must have a sufficient and continuing interest in the welfare of the adult; and
- additionally, or alternatively, the definition of 'interested person' under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should provide the following additional guidance as to what constitutes a sufficient and continuing interest in the adult:
  - a requirement that the primary motivation of the person in making the application must be the person's interest in the adult's welfare; or
  - some other requirement.

### **Submissions**

21.60 The Public Trustee, the Endeavour Foundation and a respondent who is a long term Tribunal member considered that the definition of 'interested person' in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) is appropriate.<sup>82</sup>

21.61 The Public Trustee emphasised the importance of flexibility in the definition.<sup>83</sup> He also suggested that the Tribunal's general application of the definition in *Re EEP* may address the concerns raised about service providers in the submissions.

21.62 Pave the Way commented that it was unaware of any difficulties with the current definition of 'interested person'.<sup>84</sup> However, it considered that the definition should make some reference to the person having a sufficient and continuing interest in the welfare of the adult. Pave the Way also considered that, for additional guidance as to what constitutes a sufficient and continuing interest in the adult, the Act should also include a requirement that the primary motivation of the

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80 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.53].

81 Ibid 63.

82 Submissions 156A, 163, 179.

83 Submission 156A.

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

person in making the application must be the person's interest in the adult's welfare. Another respondent made a similar observation.<sup>85</sup>

21.63 The Adult Guardian expressed concern in regard to the situation described by Legal Aid Queensland at [21.57] above.<sup>86</sup>

The Adult Guardian has heard similar allegations by advocates that service providers have brought applications to the tribunal to displace family members as guardians and secure an appointment of the Adult Guardian, presumably on the basis that the Adult Guardian is more favourably disposed to service providers. I haven't seen clear evidence of this allegation and it will be informative to see the reasons given by the tribunal about appointments to see if the tribunal is able to discriminate any preference in our appointment.

21.64 The Adult Guardian commented that '[m]otivation is the key to the concept but difficult to prove'. She also commented that clarification of the definition of interested person is 'simply regularising jurisprudence in Queensland and New South Wales' and that the definition should be amended to include 'interest in the welfare of the adult'.

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

21.65 The current definition of 'interested person' under the *Guardianship and Administration Act 2000* (Qld), in essence, requires that the person must have a sufficient and continuing interest in the welfare of the adult. In the Commission's view, the current definition is too limiting in its approach and may, in some circumstances, prevent an application about an adult being made to the Tribunal when it is in the adult's interests.

21.66 For example, where an adult's capacity for legal proceedings is in issue, and the adult is self-represented, it may be in the adult's interests for a legal practitioner who represents an opposing party in the legal proceedings, to apply to the Tribunal for a declaration about the adult's capacity for the proceedings. In addition, the requirement for an applicant to have a 'continuing interest' in the adult, may, in some circumstances, technically preclude a person who has a genuine concern in the adult's interests but not a continuing interest in the adult (for example, a hospital social worker who is seeking the appointment of a guardian to make accommodation decisions for a patient with impaired capacity) from making an application.

21.67 The Commission is of the view that the definition should be reframed so that it focuses on promoting and safeguarding the adult's rights and interests. This is consistent with the Act's objectives and offers a more flexible approach given the range of applications that may be made for different purposes under the Act.

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85 Submission 20A.

86 Submission 164.

21.68 Accordingly, the Commission considers that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to define an ‘interested person’ as ‘a person who has a sufficient and genuine concern for the rights and interests of the adult’.

## NOTIFICATION REQUIREMENTS

21.69 One of the requirements of procedural fairness is that a person must be given adequate prior notice of the date, time and location at which the matter will be heard and also of the nature of the issues that are to be decided.<sup>87</sup> Notice must be sufficiently detailed and given sufficiently early to allow the person ‘to make inquiries, to consider his position, and to prepare his response’.<sup>88</sup>

### Notification of an application

21.70 Rule 21 of the QCAT Rules sets out the notification requirements in relation to applications made under the *Guardianship and Administration Act 2000* (Qld).

21.71 The Principal Registrar is required to give written notice of an application made under the *Guardianship and Administration Act 2000* (Qld) to the following people:<sup>89</sup>

- the adult’s family members;
- the adult’s primary carers;
- all current guardians, administrators and attorneys for the adult;
- the Adult Guardian;
- the Public Trustee;
- for a proceeding under Chapter 5B of the Act:<sup>90</sup>
  - the Chief Executive of the Department in which the *Disability Services Act 2006* (Qld) is administered;

<sup>87</sup> WB Lane and S Young, *Administrative Law in Australia* (2007) [2.235], [2.240], [2.245].

<sup>88</sup> JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [10.1] citing *Johnson v Miller* (1937) 59 CLR 467, 487; *Etherton v Public Service Board of NSW* [1983] 3 NSWLR 297, 301.

<sup>89</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 21(3)(b). The copy of the application must be given to the relevant persons as soon as practicable, but no later than 7 days, after the application has been accepted under s 35 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 19(1)(b)(ii), (2)(b).

<sup>90</sup> Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with the use of restrictive practices for certain adults. See Chapter 19 of this Report.

- a relevant service provider providing disability services to the adult; and
- if the Tribunal is aware the adult is subject to a forensic order or an involuntary treatment order under the *Mental Health Act 2000* (Qld) — the Director of Mental Health; and
- anyone else the Tribunal considers should be notified of the proceeding.

21.72 The notice must state how the person to whom it is given may request further information about the application from the Tribunal.<sup>91</sup>

21.73 The Principal Registrar must also give a copy of the application to the adult concerned unless:<sup>92</sup>

- the Tribunal considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult;
- the Tribunal considers the adult is evading the hearing; or
- the adult is:
  - temporarily or permanently unconscious; or
  - unable to be located after the Tribunal has made reasonable enquiries into the adult's whereabouts.

21.74 There is no requirement to provide information to an adult, who is given a copy of the application, about how the adult may request further information about the application from the Tribunal.

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

21.75 Rule 21 of the QCAT Rules requires the Principal Registrar to give written notice of an application made under the *Guardianship and Administration Act 2000* (Qld) to various persons, and that the notice must state how the person to whom it is given may request further information about the application from the Tribunal. That rule also provides for a copy of an application to be given to the adult concerned in the application except in certain circumstances.

21.76 The Commission is of the view that the information provided in the notice of an application made under the *Guardianship and Administration Act 2000* (Qld) should also include information about the possible outcomes of the application. In relation to an application for appointment or the review of an appointment, that information should include:

- the names of any proposed appointees;

<sup>91</sup> Queensland Civil and Administrative Tribunal Rules 2009 (Qld) r 21(5).

<sup>92</sup> Queensland Civil and Administrative Tribunal Rules 2009 (Qld) r 21(3)(a), (4).

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

21.77 It is also of the view that the adult concerned in the application should also receive information about how the adult may request further information about the application from the Tribunal.

21.78 The Commission also considers that 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. This test is similar to the amended test the Commission has recommended should apply under section 118(2)(a) in relation to withholding notice of the hearing of an application from the adult concerned.<sup>93</sup>

### Notification of the hearing of an application

21.79 Section 118 of the *Guardianship and Administration Act 2000* (Qld) sets out the requirements in relation to the notification of the hearing of an application.

21.80 At least seven days before the hearing of an application about a matter, the Tribunal must give notice of the hearing to the adult concerned in the matter and, as far as practicable, to the following people:<sup>94</sup>

- if the adult concerned is not the applicant — the applicant;
- the adult's family members;
- the adult's primary carers;
- all current guardians, administrators and attorneys for the adult;
- the Adult Guardian;
- the Public Trustee;
- for a proceeding under Chapter 5B of the Act.<sup>95</sup>

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93 See Recommendation 21-6 below.

94 *Guardianship and Administration Act 2000* (Qld) s 118(1).

95 Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with the use of restrictive practices for certain adults. See Chapter 19 of this Report.

- the Chief Executive of the Department in which the *Disability Services Act 2006* (Qld) is administered;
  - a relevant service provider providing disability services to the adult; and
  - if the Tribunal is aware the adult is subject to a forensic order or an involuntary treatment order under the *Mental Health Act 2000* (Qld) — the Director of Mental Health; and
- anyone else the Tribunal considers should be notified of the hearing.

21.81 However, the Tribunal is not required to give notice to the adult if:<sup>96</sup>

- the Tribunal considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult;
- the Tribunal considers the adult is evading the hearing; or
- the adult is:
  - temporarily or permanently unconscious; or
  - unable to be located after the Tribunal has made reasonable enquiries into the adult's whereabouts.

21.82 The notice to the adult is to be given in the way the Tribunal considers is the most appropriate having regard to the adult's needs.<sup>97</sup>

21.83 The Tribunal may, by direction, dispense with the requirement to give notice to all or any of the persons, except for the adult, who would otherwise be required to be given notice. It may also reduce the standard notification period.<sup>98</sup>

21.84 The failure to comply with the requirement to give notice to the adult has the effect of invalidating the hearing and the Tribunal's decision about the application.<sup>99</sup>

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<sup>96</sup> *Guardianship and Administration Act 2000* (Qld) s 118(2).

<sup>97</sup> *Guardianship and Administration Act 2000* (Qld) s 118(3). The adult's failure to understand the notice does not affect its validity: s 118(4)–(5).

<sup>98</sup> *Guardianship and Administration Act 2000* (Qld) s 118(5).

<sup>99</sup> *Guardianship and Administration Act 2000* (Qld) s 118(6). A person appointed as a guardian or an administrator for an adult by an invalid Tribunal order who, without knowing of the order's invalidity, purports to use a power given by the order does not incur any liability, either to the adult or anyone else, because of the invalidity. A transaction between a person appointed as guardian or administrator by an invalid Tribunal order and a person who does not know of the invalidity, is, in favour of the second person, as valid as if the Tribunal order were valid: *Guardianship and Administration Act 2000* (Qld) s 121.



**Specific information that should be included in the Notice of Hearing**

21.85 In the recent appeal decision of *Re AT*,<sup>100</sup> the Appeal Tribunal considered the notification requirements under section 118 of the *Guardianship and Administration Act 2000* (Qld) in the context of the obligations of procedural fairness. The reasons for decision of the Appeal Tribunal in that case record the following facts:<sup>101</sup>

AT's complaint is, in essence, that she was denied procedural fairness because the hearing on 5 February 2010 wrongfully went ahead in circumstances where she was the original applicant; before 5 February she told QCAT that she did not wish to proceed with the application; and, she was not informed that the hearing might nevertheless proceed and that some person or institution other than her might be ordered to take responsibility for the management of some elements of her father's affairs.

The notice of hearing did not warn her of that possibility. Although a file note of 28 January 2010 shows that she was told by a QCAT officer that the hearing would be proceeding, the note does not suggest, again, that some outcome other than what was sought in her original applications — namely, her own appointment as guardian and administrator — might be ordered. Although other family members were contacted by telephone during the hearing on 5 February, AT was not.

These circumstances were considered by the Tribunal in the published reasons for its decision of 5 February 2010. The Reasons record that as late as the date of the hearing itself QCAT received a fax from AT '...confirming that she was withdrawing her application'. The reasons record:

12. On the basis of this information and in the absence of the applicant the Tribunal did not grant leave under s 122 of the Act to the applicant to withdraw her application.

The reference is to s 122 of the *Guardianship and Administration Act 2000* (GAA) which requires that, if the Tribunal does give leave to an applicant to withdraw an application under s 46 of the QCAT Act, it must give notice of the withdrawal to the parties to the proceeding. Section 46 of the QCAT Act allows a party to withdraw an application, but only with the Tribunal's leave. It does not appear, again, that AT was ever warned that an order of that kind was open to the Tribunal.

21.86 The Appeal Tribunal, noting that, while proceedings in the guardianship jurisdiction will from time to time involve elements of urgency, there was no evidence that suggested there was 'any apparent risk of such pressing urgency that a postponement of the hearing for a short time would have been inappropriate':<sup>102</sup>

The procedure for applications in the jurisdiction is set out in Chapter 7, Part 2 of the GAA. The Tribunal must give notice of any hearing to a range of persons who would, here, include AT (s 118(1)(a)). Section 118(7) provides, however, that a failure to give notice to any of those persons '... does not affect the

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100 [2010] QCATA 14 (Wilson J, Senior Member Endicott).

101 Ibid [9]–[12].

102 Ibid [13]–[14].

validity of the hearing or the tribunal's decision about an application'. It may be assumed it was this provision that lay behind the tribunal's decision to proceed despite AT's requests.

Proceedings in this jurisdiction will from time to time involve elements of urgency. Here, as the tribunal found, the adult to whom the proceedings related was being cared for at home but there was concern about the quality of the care being provided there and a view, expressed by professional witnesses, that 'care in a residential setting' might be more appropriate. While the day to day care of an adult with the problems suggested by the evidence here, and the circumstances in which that care is being provided, are important matters it cannot be said that any evidence suggested there was any apparent risk of such pressing urgency that a postponement of the hearing for a short time would have been inappropriate.

21.87 The Appeal Tribunal also held that the notification requirements under section 118 of the *Guardianship and Administration Act 2000* (Qld) must be read in light of the Tribunal's obligations, under section 29 of the QCAT Act,<sup>103</sup> to ensure that each party to a proceeding understands the Tribunal's practices and procedures:<sup>104</sup>

Section 118 of the GAA must also, now, be read in light of s 29 of the QCAT Act which requires this tribunal to ensure that each party to a proceeding understands QCAT's practices and procedures. As already observed, it is not apparent that the party whose application began the process leading to the hearing on 5 February was provided with information giving her any information about the consequences which ensued.

As Lord Denning observed, if a right to be heard is worth anything, it must carry with it the right to know the case that has to be met. Relevantly, an important requirement of notice of proceedings is that it must advise the recipient of the subject matter and the potential consequences of the proposed decision. The notice need not necessarily draw attention to every possible detriment but a failure to alert an applicant, who had herself instigated proceedings before the Tribunal, that those proceedings might (notwithstanding her plainly expressed desire not to pursue them) nevertheless lead to orders of a kind she had not sought and may not have contemplated runs contrary to these principles. A denial of procedural fairness is an error of law. (notes omitted)

21.88 As the Appeal Tribunal observed in *Re AT*, an important requirement of giving notice of a proceeding is that the recipient must be advised of the subject matter and the potential consequences of the proposed decision. Where this requirement has not been met, it would be appropriate for the Tribunal to adjourn the proceedings.

#### *The Commission's view*

21.89 Earlier in this chapter, the Commission has recommended that the notice of an application should also include information about the possible outcomes of

<sup>103</sup> Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 29 of the QCAT Act is set out at [21.25] above.

<sup>104</sup> Ibid [15]–[16].

the application, including in relation to an application for appointment or the review of an appointment:

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

21.90 Consistent with that recommendation and the decision in *Re AT*, the Commission recommends that similar information should be included in the notice of hearing. As the Appeal Tribunal observed in *Re AT*, an important requirement of giving notice of a proceeding is that the recipient must be advised of the subject matter and the potential consequences of the proposed decision. It is appropriate and desirable that this information be provided to the relevant persons both in the notice of application and in the notice of hearing.

### ***Who should be notified of a hearing***

21.91 Section 118(1) sets out a comprehensive list of the persons who must be notified of the hearing of an application. This list would generally appear to cover people who have, or may have, a genuine interest in the adult, for example, family members, carers, formal appointees for the adult and others with a proper interest in the hearing of the application. The Tribunal also has a duty to notify anyone else it considers should be notified of the hearing.

21.92 The failure to notify a person other than the adult as required (for example, because the applicant did not include the person's name in the application or because of an administrative or other oversight by the Tribunal) would not affect the validity of the hearing or the Tribunal's decision. In these circumstances, it may be open to the person to apply for a review of the appointment or to seek leave to appeal the decision.<sup>105</sup> It is also an offence under the Act for a person to provide false, misleading or incomplete documents (for example, by deliberately withholding information from the Tribunal about the names of people who may have an interest in the application).<sup>106</sup>

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The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) also enables a party to a proceeding, in limited circumstances, to apply for a reopening of the proceeding. These circumstances include that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing. The Act contains specific provisions about who may apply to reopen a proceeding, review an appointment or appeal a Tribunal decision. The mechanisms for the reopening of Tribunal proceedings and the review and appeal of Tribunal decisions are discussed in Chapter 22 of this Report.

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See n 53 above. The application form requires the applicant to make a declaration as to the truth of the information provided in the form and that no information relevant to the application has been omitted. This includes that the applicant has not withheld information from the Tribunal about the names of people who may have an interest in the application. The application form also states that it is an offence to provide false, misleading or incomplete documents to the Tribunal.

### *Discussion Paper*

21.93 In the Discussion Paper, the Commission referred to a number of submissions, which it had received earlier in the review and which raised concerns about the sufficiency of the notification procedures in terms of their efficacy and efficiency.<sup>107</sup>

21.94 The Commission sought submissions on whether the list of persons in section 118(1) who are required to be notified of a hearing of an application is appropriate or should be changed in some way.<sup>108</sup>

### *Submissions*

21.95 A number of submissions, including the Adult Guardian and the Public Trustee, considered that the list of persons to be notified under section 118(1) is appropriate.<sup>109</sup>

21.96 The Public Trustee commented that the concerns expressed in the earlier submissions about procedural fairness are not ‘a function of the statute but rather the Tribunal’s approach to procedural fairness and also the nature sometimes of the hearings which are conducted’.<sup>110</sup> He noted that:

Not uncommonly the nature of an application turns to the appropriateness (in light of past events) of an existing administrator or attorney. This may not have been identified at least to that attorney’s or administrator’s satisfaction before the hearing.

### *The Commission’s view*

21.97 The Commission considers that the persons who are listed in section 118(1) of the *Guardianship and Administration Act 2000* (Qld), as the persons who are required to be notified of a hearing, is appropriate. This list would generally appear to cover people who have, or may have, a genuine interest in the adult’s rights and interests, for example, family members, carers, formal appointees for the adult. It also enables the Tribunal to notify any other persons who are also appropriately concerned.

### ***Exception to the general requirement to give notice to the adult under section 118(2)(a)***

21.98 Section 118(2)(a) provides that the Tribunal is not required to give notice of the hearing of an application to the adult concerned if ‘the tribunal considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult’.

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107 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.62], referring to Submissions C10A, C24, C124, C132B, C141, C142, C148, 74, 83, Forum C13, Forum C16.

108 Ibid 66.

109 Submissions 20A, 135, 156A, 163, 177.

110 Submission 156A.

*Discussion Paper*

21.99 In the Discussion Paper, the Commission considered the appropriateness of the exception to the general requirement to give notice to the adult under section 118(2)(a). Given the gravity of the consequences for the adult if he or she is not notified of the hearing, it might be considered that the current test in section 118(2)(a) is too broad. If so, it may be appropriate to substantially narrow the current test in section 118(2)(a), for example, by changing the test to ‘the tribunal considers on reasonable grounds that giving notice to the adult would cause serious harm to the adult’. This test would be consistent with the test to be applied under section 157 of the Act by the Tribunal in determining whether to postpone notifying and giving a copy of its decision in a proceeding to a person. The Commission also noted that, if that test is considered too restrictive, another option may be to change the test to ‘the tribunal considers on reasonable grounds that giving notice to the adult may cause serious harm to the adult’.<sup>111</sup>

21.100 The Commission sought submissions on whether the current exception under section 118(2)(a) to the general requirement that notice of the hearing of an application must be given to the adult concerned in a proceeding is appropriate.<sup>112</sup>

*Submissions*

21.101 Pave the Way considered that the current provision in section 118(2)(a) is appropriate.<sup>113</sup>

21.102 However, the Adult Guardian and the Public Trustee and another respondent each preferred the narrower test that the Tribunal considers on reasonable grounds that giving notice to the adult *may* cause serious harm to the adult.<sup>114</sup> The Public Trustee qualified his view by commenting that:

often the judgement for the Tribunal, which is a difficult one, cannot be adequately measured in terms of the degree of likely harm. Not uncommonly advices are received in other contexts (that is decisions made by the Public Trustee as administrator) from competent health or allied health professionals that certain things or decisions will cause harm — rarely are they qualified by comment in relation to the nature and extent of the harm.

*The Commission’s view*

21.103 In the Commission’ view, the current test in section 118(2)(a), which provides that the Tribunal is not required to give notice of the hearing of an application to the adult concerned if the Tribunal considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult, is inappropriate. The general requirement to give notice to the adult should be

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<sup>111</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.70].

<sup>112</sup> Ibid 68.

<sup>113</sup> Submission 135.

<sup>114</sup> Submissions 156A, 164, 177.

displaced only if giving the notice might cause serious harm to the adult. As noted above, this higher standard is consistent with the test to be applied under section 157 of the Act by the Tribunal in determining whether to postpone notifying and giving a copy of its decision in a proceeding to a person.

21.104 The Commission therefore considers that the test in section 118(2)(a) should be recast 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.

### **Notification period**

21.105 As noted above, procedural fairness requires that the parties in a proceeding be given adequate prior notice of the date, time and location at which the matter will be heard and also of the nature of the issues that are to be decided.<sup>115</sup>

21.106 Section 118(1) of the *Guardianship and Administration Act 2000* (Qld) currently provides that the Tribunal must give notice of the hearing of an application to certain people at least seven days before the hearing of the application.<sup>116</sup>

21.107 In the other jurisdictions, the timeframe for giving notice varies. Only three jurisdictions have specific timeframes: the period is at least seven days in the ACT; at least 10 days in Tasmania; and at least 14 days in Western Australia.<sup>117</sup> In New South Wales notice must be given 'as soon as practicable'<sup>118</sup> and, in South Australia, 'reasonable notice' must be given.<sup>119</sup> There is no notification period specified in the Northern Territory or in Victoria.<sup>120</sup>

### **Discussion Paper**

21.108 In the Discussion Paper, the Commission noted that it had received, at an earlier stage of the review, several submissions which raised concerns about the sufficiency of the period of notice given prior to the hearing of an application.<sup>121</sup>

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115 WB Lane and S Young, *Administrative Law in Queensland* (2007) [2.235].

116 The Tribunal may make an interim order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of the *Guardianship and Administration Act 2000* (Qld), including s 118: *Guardianship and Administration Act 2000* (Qld) s 129.

117 *ACT Civil and Administrative Tribunal Directions* (ACT) s 25; *Guardianship and Administration Act 1995* (Tas) s 69; *Guardianship and Administration Act 1990* (WA) s 41.

118 *Guardianship Act 1987* (NSW) s 10.

119 *Guardianship and Administration Act 1993* (SA) s 14(4).

120 *Adult Guardianship Act* (NT) s 27; *Guardianship and Administration Act 1986* (Vic) s 20. In Victoria, the Tribunal must commence to hear a matter within 30 days after the day on which the application is received by the Tribunal: *Guardianship and Administration Act 1986* (Vic) s 21.

121 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.67], referring to Submissions C10A, C114, C137, 74.

21.109 In the context of the sufficiency of the notice period, the Commission noted that section 108 of the *Guardianship and Administration Act 2000* (Qld) (as it then was) entitles the active parties in a proceeding to access relevant documents on the Tribunal file before the hearing.<sup>122</sup> The Tribunal has implemented an administrative arrangement which provides for active parties to access those documents after the receipt of the Notice of Hearing.<sup>123</sup> In relation to the timeframe for the notification of a hearing, the Commission noted that, while there may be matters where there are limited issues for consideration and only a small amount of documentation, other matters may be more complex. It also noted the importance of ensuring that the standard notification period for the hearing of an application is adequate to enable active parties to exercise their rights to access documents on the Tribunal file and adequately prepare for the hearing.<sup>124</sup>

21.110 The Commission sought submissions on whether the current timeframe for notification of the hearing of an application, which generally requires the Tribunal to give notice to specified persons at least seven days before the hearing, is appropriate or should be changed in some way.<sup>125</sup>

#### *Submissions*

21.111 The Public Trustee considered that the current timeframe provided under section 118 for the notification of the hearing of an application is appropriate.<sup>126</sup>

21.112 On the other hand, several respondents, including the Endeavour Foundation and Pave the Way, considered that the timeframe should be changed.<sup>127</sup>

21.113 The Endeavour Foundation commented that the current timeframe does not allow those who wish to contribute to the hearing time to prepare, and noted that the hearing has the potential to have significant impact on interested parties and therefore they should be allowed due process.<sup>128</sup>

<sup>122</sup> Section 108 of the *Guardianship and Administration Act 2000* (Qld) was repealed by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld), and replaced by a new s 103, which is in substantially similar terms. Section 103 of the *Guardianship and Administration Act 2000* (Qld) commenced on 1 December 2009. Section 103 is set out at [21.222] below.

<sup>123</sup> See Presidential Direction No 1 of 2009, which is set out at [21.231] below. QCAT Practice Direction No 8 of 2010 provides that specified Presidential Directions, issued under the *Guardianship and Administration Act 2000* (Qld), including Presidential Direction No 1 of 2009 (which deals with arrangements for file inspection), are 'adopted as practice directions under the *Queensland Civil and Administrative Tribunal Act 2009*'. QCAT Practice Direction No 8 of 2010 also provides that 'references to the Guardianship and Administration Tribunal are to be read as references to the Queensland Civil and Administrative Tribunal. Relevant section numbers set out in the attached schedule have been changed as a result of amendments to the *Guardianship and Administration Act 2000*.'

<sup>124</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.68].

<sup>125</sup> Ibid 68.

<sup>126</sup> Submission 156A.

<sup>127</sup> Submissions 20A, 135, 163, 177.

<sup>128</sup> Submission 163.

21.114 Pave the Way also commented that:<sup>129</sup>

The current notice period of 7 days is very short, particularly when a family or individual is not an applicant. This period allows very little time in which they can seek advice and prepare themselves for a hearing. It is the shortest period of specific notice provided in any jurisdiction in Australia and is procedurally unfair.

We believe that the notice period should be 28 days. There is no reason why Tribunal processes cannot be organised to meet this period and it allows a reasonable period in which all interested parties can prepare. If more urgency is required, and the interim hearing provisions are thought not to be appropriate, section 118(5) allows the Tribunal reduce the period of notice.

21.115 Some other respondents considered it desirable to extend the notification period to 14 days.<sup>130</sup>

21.116 The Adult Guardian suggested that one of the issues with the notice period occurs when an application is before the Tribunal for a matter other than the appointment of a guardian or an administrator:<sup>131</sup>

If during the hearing it appears that the appointment of either a guardian or administrator needs to be considered, members have expressed the view that they are unable to hear an oral application brought during the hearing.

The hearing will usually include all of the relevant persons and an application for leave could be opposed. The tribunal may decline to grant the application if it breaches one of the requirements of natural justice. However often arrangements that should be considered or re-considered in light of the developments in a hearing are unable to be heard. At best inefficiency and delay may be occasioned. At worst a vulnerable adult may be placed at risk.

21.117 The Adult Guardian considered that the appropriate mechanism for resolving that situation would be for the Tribunal to consider an oral application and waive the notice period.<sup>132</sup>

*The Commission's view*

21.118 In the Commission's view, the current requirement that the Tribunal must give notice of the hearing of an application to certain people at least seven days before the hearing of the application is generally an appropriate timeframe. It is also consistent with the timeframe provided under the QCAT Act for a number of other types of applications.

21.119 Nonetheless, the Commission considers it important that the Tribunal ensure that, in each case, the timeframe for the notification of a hearing is sufficient to allow the active parties to prepare properly for a hearing.

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129 Submission 135.

130 Submissions 20A, 177.

131 Submission 164.

132 Ibid.



## PARTIES TO PROCEEDINGS

### Active parties

21.120 The *Guardianship and Administration Act 2000* (Qld) gives specified persons — active parties — particular rights in relation to the hearing of guardianship proceedings. These rights include:

- the right to appear in person, or to be represented by a lawyer or an agent (if given leave by the Tribunal to do so), in the proceeding;<sup>133</sup>
- the right to be given a reasonable opportunity to present his or her case and to access documents that are directly relevant to an issue in the proceeding;<sup>134</sup>
- the right to be notified, and given a copy, of a decision in the proceeding;<sup>135</sup>
- the right to request written reasons for a decision;<sup>136</sup> and
- the right to apply to the Tribunal for directions about how the active party should implement the Tribunal's recommendation about an action the active party should take in relation to a matter.<sup>137</sup>

21.121 Section 119 of the *Guardianship and Administration Act 2000* (Qld) defines who is 'active party' for a proceeding in relation to an adult:

#### 119 Who is an active party

Each of the following persons is an *active party* for a proceeding in relation to an adult—

- (a) the adult;
- (b) if the adult is not the applicant—the applicant;
- (c) if the proceeding is for the appointment or reappointment of a guardian, administrator or attorney for the adult—the person proposed for appointment or reappointment;
- (d) any current guardian, administrator or attorney for the adult;

<sup>133</sup> *Guardianship and Administration Act 2000* (Qld) ss 123, 124.

<sup>134</sup> *Guardianship and Administration Act 2000* (Qld) s 103.

<sup>135</sup> *Guardianship and Administration Act 2000* (Qld) s 156(2).

<sup>136</sup> *Guardianship and Administration Act 2000* (Qld) s 156(5); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122. The Tribunal must give written reasons for its decision to an active party in a limitation order proceeding: s 113.

<sup>137</sup> *Guardianship and Administration Act 2000* (Qld) s 138(3). Section 138(1)(b) provides that once an application about a matter has been made to the Tribunal, the Tribunal may make recommendations it considers appropriate about action the active party should take.

- (e) the adult guardian;
- (f) the public trustee;
- (g) a person joined as a party to the proceeding by the tribunal.

21.122 The Tribunal may join a person as a party to a proceeding if the Tribunal considers that:<sup>138</sup>

- the person should be bound by or have the benefit of a decision of the Tribunal in the proceeding;
- the person's interests may be affected by the proceeding; or
- for another reason, it is desirable that the person be joined as a party to the proceeding.

21.123 It would generally appear that, in order to be joined as a party to a proceeding under section 42 of the QCAT Act, a person must have a sufficient interest in the proceeding or its outcome. An example of a person who may be joined as an active party in a guardianship proceeding is a member of the adult's family who is not the applicant in the proceeding or a current guardian, administrator or attorney for the adult.

### ***Discussion Paper***

21.124 In the Discussion Paper, the Commission sought submissions on whether the list of persons who are classified as an active party for a proceeding in relation to an adult is appropriate or should be changed in some way.<sup>139</sup>

### ***Submissions***

21.125 The Adult Guardian, the Public Trustee, Pave the Way and another respondent considered that the list of persons classified as an active party for a proceeding in relation to an adult is appropriate.<sup>140</sup> One respondent added that a person who was considered to be an interested person or an active party on an original application for an appointment should also be an active party for the purpose of a review of an appointment.<sup>141</sup>

21.126 The Perpetual Group of Companies suggested that:<sup>142</sup>

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<sup>138</sup> Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 42.

<sup>139</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.77].

<sup>140</sup> Submissions 135, 156A, 164, 177.

<sup>141</sup> Submission 20A.

<sup>142</sup> Submission 155.

The Public Trustee is an active party in all matters before the GAAT. It was presumably seen as a logical contradictor in cases where the application is not independently opposed. It is also the de facto administrator of last resort.

However as the Public Trustee is now required to be self funding, including for its 'community service obligation' work, it is in fact a competitor to other professional administrators including trustee companies. Its 'public interest' duties may therefore sometimes be perceived, rightly or wrongly, as conflicting with its 'commercial' interest.

In these circumstances the Public Advocate (soon to be the Adult Guardian) may be a more appropriate contradictor. One disadvantage of this would be that the Public Trustee does have a more extensive knowledge base to draw on than the Public Advocate.

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

21.127 The classification of a person as an active party gives that person particular rights in relation to the hearing of guardianship proceedings. In the Commission's view, the list of people who are currently classified as an active party for a proceeding in relation to an adult is appropriate. The interest of these persons in the proceeding may vary. It may arise from the person's role as an existing or potential substitute decision-maker for the adult. In addition to its role as an existing or potential guardian, the Adult Guardian also has a statutory role in promoting and safeguarding the adult's rights and interests. Persons who are joined as an active party in a proceeding must also have a sufficient interest in the proceeding or its outcome.

### **The right to appear**

21.128 Section 123 of the *Guardianship and Administration Act 2000* (Qld) gives an active party in a proceeding the right to appear in the proceeding. Sections 124 and 125 of the Act also provide for the circumstances in which an active party, including an adult, may appear with legal or other representation. The legal representation provisions are, however, now subject to section 43 of the QCAT Act.

### **Legal and other representation**

#### ***Legal representation in the context of Tribunal proceedings***

21.129 As alternatives to courts, tribunals are intended to provide speedy, cost-effective and accessible forums for determination of disputes and other legal issues.<sup>143</sup> As such, tribunal procedures are generally flexible: tribunals are relieved from the requirement to apply strict rules of evidence and parties are 'permitted to tell their story in their own words'; tribunal members are able to adopt a more interventionist, or inquisitorial, role than judges in court, being conferred with wide

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See generally H Genn, 'Tribunals and informal justice' (1993) 56 *The Modern Law Review* 393, 393, 395–6 citing *Report of the Committee on Administrative Tribunals and Enquiries*, HMSO (1957) Cmnd 218, 9.

information gathering powers; and tribunals are generally enjoined to act informally.<sup>144</sup>

21.130 It has been argued that tribunals would therefore remove the need for costly legal representation and thus provide greater access to justice for unrepresented parties.<sup>145</sup> It has also been suggested that ‘the presence of lawyers might undermine the speed and informality that are the hallmarks of tribunal procedures’.<sup>146</sup> In practice, parties to tribunal proceedings infrequently have legal representation.<sup>147</sup>

21.131 On the other hand, it has been argued that unrepresented parties may face significant disadvantages when appearing before tribunals:<sup>148</sup>

Those who appear before tribunals without assistance may be disadvantaged because there is an imbalance of power between the parties, because they do not understand the law, are unable to present their cases coherently and are unaware of the need to furnish the tribunal with evidence of the facts they are asserting.

21.132 Tribunals often deal with complex legal issues, and even small monetary claims can involve considerable legal and factual complexity.<sup>149</sup> The complexity of the relevant legislation may, in fact, be one reason for the establishment of a specialist tribunal with jurisdiction in the particular area.<sup>150</sup> A particular problem facing inadequately informed unrepresented parties is the difficulty of adducing adequate evidence.<sup>151</sup> The focus on informality may encourage parties to believe that the decision-making process itself is informal and that it is sufficient for them simply to tell their story, without appreciating the need for legal relevance and evidence.<sup>152</sup>

21.133 While it will not be so in every case, it is also acknowledged that, in general, ‘there is likely to be an inequality of power and legal skills between the

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144 H Genn, ‘Tribunals and informal justice’ (1993) 56 *The Modern Law Review* 393, 399. Also see Council of Australasian Tribunals, *Practice Manual for Tribunals* (2006) [5.1].

145 Eg T Mullen, ‘Representation at tribunals’ (1990) 53(2) *The Modern Law Review* 230, 230–31; H Genn, ‘Tribunals and informal justice’ (1993) 56 *The Modern Law Review* 393, 396.

146 H Genn, ‘Tribunals and informal justice’ (1993) 56 *The Modern Law Review* 393, 399; A Robbins, ‘Representation before tribunals’ (1983) 8 *Legal Service Bulletin* 128, 128–9. Also see Council of Australasian Tribunals, *Practice Manual for Tribunals* (2006) [5.4.10] in which it is noted that legal representatives may be more accustomed to an adversarial culture that is at odds with tribunal procedure, or may attempt to intimidate tribunal members.

147 H Genn, ‘Tribunals and informal justice’ (1993) 56 *The Modern Law Review* 393, 398.

148 *Ibid* 407.

149 *Ibid* 400.

150 *Ibid*.

151 *Ibid* 404. Also see eg P Lewis, ‘Litigants in person and their difficulties in adducing evidence: a study of small claims in an English county court’ (2007) 11 *International Journal of Evidence and Proof* 24.

152 H Genn, ‘Tribunals and informal justice’ (1993) 56 *The Modern Law Review* 393, 403.

parties' appearing before a tribunal.<sup>153</sup> This may arise as a consequence of the relative skills, experience or knowledge of the parties, or because of the parties' resources or standing. There may also be an imbalance when one party is legally represented, and another is not,<sup>154</sup> or between an inexperienced party and the expert tribunal itself.

21.134 The practice manual produced for the Council of Australasian Tribunals highlights the need for tribunals to take steps to overcome these difficulties.<sup>155</sup>

Many tribunal hearings take place with persons who are not legally represented and who have limited understanding of the procedures employed by the tribunal and the legal constraints which govern the matters that can be dealt with by the tribunal. These facts, together with the inevitable anxiety engendered by appearance before an official body, highlight the need for clear and calm communication to parties by tribunal members about matters such as:

- the nature and legal limits of the tribunal's role;
- what is expected and permitted of parties;
- how the proceedings will be conducted; and
- parties' appeal rights.

...

While it is unrealistic to expect that all non-legally qualified parties will be equipped to conduct themselves with an informed understanding of tribunal processes and enabling legislation, it remains appropriate to impose limits upon questioning and conduct so as to facilitate the conduct of orderly, efficient and dignified hearings. However, the absence of representation for parties imposes upon tribunal members additional responsibilities to enable parties to participate effectively in proceedings. These extend to:

- providing of additional information to self-represented parties;
- giving guidance about the posing of questions to witnesses;
- exploring technical matters of which self-represented parties may be unaware; and
- posing questions and raising issues which have not been canvassed by parties.

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153 Council of Australasian Tribunals, *Practice Manual for Tribunals* (2006) [5.1]. Also see *R v Equal Opportunity Board; Ex parte Burns* [1985] VR 317, 325 (Nathan J).

154 Council of Australasian Tribunals, *Practice Manual for Tribunals* (2006) [5.4.10].

155 Ibid [5.4.9]. Also see *ibid* [5.4.10] where it is noted that if there is an imbalance caused by one party having legal representation when another does not or by a significant difference in the quality of legal representation, there is a need for the tribunal to provide additional 'assistance and explanations' to the parties.

21.135 Some commentators have doubted, however, whether it is possible for tribunals to compensate adequately for the disadvantages faced by unrepresented parties, particularly in relation to the ability to present a case within the relevant legal framework.<sup>156</sup>

none of the procedural informality of tribunals can overcome or alter the need for applicants to bring their cases within the regulations or statutes, and prove their factual situation with evidence. Nor do informal procedures relieve tribunals from the obligation to make reasoned and consistent decisions.

21.136 There is some evidence to suggest that legal representation in tribunals is advantageous. Early empirical studies in the United Kingdom about the effect of legal representation on the outcome of tribunal proceedings found that parties who were represented were more likely to achieve favourable outcomes.<sup>157</sup> Similar results were obtained more recently in relation to the Australian Administrative Appeals Tribunal.<sup>158</sup> That research also found that cases were more likely to be resolved by consent or settlement (than by hearing) when the applicant was represented.<sup>159</sup> It has also been noted that legal representation before tribunals 'often results in hearings taking a shorter time and parties communicating more effectively what they want the tribunal to know'.<sup>160</sup>

21.137 If the statute that establishes a tribunal does not deal with the matter, the question of legal representation remains in the tribunal's discretion, subject to the rules of procedural fairness.<sup>161</sup>

On the authorities there is no absolute right to representation even where livelihood is at stake. But that is not say that in all cases a tribunal can refuse it with impunity. The seriousness of the matter and the complexity of the issues, factual or legal, may be such that refusal would offend natural justice principles.

21.138 Whether representation is necessary to secure a fair hearing will depend on all of the circumstances of the particular case.<sup>162</sup> A number of factors have been identified as relevant considerations in deciding whether representation

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<sup>156</sup> H Genn, 'Tribunals and informal justice' (1993) 56 *The Modern Law Review* 393, 401. Also see *ibid* 407; A Robbins, 'Representation before tribunals' (1983) 8 *Legal Service Bulletin* 128, 129; and M Castles, 'Worse decisions? The Administrative Review Tribunal' (2000) 25 *Alternative Law Journal* 180, 183 in which it is suggested, in the context of the need for legal representation before the Administrative Review Tribunal, that:

the very concept of simple, informal, quick and cheap review of decisions being made against a background of complex, formal, technical and administratively costly legislative schemes is inherently flawed.

<sup>157</sup> See the studies discussed in H Genn, 'Tribunals and informal justice' (1993) 56 *The Modern Law Review* 393; and T Mullen, 'Representation at tribunals' (1990) 53(2) *The Modern Law Review* 230.

<sup>158</sup> Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89 (2000) [9.99].

<sup>159</sup> *Ibid* [9.100].

<sup>160</sup> Council of Australasian Tribunals, *Practice Manual for Tribunals* (2006) [5.4.3].

<sup>161</sup> *Cains v Jenkins* (1979) 28 ALR 219, 230 (JB Sweeney and St John JJ). Also see *Smith v Aldridge* [1993] QCA 235; *McNab v Auburn Soccer Sports Club Ltd* [1975] 1 NSWLR 54.

<sup>162</sup> See generally JRS Forbes, *Justice in Tribunals* (2nd ed, 2006) ch 11.

should be allowed as a matter of procedural fairness:<sup>163</sup>

- The applicant's capacity to understand the nature of the proceedings and the issues for determination, and to represent himself or herself adequately;<sup>164</sup>
- The applicant's ability to understand and communicate effectively in the language used by the tribunal;<sup>165</sup>
- The legal and factual complexity of the case;<sup>166</sup> and
- The gravity of the matters involved, the seriousness of the consequences that may follow (such as a penalty),<sup>167</sup> or the importance of the decision to the applicant's liberty or welfare.<sup>168</sup>

21.139 In addition to the parties' capabilities to appear on their own behalf, the gravity of the matter and the complexity of the issues, it has been suggested that tribunals should also consider:<sup>169</sup>

- the nature of the hearing, and whether it is inquisitorial or adversarial;
- whether there is, or is likely to be, any significant educational, occupational, social or other gap between the parties and the tribunal itself; and
- whether there is likely to be any significant inequality between the parties which cannot be redressed by the tribunal.

21.140 A number of factors have also been identified as tending, in the particular circumstances, to weigh against allowing legal representation, for example, that:<sup>170</sup>

- legal representation would cause inefficiency;

<sup>163</sup> See generally *ibid* [11.29]; P Latimer, M Hocken and S Marsden, 'Legal representation in Australia before tribunals, committees and other bodies' (2007) 14(2) *Murdoch University E-Law Journal* 122, 137–8. Those commentators also include in the list of relevant factors, consideration of whether the facts involve important matters of credit, or there is a conflict of evidence.

<sup>164</sup> *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, [69] (French and Lee JJ); *Cains v Jenkins* (1979) 28 ALR 219, 230 (JB Sweeney and St John JJ).

<sup>165</sup> *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, [69] (French and Lee JJ).

<sup>166</sup> *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, [69] (French and Lee JJ); *Majar v Northern Land Council (Cth)* (1991) 37 FCR 117, 138 (Olney J).

<sup>167</sup> *Majar v Northern Land Council (Cth)* (1991) 37 FCR 117, 138 (Olney J); *R v Equal Opportunity Board; Ex parte Burns* [1985] VR 317, 325 (Nathan J); *Cains v Jenkins* (1979) 28 ALR 219, 230 (JB Sweeney and St John JJ).

<sup>168</sup> *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, [69] (French and Lee JJ).

<sup>169</sup> A Robbins, 'Representation before tribunals' (1983) 8 *Legal Service Bulletin* 128, 129.

<sup>170</sup> See P Latimer, M Hocken and S Marsden, 'Legal representation in Australia before tribunals, committees and other bodies' (2007) 14(2) *Murdoch University E-Law Journal* 122, 138–40.

- the matter does not involve any complex issues;
- the party is capable of representing himself or herself adequately or has adequate non-legal representation; and
- there exists a statutory right of appeal which allows legal representation as of right.

21.141 Where procedural fairness does found an entitlement to legal representation, it does not amount to an entitlement to be publicly funded for the cost of such representation.<sup>171</sup>

### **Legal representation in the context of guardianship proceedings**

#### *The law in Queensland*

21.142 The QCAT Act contains specific provisions which support the Act's objective of ensuring that Tribunal proceedings are accessible, fair, just, economical, informal and quick. These provisions are relevant to the question of legal representation in Tribunal proceedings

21.143 Section 28 of the QCAT Act requires that the Tribunal must act fairly, in accordance with the substantial merits of the case, observe the rules of natural justice, act with as little formality and technicality as proper consideration of the issues permit and ensure that all relevant material is disclosed as far as is practical.

21.144 In addition, section 29 of the QCAT Act also requires that the Tribunal must take all reasonable steps to ensure that each party to a proceeding understands the practices and procedures of the Tribunal, the nature of assertions made in the proceeding and the legal implications of the assertions, and any decision of the Tribunal relating to the proceeding.

21.145 In *Lida Build Pty Ltd v Miller*<sup>172</sup> Wilson J observed that:<sup>173</sup>

While [section 29 of the QCAT Act] largely reflects and embodies what the courts have said in recent years is the nature of the duty owed by the judicial system to, at least, self representative litigants, it also suggests that parties to proceedings before this Tribunal will receive, and have an entitlement to expect, assistance with the legal implications of the issues in the case

21.146 Section 43 of the QCAT Act makes general provision for the representation of parties in Tribunal proceedings.<sup>174</sup> The intent of that section is 'to

<sup>171</sup> See JRS Forbes, *Justice in Tribunals* (2nd ed, 2006) [11.28].

<sup>172</sup> [2010] QCAT 17, [6].

<sup>173</sup> See also *Tomasevic v Travaglini* [2007] VSC 337, in which Bell J examined the nature of the duty owed by courts to self represented litigants.

<sup>174</sup> A person is a party to a proceeding in QCAT's original jurisdiction if the person is: the applicant; a person in relation to whom a decision of the Tribunal is sought by the applicant; intervening in a proceeding under s 41 of the Act; joined as a party to the proceeding under s 42 of the Act; or someone else an enabling Act states is a party to the proceeding: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 39.



have parties represent themselves unless the interests of justice require otherwise.<sup>175</sup>

21.147 Section 43 of the QCAT Act relevantly provides:

**43 Representation**

- (1) The main purpose of this section is to have parties represent themselves unless the interests of justice require otherwise.
- (2) In a proceeding, a party—
  - (a) may appear without representation; or
  - (b) may be represented by someone else if—
    - (i) the party is a child or a person with impaired capacity; or
    - (ii) the proceeding relates to taking disciplinary action, or reviewing a decision about taking disciplinary action, against a person; or
    - (iii) an enabling Act that is an Act, or the rules, states the person may be represented; or
    - (iv) the party has been given leave by the tribunal to be represented.
- (3) In deciding whether to give a party leave to be represented in a proceeding, the tribunal may consider the following as circumstances supporting the giving of the leave—
  - (a) the party is a State agency;<sup>176</sup>
  - (b) the proceeding is likely to involve complex questions of fact or law;
  - (c) another party to the proceeding is represented in the proceeding;
  - (d) all of the parties have agreed to the party being represented in the proceeding.
- (4) A party can not be represented in a proceeding by a person—

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<sup>175</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(1).

<sup>176</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 53 provides that:

- (1) A State Agency may appear in a proceeding through an employee, officer or member of the agency who is authorised by the agency to act for it in the proceeding.
- (2) However the State agency may appear through an Australian legal practitioner or a government legal officer only with the tribunals leave.

- (a) who, under rules made under section 224(3), is disqualified from being a representative of a party to a proceeding; or
  - (b) who is not an Australian legal practitioner or government legal officer, unless the tribunal is satisfied the person is an appropriate person to represent the party.
- (5) A person who is not an Australian legal practitioner or government legal officer and who is seeking to represent a party in a proceeding must give the tribunal a certificate of authority from the party for the representation if—
- (a) the party is a corporation; or
  - (b) the tribunal has asked for the certificate.
- (6) The tribunal may appoint a person to represent an unrepresented party.
- (7) In this section—

**Australian legal practitioner** see the *Legal Profession Act 2007*.

**government legal officer** see the *Legal Profession Act 2007*.  
(note added)

21.148 The *Guardianship and Administration Act 2000* (Qld) also includes a provision dealing with the legal or other representation of active parties. The Act does not provide an automatic right of representation for the active parties involved in a proceeding. Instead, the Tribunal may exercise its discretion to allow any of the active parties to a hearing to be represented by a lawyer or another person. This approach is intended to encourage the parties to appear and speak for themselves in Tribunal proceedings, and to avoid overly legalistic procedures which may cause delay, additional expense and an adversarial atmosphere in proceedings.<sup>177</sup> As an additional means of safeguarding the adult's rights and interests, the Tribunal also has power to appoint a separate representative for the adult.

21.149 Section 124 of the Act enables an active party (including the adult concerned) to be represented by a lawyer or agent, if given leave by the Tribunal.<sup>178</sup> That section provides:

**124 Representative may be used with tribunal's leave**

- (1) An active party may, with the tribunal's leave, be represented by a lawyer or agent.
- (2) A person given notice to attend at a hearing to give evidence or produce things may, with the tribunal's leave, be represented by a lawyer or agent.

<sup>177</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 259–60.

<sup>178</sup> The persons who are specified as active parties under the *Guardianship and Administration Act 2000* (Qld) are set out in [21.121] above.

21.150 Section 125 enables the President or the presiding member in a proceeding to appoint a separate representative 'to represent the adult's views, wishes and interests'. An appointment may be made if the adult is not represented or is represented by an agent the President or presiding member considers to be inappropriate to represent the adult's interests. Section 125 provides:

**125 Representative may be appointed**

- (1) If, in a proceeding before the tribunal—
- (a) the adult concerned in the proceeding is not represented in the proceeding; or
  - (b) the adult is represented in the proceeding by an agent the president or presiding member considers to be inappropriate to represent the adult's interests;
- the president or the presiding member may appoint a representative to represent the adult's views, wishes and interests.
- (2) A proceeding may be adjourned to allow the appointment to be made.

21.151 The QCAT Act provides that, to the extent that there is any inconsistency between the provisions under the *Guardianship and Administration Act 2000* (Qld) and the QCAT Act, the provisions under the *Guardianship and Administration Act 2000* (Qld) prevail.<sup>179</sup>

21.152 Section 43 of the QCAT Act has a substantially different policy basis than section 124 of the *Guardianship and Administration Act 2000* (Qld). While section 43 generally restricts the rights of parties in Tribunal proceedings to be represented in those proceedings, section 124 confers a general right of representation subject to the leave of the Tribunal.

21.153 The Explanatory Notes to the Queensland Civil and Administrative Tribunal Bill 2009 (Qld), in noting that section 43 for restricts the rights of parties in proceedings before QCAT to be represented in those proceedings, explain that:<sup>180</sup>

This restriction potentially breaches the principles of natural justice that a person should be afforded procedural fairness. Clause 43 states that the general approach is that parties represent themselves unless the interests of justice require otherwise. This provision generally reflects the current situation in most Queensland tribunals. It also must be considered in the context of the objective of the Bill to have the tribunal carry out its functions in a way that is accessible, fair, just, economical, informal and quick. A provision generally allowing representation may act as a barrier for many people in that it will tend to make proceedings more expensive. Legal representation may increase the length, formality and technicality of proceedings. The majority of matters before QCAT will be minor civil disputes which are currently dealt with by the Small Claims Tribunal or the Magistrates Court using the simplified procedures for minor debt claims. Representation in these jurisdictions is at the discretion of

179 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 6(7)(b), 7(1)(b).

180 Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 10–11.

the Tribunal or not permitted. This is because these jurisdictions are meant to provide people, many of whom could not afford representation, with cheap and expeditious access to justice which may otherwise be beyond their means.

QCAT will be required under the Bill to comply with the rules of natural justice. In some cases, for example those that involve complex questions of fact and law or where another party is represented, the principles of natural justice may require the parties be allowed to be represented. However, the right to representation is not, in all cases, a necessary incident of natural justice.

The provision does recognise that there are certain types of matters and parties where natural justice would generally require an entitlement to representation. Consequently, the Bill provides that a party may be represented if the party is a child, a person with impaired capacity or a party to a disciplinary proceeding. A party may be represented if the enabling Act or the QCAT rules allow the party to be represented. A party may also be represented if the tribunal gives leave for the representation.

When exercising its discretion to refuse or grant leave, the tribunal will be bound by the rules of natural justice. The power to make rules about representation will also enable the tribunal to determine what other general categories of matters or person should be entitled to representation in accordance with the principles of natural justice or in the interests of justice. The approach in clause 43 is considered to be most appropriate as it provides the tribunal with flexibility in the conduct of a diverse range of matters while ensuring parties are afforded procedural fairness.

### *Legal assistance for parties*

21.154 A recent development in relation to proceedings before QCAT has been the establishment of the Self Representation Service, a legal assistance and advice scheme conducted on behalf of the Tribunal by the Queensland Public Interest Law Clearing House Incorporated (QPILCH), an independent, non-profit community based legal organisation that coordinates the provision of pro bono legal services for individuals and community groups.<sup>181</sup> Under that scheme, self-represented parties in certain Tribunal proceedings (including guardianship proceedings) may be eligible for free legal advice and assistance in relation to certain aspects of those proceedings.

21.155 The service provides legal advice, including advice about appealing a Tribunal decision, assistance in drafting documents, including Tribunal application forms and correspondence, advice about other options for the resolution of a dispute, and advice about the Tribunal's processes. While the service does not provide representation or act on a person's behalf, it may refer a matter, if appropriate, for further advice, support or representation.

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Queensland Civil and Administrative Tribunal, Legal advice and representation, 'Self Representation Service' <<http://www.qcat.qld.gov.au/self-representation-service.htm>> at 30 September 2010. The level of assistance provided will be determined by a person's means and priority will be given to those who cannot afford private legal assistance. The Service may not provide assistance in some cases such as those cases which lack legal merit or those which are so urgent the Service cannot effectively provide assistance in time.

*The law in other jurisdictions*

21.156 In the ACT, a person may, in relation to an application before the Tribunal, appear in person or be represented by a lawyer or someone else.<sup>182</sup> In South Australia, a person is entitled to appear in guardianship proceedings personally, by counsel or, with leave, by any other representative.<sup>183</sup> In Western Australia, a party to the proceeding may appear in person or be represented by a lawyer or, in certain circumstances, another representative.<sup>184</sup>

21.157 In guardianship proceedings in Victoria, a party may appear in person, or may be represented by a professional advocate if, for example, another party is represented by a professional advocate, all parties agree or the Tribunal gives permission.<sup>185</sup>

21.158 The Tasmanian legislation gives the adult a right to representation, and provides that other parties may seek leave to appear by a representative.<sup>186</sup>

21.159 In New South Wales, parties to guardianship proceedings may be represented if given leave by the Tribunal.<sup>187</sup> The NSW Guardianship Tribunal also has a specific Practice Note dealing with legal representation:<sup>188</sup>

**6 Applications for leave to be legally represented in Tribunal proceedings**

6.1 There is no entitlement as of right to legal representation at proceedings before the Tribunal. If a party wishes to be represented by a legal practitioner, that party must obtain the leave of the Tribunal (s 58(1) of the Act).

6.2 Applications for leave of the Tribunal are not frequently made and in the majority of proceedings before the Tribunal the parties are not legally represented.

...

<sup>182</sup> ACT *Civil and Administrative Tribunal Act 2008* (ACT) s 30. The Tribunal may remove a person's representative in certain circumstances: ACT *Civil and Administrative Tribunal Rules 2009* (No 2) (ACT) r 8.

<sup>183</sup> *Guardianship and Administration Act 1993* (SA) s 14(9)(a), (c). A person who is the subject of an application is entitled to be represented by the Public Advocate or, except in appeal proceedings, by a recognized advocate: s 14(9)(b).

<sup>184</sup> *State Administrative Tribunal Act 2004* (WA) s 38.

<sup>185</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62. A professional advocate includes a lawyer or a person who in the opinion of the Tribunal has had substantial experience as an advocate in proceedings of a similar nature before the Tribunal: s 62(8).

<sup>186</sup> *Guardianship and Administration Act 1995* (TAS) s 73.

<sup>187</sup> *Guardianship Act 1987* (NSW) s 58(1).

<sup>188</sup> Guardianship Tribunal (NSW), *Practice Note No 1 of 2009*, 'Legal Practitioners and Guardianship Tribunal proceedings' <[http://www.gt.nsw.gov.au/information/doc\\_181\\_gt\\_practice\\_note\\_no\\_1\\_2009\\_final.pdf](http://www.gt.nsw.gov.au/information/doc_181_gt_practice_note_no_1_2009_final.pdf)> at 30 September 2010.

- 11 Relevant factors to address in applications for leave to be legally represented
- 11.1 The Act gives the Tribunal a broad discretion to decide whether to grant an application for leave to be legally represented. The Tribunal takes into account the principles in section 4 of the Act when making a decision about such an application.
- 11.2 Some considerations which may be relevant to the Tribunal's determination to grant leave are:
- Whether representation will promote the principles in s 4 of the Act, in particular the paramountcy of the interests of the subject person.
  - Any disability or other factor that impedes the party's capacity to fully participate in the hearing.
  - The nature and seriousness of the interests of the party that are affected by the proceedings.
  - Whether the party's interests and point of view conflict with those of other parties.
  - Whether the proceedings involve complex legal or factual issues.
  - Fairness between the parties. It may be unfair if one party is represented but another is not, particularly if the subject person is unrepresented or the parties are in conflict.
  - Whether representation may assist a party to focus on the relevant issues and may promote a conciliatory approach to the proceedings.
- 11.3 The above list is not exhaustive and the Tribunal may take into account any other factors which are relevant in the particular circumstances of the subject person.

...

### ***The adult's right to representation***

21.160 Section 43(2)(b)(i) of the QCAT Act generally provides that a party may appear with representation if the party is a 'person with impaired capacity'.<sup>189</sup> That section does not expressly limit the right to representation to a person with impaired capacity for the proceeding.

<sup>189</sup>

If the party is not a person with impaired capacity, the party may be represented by someone else if an enabling Act (for example, the *Guardianship and Administration Act 2000* (Qld)) or the rules state that the person may be represented or, if given leave by the Tribunal: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)(b) (iii), (iv).

21.161 Section 124(1) of the *Guardianship and Administration Act 2000* (Qld) provides that, if given leave by the Tribunal, an active party (which includes the adult) in a guardianship proceeding may be represented by a lawyer or agent.<sup>190</sup>

21.162 In many cases, the capacity of the adult who is the subject of a guardianship proceeding may be unclear.<sup>191</sup> The issue of whether the adult has impaired capacity for a matter is a threshold issue under the *Guardianship and Administration Act 2000* (Qld) and is often the focus of dispute in guardianship proceedings. When hearing an application, the Tribunal must apply the General Principles, which provide that an adult is presumed to have capacity for a matter.<sup>192</sup>

21.163 The application of these legislative provisions could have the result that the adult would have to seek leave for legal representation for a proceeding in which his or her capacity is in issue but would be entitled as of right to legal representation if the Tribunal had already made a finding that the adult had impaired capacity.

21.164 An issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide expressly that, in a guardianship proceeding, the adult is entitled to be represented without the need to be given leave by the Tribunal.

#### *Discussion Paper*

21.165 In the Discussion Paper (which was released prior to the commencement of QCAT), the Commission noted that it had received a number of submissions which favoured giving a right to legal or other representation to an adult in a guardianship proceeding.<sup>193</sup>

21.166 The adult is the central focus of guardianship proceedings. The Commission noted that the conferral of such a right would be consistent with the application of General Principle 7 of the Act, which requires that ‘an adult’s right to participate, to the greatest extent practicable, in decisions affecting the adult’s life, ... must be recognised and taken into account’ and that ‘the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult’s life’.<sup>194</sup> It would also be consistent with article

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190 The Tribunal may also appoint a separate representative for the adult in certain circumstances: *Guardianship and Administration Act 2000* (Qld) s 125.

191 To the extent that there is any inconsistency between the provisions of the *Guardianship and Administration Act 2000* (Qld) and the QCAT Act, the provisions under the *Guardianship and Administration Act 2000* (Qld) prevail: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 6(7)(b), 7(1)(b).

192 One of the General Principles under the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) states that an adult is presumed to have capacity for a matter: *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1. The Tribunal is required to apply the principles under the Act, including the presumption of capacity, when it exercises a power for a matter in relation to an adult: *Guardianship and Administration Act 2000* (Qld) s 11(1). See *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402, [43].

193 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.89], referring to Submissions C24, C36A, C37A, C38B, 36, 63.

194 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(1), (3)(a).

12(3) of the United Nations *Convention on the Rights of Persons with Disabilities*, which provides that 'States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising that capacity'.<sup>195</sup> This entitlement would also be consistent with the general right of representation given to adults with impaired capacity in other QCAT proceedings.

21.167 The Commission, however, also noted that the issue of representation in Tribunal proceedings raises a number of practical considerations in relation to the accessibility of legal representation.<sup>196</sup> These include the affordability of private legal representation and the limited availability of publicly funded legal representation.<sup>197</sup> In this regard, it is relevant to note that a person other than a lawyer (for example, an advocate) may represent an adult in Tribunal proceedings.

21.168 The Commission sought submissions on whether the adult concerned in a Tribunal proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld) should have an entitlement to be represented in the proceeding without the need to be given leave by the Tribunal.<sup>198</sup>

#### *Submissions*

21.169 Several respondents, including the Adult Guardian, considered that the adult concerned in a Tribunal proceeding in relation to an application made under the *Guardianship and Administration Act 2000* (Qld) should have an entitlement to be represented in the proceeding without the need to be given leave by the Tribunal.<sup>199</sup>

21.170 One respondent considered that the adult should always be represented in proceedings.<sup>200</sup>

21.171 The Public Trustee commented that the legislation and laws that apply in respect of QCAT 'are part of a general scheme and the position reflected in that legislation is appropriate'.<sup>201</sup> He noted that:

Should an adult have a right to be legally represented the adult does not usually have capacity (power) to enter into a contract to retain such representation — this would be a function for the administrator should one be appointed.

<sup>195</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006. The Convention is discussed in Chapter 3 of this Report.

<sup>196</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.92].

<sup>197</sup> See Legal Aid Queensland, *Grants Handbook*, Civil Law, Guardianship and Administration Tribunal <<https://elo.legalaid.qld.gov.au/grantshandbook/default.asp>> at 30 September 2010. See also [21.154] above.

<sup>198</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 75.

<sup>199</sup> Submissions 20A, 27A, 135, 163, 164, 177.

<sup>200</sup> Submission 94I.

<sup>201</sup> Submission 156A.



Caution is to be exercised in respect of the foreshadowed amendment then as to whether the representative person represents the adult or the administrator — of course in most instances there will be no divergence of interests in this regard but on some occasions there may be.

### *The Commission's view*

21.172 The Commission is of the view that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide expressly that, in a guardianship proceeding, the adult is entitled to be represented without the need to be given leave by the Tribunal.

21.173 It is important that the adult concerned in a guardianship proceeding has a statutory right to representation. Not only do these types of proceedings concern the adult's fundamental rights and interests but their outcome may also have grave consequences for the adult. The provision of an entitlement to representation is also consistent with the application of the presumption of capacity and General Principle 7 under the *Guardianship and Administration Act 2000* (Qld), the general right of representation given under the QCAT Act to persons with impaired capacity and article 12(3) of the United Nations Convention.<sup>202</sup> It is also consistent with section 43(2)((b)(i) of the QCAT Act, which gives a person with impaired capacity an automatic right to representation.

21.174 The Commission acknowledges that, in some cases, the adult's capacity to give instructions may be in doubt. However, if the presumption is rebutted in relation to the adult's capacity to give instructions, there are several options open. If the adult already has a substitute decision-maker who has the power to bring or defend legal proceedings for the adult, the substitute decision-maker may give instructions on behalf of the adult. The Tribunal may also appoint a separate representative for the adult.

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

21.175 Section 43(1) of the QCAT Act provides that the main purpose of that section is 'to have parties represent themselves unless the interests of justice require otherwise'.

21.176 Section 43(2)(b) stipulates a number of circumstances in which a party may be represented by someone else in a Tribunal proceeding. Relevantly, the party may be represented by someone else if an enabling Act or the rules state that the person may be represented or if given leave by the Tribunal.<sup>203</sup>

21.177 However, section 43(3) of the QCAT Act provides that, in weighing up whether to grant leave for a party to be represented in a proceeding, the Tribunal must take into account the following circumstances supporting the giving of leave:

- the party is a State agency;

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<sup>202</sup> See [21.166] above.

<sup>203</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)(b) (iii), (iv).

- the proceeding is likely to involve complex questions of fact or law;
- another party in a proceeding is represented in a proceeding; and
- all of the parties have agreed to the party being represented in the proceeding.

21.178 These factors are not exhaustive, and it is noted that, on occasion, the Tribunal has also considered other factors.<sup>204</sup> The QCAT Act also requires Tribunal proceedings to be conducted with as little formality and technicality as possible and with as much speed as the requirements of the Act and a proper consideration of the matters before the Tribunal permit.<sup>205</sup>

21.179 In contrast, section 124(1) of the *Guardianship and Administration Act 2000* (Qld) provides that an active party may, with the Tribunal's leave, be represented in a guardianship proceeding by a lawyer or an agent. This provision covers both the adult and the other active parties to the proceedings. There are currently no legislative criteria in section 124 to guide the exercise of the Tribunal's discretion under section 124(1).

21.180 Section 43 of the QCAT Act and section 124 of the *Guardianship and Administration Act 2000* (Qld) therefore represent different policy positions. As mentioned above, the main objective of the QCAT provisions is to have parties represent themselves unless the interests of justice require otherwise. The Tribunal is guided in the exercise of its discretion whether to grant leave by the list of circumstances in section 43(3) of the QCAT Act, which support the giving of leave, and must also apply the other requirements under that Act relating to accessible, fair and informal procedures. These matters must all be weighed in the balance in the particular circumstances of each case. Section 124 of the *Guardianship and Administration Act 2000* (Qld), on the other hand, applies a presumption in favour of representation.

21.181 An issue that arises is whether the provisions in the QCAT Act and the *Guardianship and Administration Act 2000* (Qld) strike the right balance in terms of giving leave for legal representation to active parties (other than the adult) in guardianship proceedings.<sup>206</sup>

21.182 The guardianship jurisdiction deals with one of the most fundamental of human rights — an adult's right to autonomy. The Tribunal has the power to

<sup>204</sup> Eg *YE* [2009] QCAT 14, [16]–[20] in which the Tribunal considered but rejected submissions that legal representation would bring objectivity to the Tribunal's decision-making process and that the active party would be prejudiced if not represented because of the superior knowledge of the Adult Guardian and the Public Trustee. The Tribunal in that case also rejected (at [9]–[15]) the submissions that the proceeding — which was to determine the capacity of the adult to enter into complex financial transactions in 2007 in relation to real property valued at \$14 million, the adult's present capacity, whether there was a need to appoint a guardian and an administrator for the adult, and, if so, who should be appointed — involved complex factual or legal issues that supported the giving of leave for legal representation.

<sup>205</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(d).

<sup>206</sup> The Commission has recommended, earlier in this chapter that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that an adult in a guardianship proceeding has a right to legal representation: see [21.172] above.

remove an adult's decision-making autonomy and to regulate those who are appointed to make decisions on an adult's behalf. The jurisdiction is extensive, and many participants in guardianship proceedings have little or no experience in conducting legal proceedings, including informal proceedings. The guardianship legislation is complex and often nuanced in its application. In some circumstances, an active party in a proceeding may face a significant disadvantage if there is an imbalance of power and knowledge between the parties, particularly in relation to the Adult Guardian and the Public Trustee, who have a statutory right to appear in proceedings as active parties. The fact that the Tribunal itself has expertise in guardianship law is also a factor which may affect the balance of power and knowledge between the Tribunal and a party in a proceeding.

21.183 Within the general framework of the Tribunal's broad jurisdiction, these are aspects which set the guardianship jurisdiction apart. While section 43(3) of the QCAT Act sets out certain factors that the Tribunal may consider as circumstances supporting the giving of leave, the special nature of the guardianship jurisdiction raises the issue of whether there may be aspects of those factors which require special consideration or other factors which are relevant to the Tribunal's consideration of whether to give leave for legal representation.

21.184 For example, one of the circumstances listed in section 43(3) as supporting the giving of leave is the complexity of the legal or factual issues in the proceeding. While the Tribunal has expertise in dealing with the legal and factual issues in guardianship proceedings, some of the issues that arise for determination may be quite complex, particularly for an unrepresented active party. In some cases, the assistance of the Tribunal may not be sufficient to overcome the disadvantage faced by an active party who does not have sufficient knowledge or skill to present his or her case coherently or who fails to adduce vital evidence.

21.185 Another factor may be the gravity of the application and its consequences, which is not included as a factor for consideration in section 43(3). There is a wide range of applications that may be made in the guardianship jurisdiction. These applications and their outcomes may have a serious impact, not only on the adult, but also, in some cases, on the adult's family, friends and carers.

21.186 An additional consideration is that, in some circumstances, there may be an imbalance between the Adult Guardian and the Public Trustee and another active party in terms of the relevant knowledge, skills and experience the parties may bring to bear in the proceedings, particularly if the agencies are potentially in conflict with the active party in a proceeding.

### *Discussion Paper*

21.187 In the Discussion Paper (which was released prior to the commencement of QCAT), the Commission noted that, at an earlier stage of the review, it had received submissions which raised concerns about legal or other representation for these parties in proceedings.<sup>207</sup>

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Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.94], referring to Submissions C24, C36A, C37A, C38B, 11B, 20, 63 and Forum C9.

21.188 One of the concerns raised related to a perception that some lay persons who are not familiar with, or who are intimidated by, Tribunal proceedings may be at a disadvantage in Tribunal hearings, particularly given that many agencies and service providers have become increasingly familiar with Tribunal processes and hearings.<sup>208</sup> In this regard, the Guardianship and Administration Reform Drivers ('GARD')<sup>209</sup> submitted that the Tribunal should ensure that parties are placed on an equal footing in relation to representation so that each party is given an adequate opportunity to articulate his or her interests.<sup>210</sup> A related concern was that the informality of Tribunal proceedings may be compromised if there is a disparity in the representation of the parties.<sup>211</sup> In relation to these particular issues, the Commission noted that the QCAT Act provides that, when deciding whether to give a party leave to be represented in a proceeding, the Tribunal may consider, as a factor supporting the giving of leave, the circumstance that another party to the proceeding is represented.<sup>212</sup>

21.189 The Commission sought submissions on whether the current position that an active party (other than the adult concerned in the proceeding) may be represented in a Tribunal proceeding, if given leave by the Tribunal, is appropriate.<sup>213</sup>

#### *Submissions*

21.190 Almost all of the submissions considered that the then existing position under section 124 of the *Guardianship and Administration Act 2000* (Qld), that an active party (other than the adult concerned in the proceeding) may be represented in a Tribunal proceeding if given leave by the Tribunal, was appropriate.<sup>214</sup>

21.191 One respondent considered it important that all participants in a hearing are represented.<sup>215</sup> Another respondent considered it important that all applicants be assisted in proceedings by an advocate.<sup>216</sup>

#### *The Commission's view*

21.192 The Commission considers that the presumption in section 43(1) of the QCAT Act, that parties should represent themselves unless the interests of justice

208 Ibid [16.95], referring to Submission C24.

209 GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents for People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network.

210 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.95], referring to Submission C24.

211 Ibid, referring to Submissions C24, 20, 63.

212 Ibid, referring to *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(3).

213 Ibid 76.

214 Submissions 27A, 135, 156A, 163, 164.

215 Submission 94I.

216 Submission 20A.

require otherwise, is not appropriate to apply in guardianship proceedings. As mentioned above, the guardianship jurisdiction has special features which suggest that a different policy approach is warranted in relation to the representation of active parties to guardianship proceedings.

21.193 Unlike some of the other jurisdictions of the Tribunal, such as the minor civil jurisdiction, the guardianship jurisdiction involves the application of complex legislation which focuses on promoting and safeguarding the rights and interests of adults with impaired capacity. Such proceedings may have significant and far-reaching effects for the adult concerned, and for others involved in the adult's life. As such, these types of proceedings may also be highly emotive. In these circumstances, it may be quite daunting for an active party to be self-represented and may hinder his or her ability to do so.

21.194 Another unique feature of the guardianship jurisdiction is that the Adult Guardian and the Public Trustee have a statutory right, as active parties to guardianship proceedings, to appear in guardianship proceedings. As a consequence, there may be an imbalance in the relative knowledge, skill and expertise between these agencies and an unrepresented active party. An active party who is unrepresented may be at an unfair disadvantage if the Adult Guardian or the Public Trustee, or both, are in conflict or, on an application for an appointment order, in competition, with an active party.

21.195 The Commission is also not persuaded that the involvement of legal representatives in guardianship proceedings will potentially increase the level of formality and expense involved in such proceedings. To the contrary, if an active party is legally represented in guardianship proceedings, it is more likely to facilitate the conduct of orderly and efficient proceedings. In addition, the fact that an active party in a guardianship proceeding generally bears his or her own costs means that he or she is accountable for his or her own legal expenses.

21.196 In light of these matters, the Commission is of the view that 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. While the Commission considers that the Tribunal's exercise of discretion ought to be at large, it also notes that the right to representation is an important one and should be denied only if there is a good reason for doing so.<sup>217</sup> In this regard, the Commission makes the general observation that the type of circumstances in which it may be appropriate for the Tribunal to refuse to allow a person to be represented might include where the legal representative has a conflict of interest.

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See also Hon Justice K Bell, *One VCAT: President's review of VCAT Report*, (November 2009) 79, in which Bell J, the President of the Victorian Civil and Administrative Tribunal, commented that:

the right to representation is very important. There have to be very strong reasons for denying people the right to be represented in the tribunal by the advocate of their choosing, including a lawyer.

21.197 The Commission has recommended that the amended form of section 124 of the *Guardianship and Administration Act 2000* (Qld) should be expressed to apply despite section 43(1)-(3) of the QCAT Act to make it clear that the right of an active party to representation in guardianship proceedings is governed by section 124 of the *Guardianship and Administration Act 2000* (Qld) and not section 43 of the QCAT Act.

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

21.198 As mentioned above, section 125 of the *Guardianship and Administration Act 2000* (Qld) empowers the President or the presiding member in a proceeding to appoint a separate representative for the adult concerned in the proceeding 'to represent the adult's views, wishes and interests'. The Act provides no other guidance in relation to the role of the adult's separate representative.

21.199 Section 80L of the Act provides for the Tribunal to appoint a separate representative for a child who is the subject of an application for sterilisation under Chapter 5A of the Act. Section 80L(3), which sets out the role of the child representative, requires the child representative to:<sup>218</sup>

- act in the child's best interests;
- have regard to any expressed views or wishes of the child; and
- to the greatest extent practicable, present the child's views and wishes to the Tribunal.

21.200 The New South Wales Guardianship Tribunal may appoint a separate representative for certain persons.<sup>219</sup> It does not set out the separate representative's role in guardianship proceedings. However, Practice Note No 1 of 2009 provides some guidance about the role:<sup>220</sup>

#### **Legal Practitioners and Guardianship Tribunal proceedings**

...

#### **18 Role of a separate representative**

18.1 The role of a separate representative is different from that of a solicitor acting on instructions. A separate representative's role is to make submissions to the Tribunal about the best interests of a person with a disability as they arise in the matter before the Tribunal.

218 Similar requirements are imposed on separate representatives who represent a child in Tribunal proceedings for child protection matters and in matters before the Children's Court: *Child Protection Act 1999* (Qld) ss 99Q(6), 110(3).

219 *Guardianship Act 1987* (NSW) s 58(3).

220 New South Wales Guardianship Tribunal, *Practice Note No 1 of 2009*, Legal Practitioners and Guardianship Tribunal proceedings <[http://www.gt.nsw.gov.au/information/doc\\_181\\_gt\\_practice\\_note\\_no\\_1\\_2009\\_final.pdf](http://www.gt.nsw.gov.au/information/doc_181_gt_practice_note_no_1_2009_final.pdf)> at 30 September 2010.

- 18.2 A separate representative should seek out the views and opinions of the person with a disability wherever possible and present these to the Tribunal but they are not limited to conveying only those views. The role of a separate representative is not only to seek and inform the Tribunal of the wishes of the subject person but ultimately to represent the best interests of the person rather than act on instructions.
- 18.3 A separate representative may also canvass the views of all others involved in the proceedings and make a submission to the Tribunal, based on all the available information, about what is the best outcome for the person with a disability.

21.201 The New South Wales Guardianship Tribunal has published an Information Sheet, which provides additional information about the specific duties associated with the role of the separate representative. In that Information Sheet, the Tribunal notes that:<sup>221</sup>

If a solicitor or advocate who has been appointed as the separate representative considers that the person the hearing is about is capable of providing instructions, they should inform the Tribunal. In these circumstances, the separate representative may seek leave to act as the legal representative for the person.

21.202 Several submissions, received by the Commission at an earlier stage of the review, have suggested that the separate representative for an adult should act as an independent advocate for the adult, similar to the role of an independent children's lawyer in a family law proceeding.<sup>222</sup>

21.203 Section 68L of the *Family Law Act 1975* (Cth) outlines the role of an independent children's lawyer. The appointed independent children's lawyer is not obliged to act upon the instructions of the relevant child or young person but is required to:

- form an independent view based on the evidence available to him or her of what is in the child's best interests; and
- act in relation to the proceedings in what he or she believes to be the best interests of the child.

21.204 An independent children's lawyer also has a specific duty to ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court.

21.205 It has been suggested that the role of the independent children's lawyer is based on a 'beneficence model', which focuses on the care and protection of the child.<sup>223</sup> However, the practical application of that role would appear to involve

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221 New South Wales Guardianship Tribunal, 'Information for separate representative' (2009) <[http://www.gt.nsw.gov.au/information/doc\\_200\\_separate\\_representative\\_july09.pdf](http://www.gt.nsw.gov.au/information/doc_200_separate_representative_july09.pdf)> at 30 September 2010.

222 Submissions C24, 36.

223 G Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8(2) *Queensland University of Technology Law Journal* (2008) 392, 398.

some element of respect for the child's autonomy. For example, recently developed National Legal Aid guidelines about the role and duties of an independent children's lawyer suggest that the best interests of the child will ordinarily be served by the independent children's lawyer enabling the child to be involved in decision-making about the proceedings.<sup>224</sup>

21.206 Another approach used in the separate representation of children is the 'direct instructions' model, which focuses on the expressed wishes of the child.<sup>225</sup> Under this model, depending on the child's age and level of maturity, children who are able to give instructions generally are represented on the basis of those instructions.<sup>226</sup>

21.207 In the New South Wales Children's Court, the child's legal representative is required to act as either an 'independent legal representative' (reflecting a beneficence approach) or a 'direct legal representative' (reflecting an autonomous approach), depending on the child's age or level of disability.<sup>227</sup>

21.208 While it is useful to compare the different types of models used for the separate representation of children in legal proceedings, an important consideration is that the guardianship system is primarily focused on promoting and safeguarding the adult's rights and interests. This would suggest that the role of the separate representative for an adult should be flexible enough to balance the promotion of the adult's autonomy with the promotion of the adult's other rights and interests in a wide range of circumstances.

#### *The Discussion Paper*

21.209 Section 125 of the *Guardianship and Administration Act 2000* (Qld) requires that an adult's separate representative be appointed to represent the adult's views and wishes as well as the adult's interests. However, at times, what is in the adult's interests may conflict with the adult's expressed views and wishes. Section 125 does not give any guidance about how such a conflict should be resolved; nor does it indicate the steps the separate representative should take if he or she considers that the adult is capable of giving instructions.

21.210 In the Discussion Paper, the Commission noted that it might be desirable to clarify the role and duties of the separate representative for an adult either in the *Guardianship and Administration Act 2000* (Qld) or the QCAT Act (as the case may

224 National Legal Aid, *Guidelines for Independent Children's Lawyers* (2007) <<http://www.nla.aust.net.au/res/File/PDFs/ICL%20guidelines-6-12-07.pdf>> at 30 September 2010.

225 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [13.32].

226 Ibid.

227 *Children and Young Person's (Care and Protection) Act 1998* (NSW) ss 99A, 99D. There is a rebuttable presumption that a child who is 12 years or over is capable of giving instructions to his or her representative. On the application of a legal representative for the child, the Court may make a declaration that the child either has capacity or does not have capacity to give instructions and the representative may act accordingly: s 99C. There is a rebuttable presumption that a child who is less than 12 years of age is not capable of giving proper instructions to his or her legal representative. On the application of a legal representative for the child, the Court may make a declaration that the child is capable of giving proper instructions: s 99B.



be), or by way of subordinate legislation. An alternative or additional approach might be for the Tribunal to develop comprehensive administrative guidelines to assist separate representatives in their role.<sup>228</sup>

21.211 It also noted that a practical consideration in relation to the appointment of a separate representative for an adult, who is the subject of a guardianship proceeding, is the lack of public funding available in relation to the appointment.<sup>229</sup> Although the Tribunal has power to appoint a separate representative for an adult concerned in such a proceeding, there is no legal aid funding available in relation to appointment of a separate representative for the adult, as there is with children with an intellectual impairment in relation to applications under Chapter 5A of the *Guardianship and Administration Act 2000* (Qld) or in the family law or child protection jurisdictions.<sup>230</sup>

21.212 The Commission sought submissions on whether the role of the separate representative in section 125 of the *Guardianship and Administration Act 2000* (Qld) needs to be clarified in any way, and if so, what the role should entail.<sup>231</sup>

### *Submissions*

21.213 Several submissions expressed the view that it was unnecessary to clarify the role of the adult's separate representative.<sup>232</sup>

21.214 The Adult Guardian commented that:<sup>233</sup>

The wording of GAAA s 125 is similar to the wording used in the [*Mental Health Act 2000* (Qld)] in respect to the role of the allied person ie both roles are designed to ensure that the particular tribunal in considering the issues before it is apprised of the views, wishes and interests of the adult. In the work of the Adult Guardian as allied person of last resort under the *Mental Health Act 2000* the Adult Guardian does not take the view that it is necessary for her in that role to reconcile the views, wishes and interests of the adult if they are disparate: sometimes that is a function better left to the tribunal. Rather the predominant function of the role is to ensure, similar to the model litigant, that the information is gathered and presented, and that the views of others before the tribunal are

228 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.109].

229 Ibid, referring to Submissions C24, 36. See also *Re TAD* [2007] QGAAT 43, in which the Tribunal directed the adult's administrator (who was a trustee company) to pay the fees of the adult's appointed representatives from the adult's funds. In making the order, the Tribunal observed at [59] that:

On most other occasions when the Tribunal has appointed legal professionals as representatives for an adult the expectation of the Tribunal has been that the representatives are acting on a pro bono basis for the adult. In this case, at the time of their appointment the Tribunal did not have the same expectation that the representatives should work on a pro bono basis.

230 Legal Aid Queensland, *Grants Handbook*, Civil Law, Guardianship and Administration Tribunal <<https://elo.legalaid.qld.gov.au/grantshandbook/default.asp>> at 30 September 2010.

231 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 79.

232 Submissions 135, 164, 177.

233 Submission 164.

challenged where appropriate. In making submissions to the tribunal the role relies upon clarifying for the tribunal risks, benefits, strengths and opportunities as opposed to necessarily formulating a definitive submission.

The separate representative model as practiced within the Family Court is not generically applied across Australia. The model as it applies within Queensland depends in significant part upon the capacity of the separate representative to make independent enquiries and to fund independent reports. If the provisions of the GAAA were to be significantly amended, resourcing would be required

21.215 Pave the Way considered that the lack of legal aid for such representatives was problematic.<sup>234</sup> It considered that the legislation should allow the Tribunal to request that the Chief Executive of the Department of Justice arrange legal aid where the Tribunal believes legal aid is required in the interests of justice.

21.216 The Public Trustee commented that, in practice, the issue involved in the appointment of a separate representative is not so much the divergence of the adult's views and wishes and the adult's interests but the nature and scope of the circumstances in which the Tribunal make such an appointment:<sup>235</sup>

The judgement is best made on application to the Tribunal in the particular matter before that Tribunal as to whether leave ought be granted.

The tension or concern that exists in respect of section 125 is not so much in practice the divergence of the adults views and wishes and the adult's interests.

This may occur but presumably the position is the same as for any independent children's lawyer ... and an appropriate separate representative can put both that which are the expressed views of the adult and that which the representative believes to be in the interests of the adult.

The matter which in practice might be concerning is the nature and scope of the occasions upon which the Tribunal appoints separate representatives.

With unfortunate frequency the Tribunal finds itself presented with breaches of the GAA or POA by attorneys or administrators but the adult either expresses no view or expresses a view to retain the administrator or attorney in that role.

Submissions or advices would be useful to the Tribunal as to what course of action to take both in respect of the continued role of the administrator or attorney and indeed what action should be taken in respect of the likely malfeasance that emerges during the matter.

The attorney or administrator of course is conflicted in such an enquiry and consequently there is no advocate or 'contradictor' to explore very important issues.

Often the Tribunal continues the appointment of the administrator or attorney despite findings of the administrator or attorney having failed to invest prudently, or making good losses occasioned, the adult.

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234 Submission 135.

235 Submission 156A.

A better approach may be to appoint a separate representative but these occasions are rare. ...

Greater clarification as to the appropriate circumstances to engage a separate representative might assist (in the legislation).

#### *The Commission's view*

21.217 The Commission considers that section 125 of the *Guardianship and Administration Act 2000* (Qld) does not give sufficient guidance about the role of the separate representative for an adult in a guardianship proceeding and should be amended to clarify the separate representative's role. In the Commission's view, a separate representative for an adult in a guardianship proceeding should be required to:

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

21.218 This approach is consistent with focus of the guardianship legislation on the promotion of the adult's autonomy and the promotion and safeguarding of the adult's interests. In accordance with that focus, the Commission has recommended that the reference to the adult's 'interests' should be recast to reflect the language of the redrafted General Principles (as recommended by the Commission in Chapter 4) so that a separate representative for an adult is required to 'promote and safeguard the adult's rights, interests and opportunities'<sup>236</sup> rather than 'act in the adult's best interests' (as is the case for child separate representatives acting under section 80L of the Act).

21.219 Section 125(1) sets out the circumstances in which the Tribunal may appoint a separate representative for an adult namely, if the adult is unrepresented or is represented by an agent who the President or Presiding Member considers to be inappropriate to represent the adult's interests. The Commission considers that these criteria are appropriate.

## **ACCESS TO DOCUMENTS (INCLUDING THE RIGHT TO OBTAIN COPIES OF DOCUMENTS)**

### **Introduction**

21.220 One of the requirements of natural justice or procedural fairness is that the parties to a proceeding must be given an adequate opportunity to present their case. Each party must be given adequate disclosure of the evidence upon which

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See now the new General Principle 7(a) recommended in Chapter 4 of this Report.

the decision-maker proposes to base its decision<sup>237</sup> — that is, the person should be given an opportunity to ‘deal with adverse information that is credible, relevant and significant to the decision to be made’.<sup>238</sup> This means that, for example, the person should be apprised of the substance of any documentary evidence<sup>239</sup> and of any oral evidence that is received,<sup>240</sup> and given an opportunity to respond to it.

## The law in Queensland

### Access under section 103

21.221 The QCAT Act requires the Tribunal ‘to observe the rules of natural justice’.<sup>241</sup> Consistent with this requirement, section 103 of the *Guardianship and Administration Act 2009* (Qld) creates a statutory right for active parties<sup>242</sup> to access documents filed in the Tribunal in relation to guardianship proceedings.<sup>243</sup>

21.222 Section 103 of the *Guardianship and Administration Act 2000* (Qld) provides:<sup>244</sup>

#### 103 Access

- (1) Each active party in a proceeding must be given a reasonable opportunity to present the active party’s case and, in particular—

237 WB Lane and S Young, *Administrative Law in Queensland* (2007) [2.235], [2.240], [2.245].

238 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J). See also *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

239 This includes documentary evidence held by other parties to the proceedings, not just documents held by the decision-maker. However, procedural fairness may not necessarily require that the person be given a copy of the document itself as it may be sufficient that the substance of the information is brought to the person’s attention. See J Blackwood, ‘Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals’ (2004) 11 *Psychiatry, Psychology and Law* 122, 122, 123, 128–9, citing *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417, 413; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 197, 205, 223; *Gilson v Minister for Immigration and Multicultural Affairs* (Unreported, Federal Court of Australia, Lehane J, 21 July 1997) 8–9; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539, 557; and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, 748–7 (which was subsequently appealed to the High Court: *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88). See also JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [12.31]. Compare, however, in the guardianship context, *Moore v Guardianship and Administration Board* [1990] VR 902, 912 (Gobbo J), where it was held that the nature of the document required that it actually be produced, preferably before the hearing.

240 JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [12.30].

241 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(a). Until its repeal by s 1446 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld), s 108(1) of the *Guardianship and Administration Act 2000* (Qld) provided that the Tribunal must observe the rules of procedural fairness. For a discussion of the principles determining the operation of the hearing rule in the guardianship jurisdiction, see *GM v Guardianship Tribunal* [2003] NSWADTAP 59.

242 *Guardianship and Administration Act 2000* (Qld) s 103(2) also confers a statutory right on non-parties to access documents in specified circumstances.

243 See also s 134(2) of the *Guardianship and Administration Act 2000* (Qld), which deals with the rights of active parties to access written reports of Tribunal staff that are received in evidence.

244 The background to s 103 of the *Guardianship and Administration Act 2000* (Qld) is discussed at [21.225]–[21.229] below.

- (a) to access, before the start of a hearing, a document before the tribunal that the tribunal considers is relevant to an issue in the proceeding; and
  - (b) to access, during a hearing, a document or 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) Each active party in a proceeding, or person the tribunal considers has a sufficient interest in the proceeding, must be given a reasonable opportunity to access, within a reasonable time after a hearing, a document before the tribunal that the tribunal considered credible, relevant and significant to an issue in the proceeding.
- (3) For subsections (1) and (2), 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.

21.223 The right to access documents under section 103 may be displaced by a confidentiality order,<sup>245</sup> but is not affected by an adult evidence order, a closure order, or a non-publication order.<sup>246</sup>

21.224 The rights conferred by section 103 on active parties and on non-parties are considered separately below.<sup>247</sup>

### **Background to section 103**

21.225 Section 103 was enacted in its current form on 1 December 2009. It replaced section 108(2)–(7), which was in substantially similar terms.<sup>248</sup>

21.226 Section 108 (as it then was) was amended in 2008<sup>249</sup> in accordance with the recommendations made in the Commission's 2007 report on confidentiality in

<sup>245</sup> A confidentiality order permits the Tribunal to withhold a document or information from an active party or another person, and may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person: *Guardianship and Administration Act 2000* (Qld) s 109.

<sup>246</sup> *Guardianship and Administration Act 2000* (Qld) s 103(5)–(6).

<sup>247</sup> See the discussion commencing at [21.232] in relation to active parties and the discussion commencing at [21.257] in relation to non-parties.

<sup>248</sup> *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446.

<sup>249</sup> See *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 10.

relation to the right of active parties to access documents in Tribunal proceedings.<sup>250</sup> The Commission's recommendations were implemented by what became section 108(1), (2) (4), (6) and (7) of the substituted section 108 — that is, what is now section 103(1), (3), (5) and (6).<sup>251</sup>

21.227 Because the Commission's recommendations in that report dealt only with the confidentiality provisions under the guardianship legislation, the Commission did not make any specific recommendations in the report about whether the *Guardianship and Administration Act 2000* (Qld) should provide a statutory right of post-hearing access; instead, the Commission indicated that it would revisit the issue in this stage of the review.<sup>252</sup>

21.228 The Commission also recommended in its report on confidentiality that the Tribunal should develop an administrative access policy to provide an administrative mechanism for post-hearing access to documents by active parties. It also indicated that it would consider the issue of whether the right to access documents conferred on the active parties before or during a proceeding should include a right to obtain copies of the documents.<sup>253</sup>

21.229 Section 103(2), which deals with post-hearing access to documents, was inserted when section 108 (as it then was) was amended in 2008,<sup>254</sup> but did not result from the Commission's recommendations in its 2007 report on confidentiality.

### **Presidential Direction in relation to access to documents**

21.230 Presidential Direction No 1 of 2009, which was published by the Guardianship and Administration Tribunal in January 2009, implemented an administrative access policy for documents in Tribunal proceedings. It complemented the new section 108 (now section 103), which also commenced on 1 January 2009. The Presidential Direction summarised the position under section 108 (as it then was) for access by active parties and persons with a sufficient interest in the Tribunal proceeding to documents filed in the Tribunal. It also outlined the practical arrangements for access to documents before, during and after hearings.

21.231 Presidential Direction No 1 of 2009 has been adopted (with consequential minor amendments) as a practice direction under the QCAT Act.<sup>255</sup> The QCAT Practice Direction provides:<sup>256</sup>

<sup>250</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [5.239].

<sup>251</sup> As explained earlier, what was s 108(1) of the *Guardianship and Administration Act 2000* (Qld) was omitted when s 108 was replaced by s 103. That subsection was no longer required because s 28(3)(a) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) now provides that the Tribunal must observe the rules of natural justice.

<sup>252</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [8.506]–[8.511], [8.514]–[8.519].

<sup>253</sup> *Ibid* [5.238].

<sup>254</sup> Section 103(2) was previously numbered as s 108(3).

**Presidential Direction No 1 of 2009  
Replacing Practice Direction 1 of 2005  
Arrangements for File Inspection**

**1. Introduction**

The provisions about access to information in the *Guardianship and Administration Act 2000* (the Act) seek to achieve an appropriate balance between the principles of protecting the privacy of persons affected by the guardianship system and the promotion of accountability and transparency in decision-making within the guardianship system. The Act contains a legislative presumption of openness permitting publication of information about Tribunal proceedings, provided the publication does not lead to identification of the adult. The aim of this Direction is to provide information to parties and other persons with a sufficient interest in the proceedings as to the general procedures the Tribunal has adopted in satisfying the competing principles of protection for individuals and of openness and accountability for parties and the public.

**2. Right to access documents and information on the Tribunal files**

The public does not have the right to access the Tribunal files.

Active parties in a proceeding have the right to access documents and information in the Tribunal files before, during and after a hearing — section 103(1) and (2) of the Act.

In addition a person who the Tribunal considers has a sufficient interest in the proceeding can access the Tribunal files after a hearing — section 103(2) of the Act.

**3. Preservation of Privacy by section 114A and General Principle 11**

Generally, information about a guardianship proceeding may be published. However, it is an offence under subsection 114A(2) of the Act for anyone to publish information about a guardianship proceeding if the information is likely to lead to the identification of the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published.

The General Principles apply to anyone performing a function or exercising a power under the Act. General Principle 11 states that an adult's right to confidentiality of information about themselves must be recognised and taken into account.

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255 Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 8 of 2010* <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 30 September 2010. QCAT Practice Direction No 8 of 2010, which deals with directions relating to guardianship matters, provides that specified Presidential Directions, issued under the *Guardianship and Administration Act 2000* (Qld), are adopted (with necessary amendments) as practice directions under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

256 See <[http://www.gaat.qld.gov.au/files/2009\\_-\\_1\\_Arrangements\\_for\\_File\\_Inspection.pdf](http://www.gaat.qld.gov.au/files/2009_-_1_Arrangements_for_File_Inspection.pdf)> at 30 September 2010.

**4. Procedural Fairness required by section 103**

The right of active parties to access documents and information applies to a document or information before the Tribunal that the Tribunal considers is credible, directly relevant and significant. The Tribunal may displace the right to inspect the document only by a confidentiality order.

**5. Confidentiality Order made under section 109**

The Tribunal on its own initiative, or by request from an active party or entity providing information, may make a confidentiality order withholding from an active party or another person a document or part of a document or information before the Tribunal.

The Tribunal will not make a confidentiality order prohibiting or restricting access to documents or information unless it is satisfied a confidentiality order is necessary to avoid serious harm to a person, or necessary to avoid injustice to a person. The Tribunal will only make a confidentiality order to the extent necessary to avoid serious harm or injustice.

**6. Access to File Information and Document Inspection — *Active Parties Only***

The principles in section 103 of the Act contain the guidelines for the inspection of documents which have been lodged with the Tribunal Registry.

**7. Prior to Hearing — *Active Parties Only***

Documents that are directly relevant to an issue in the proceedings can be inspected by an active party or their representative unless a confidentiality order has been made prohibiting or restricting inspection.

The registrar or a member of the Tribunal may permit an active party or their representative, after they have inspected the file, to obtain copies of documents available for inspection where this is necessary for an active party to adequately prepare for the hearing.

When an active party or their representative is not able to inspect the file in person prior to the hearing, due to distance, ill health, a medical disability or other practical reasons copies of documents will be provided on request to the Registrar.

**8. Practical Arrangements Relating to Inspection and Access**

**Pre-hearing — Active parties only**

- (a) *Time of inspection:* An active party or their representative can inspect the file after receipt of the Notice of Hearing as at this stage all material information will have been received by the tribunal and inspection of the file at this stage reduces the need for repeated inspections. Additional inspection of the file can occur when material documents have been received by the Tribunal after the sending out of the Notice of Hearing.



- (b) *Place of Inspection*: File inspections will generally occur in two locations:
- (i) at the registry for Brisbane hearings; or
  - (ii) at the venue of the hearing for regional matters.

For hearings in Brisbane, a time will be made for the file to be inspected at the registry of the Tribunal. For regional matters, a time will be made for the file to be inspected on the day of the hearing but before the hearing commences. However, alternate arrangements for earlier inspection of the file can be made having regard to the individual circumstances of each matter.

#### **At the Hearing — Active parties only**

An active party has the right to inspect at the hearing a document or other information before the Tribunal that the Tribunal considers is credible, directly relevant and significant to an issue in the proceeding unless a confidentiality order prohibiting or restricting access to the document or information has been made.

In cases where a confidentiality order has been made prior to the hearing, the confidentiality order is automatically vacated at the start of the hearing. If the prohibition or restriction about access is sought to be continued after the hearing commences, the party or entity who had requested the confidentiality order will be required to re-apply at the hearing and all active parties and any entity affected by the proposed order will be heard on the application.

#### **After the Hearing**

Section 103(2) of the Act provides that each active party in a proceeding, or a person the Tribunal considers has a sufficient interest in the proceeding, must be given a reasonable opportunity to access within a reasonable time after the hearing, a document that the Tribunal considers credible, relevant and significant to an issue in the proceeding.

Written requests for access to documents, after a hearing, should be made to the Registrar.

### **Access to documents by active parties**

21.232 Section 103(1) of the *Guardianship and Administration Act 2000* (Qld) generally provides that the Tribunal must give each active party<sup>257</sup> in a proceeding a reasonable opportunity to present his or her case. In particular, an active party is entitled:

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*Guardianship and Administration Act 2000* (Qld) s 119 sets out who is an active party in a guardianship proceeding: see [21.121] above. A person who has been notified of a hearing but who does not automatically fall within the definition of an active party for a proceeding (for example, a family member who is not the adult's formally appointed guardian, administrator or attorney) may become an active party to the proceeding if joined as an active party by the Tribunal. This type of application is usually dealt with 'on the papers' by the Tribunal. The joinder of a person as an active party for a proceeding is discussed at [21.122]–[21.123] above.

- before the start of a hearing — to access a document in the Tribunal files that the Tribunal considers is relevant to an issue in the proceeding;
- during a hearing — to access any document or other information before the Tribunal that the Tribunal considers is credible, relevant and significant to an issue in the proceeding; and
- to make submissions about a document or other information that has been accessed under section 103(1).

21.233 Section 103(2) provides that, within a reasonable time after a hearing, the Tribunal must give each active party in a proceeding (or person the Tribunal considers has a sufficient interest in the proceeding) a reasonable opportunity to access a document before the Tribunal that the Tribunal considered credible, relevant and significant to an issue in the proceeding.

21.234 Section 103 does not specify the manner in which access to documents is to be given. In particular, it does not confer a right to obtain copies of documents. Instead, the procedure for accessing documents is provided for by Presidential Direction No 1 of 2009, which has been adopted as a Practice Direction of QCAT.<sup>258</sup>

### ***Access before a hearing***

21.235 Paragraph 7 of the Practice Direction provides that, before a hearing, active parties can inspect documents and may, with the permission of the registrar or a Tribunal member, obtain copies of the document where that is necessary for an active party to prepare for the hearing adequately:

Documents that are directly relevant to an issue in the proceedings can be inspected by an active party or their representative unless a confidentiality order has been made prohibiting or restricting inspection.

The registrar or a member of the Tribunal may permit an active party or their representative, after they have inspected the file, to obtain copies of documents available for inspection where this is necessary for an active party to adequately prepare for the hearing.

21.236 The Commission understands that the practice of the Tribunal is to give a person who is an active party, or the representative of an active party, at the person's request, a copy of any document that satisfies the criteria for inspection, unless the document is subject to a confidentiality order.<sup>259</sup> Although the Commission is not aware of copies not being provided on request, it is nevertheless the case that there is no statutory entitlement to copies of documents.

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<sup>258</sup> See [21.230]–[21.231] above.

<sup>259</sup> Information provided to the Commission by the A/Principal Registrar, Queensland Civil and Administrative Tribunal 8 October 2009. The Commission understands that the same practice was previously applied by the Guardianship and Administration Tribunal between 1 January 2009 (when GAAT Presidential Direction No 1 of 2009 was made) and 30 November 2009 (immediately prior to the commencement of QCAT on 1 December 2009).

### **Access during a hearing**

21.237 Paragraph 8 of the Practice Direction deals with access to documents during a hearing. It refers to an active party's 'right to inspect' a document that the Tribunal considers is 'credible, directly relevant and significant to an issue in the proceeding'. However, it is silent on the issue of obtaining a copy of such a document.

### **Access after a hearing**

21.238 The Practice Direction does not specify how post-hearing access to documents is to be provided. Paragraph 8 simply states that written requests for access to documents after a hearing should be made to the Registrar.

### **Discussion Paper**

21.239 In the Discussion Paper, the Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the right of active parties to access a document under section 103(1) should include a right to obtain a copy of the document.<sup>260</sup> The Commission noted that an alternative approach might be for the right to obtain a copy of a document to be conferred under the QCAT Rules.<sup>261</sup> Either of these options would create a statutory right to obtain a copy of a document.<sup>262</sup>

21.240 The Commission also sought submissions on whether, if the *Guardianship and Administration Act 2000* (Qld) or the QCAT Rules were to provide that the right of an active party to access a document under section 103(1) of the *Guardianship and Administration Act 2000* (Qld) includes a right to obtain a copy of the document, the right to obtain a copy of the document should be subject to the Tribunal's discretion.<sup>263</sup>

### **Submissions**

21.241 A number of respondents considered that the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that the right of an active party to access a document under section 103(1) includes a right to obtain a copy of the document.<sup>264</sup>

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<sup>260</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 86.

<sup>261</sup> Ibid [16.123].

<sup>262</sup> The *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) fall within the definition of 'statutory rule' under the *Statutory Instruments Act 1992* (Qld): *Statutory Instruments Act 1992* (Qld) s 9 (Meaning of subordinate legislation). Cf *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 226(2), which expressly provides that a Practice Direction is not subordinate legislation.

<sup>263</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 86.

<sup>264</sup> Submissions 20A, 27A, 94I, 135, 155, 156A.

21.242 Pave the Way commented that:<sup>265</sup>

a right to have access to a document should include a right to obtain a copy, at the Tribunal's cost. There is little point in allowing people a right to inspect documents and then expect them either to remember their contents, or transcribe them by hand. ... [I]t is a requirement of procedural fairness that parties be given adequate opportunities to present their case.

21.243 The Perpetual Group of Companies also considered that, except in the most extraordinary circumstances, an active party should be entitled to a copy of any document that it has a right to inspect.<sup>266</sup> It stated that, although it had never been denied such access, it would be prudent to legislate for this right. It also observed that:

Some active parties may be inclined to misuse such documents, including perhaps by flouting the confidentiality requirements. However the utility of having access to copies so we can properly assist the tribunal is so great that the need for access outweighs the risks.

We agree that the tribunal should be able to make an order to the contrary, subject to the usual right of review and appeal.

21.244 The Public Trustee commented that 'there can be no doubt that an active party and, in particular, an active party who has a direct interest in matters being agitated should have a right to obtain a copy of relevant documents':<sup>267</sup>

It is extraordinarily difficult for active parties to usefully participate in a hearing as to capacity for example without having the benefit of the relevant medical report or in a matter where property or money has been likely misappropriated without similarly having the benefit of the documentary evidence in that respect.

21.245 The Public Trustee suggested that the right to obtain a copy of a document might be subject only to a Tribunal order that the document not be made available (not dissimilar to the position in respect of 'sealed' documents in a court).

21.246 The Adult Guardian favoured giving active parties a right to receive a copy of any document prior to the hearing, as opposed to simply having the right to inspect.<sup>268</sup> However she considered that there would 'undoubtedly be significant resourcing issues with such a proposal, given the number of applications received by the tribunal'.<sup>269</sup>

The risk is that some active parties will use the document inappropriately and, in the experience of this office, they will occasionally be posted on the internet or in other ways published. This is problematic for two reasons. The tribunal deals with adults who frequently lack capacity or are at least highly vulnerable

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265 Submission 135.

266 Submission 155.

267 Submission 156A.

268 Submission 164.

269 Ibid.

and often unable to protect their own privacy. The tribunal is also often the forum for vitriolic longstanding family disputes. Although the tribunal can limit the use of the document to the purposes of the proceedings, this is unlikely to operate as a bar to wider distribution. The best manner in which to protect the adult would seem to be to allow the tribunal some discretion.

21.247 However, one respondent considered that the inspection of documents was sufficient, and that it was not necessary to provide a statutory entitlement to copies of documents.<sup>270</sup>

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

#### *The right to inspect and obtain copies of documents before and during a hearing*

21.248 In the Commission's view, the proper preparation and presentation of an active party's case requires that an active party should have a right not only to inspect any document that is relevant to an issue in the proceeding, but also to obtain a copy of any document that he or she is entitled to inspect. Although the practice of the Tribunal is to provide copies of relevant documents on request,<sup>271</sup> the Commission does not consider it appropriate that an issue as fundamental as an active party's right to obtain a copy of a document should be a matter of discretion for the Tribunal. Section 103 of the *Guardianship and Administration Act 2000* (Qld) should therefore be amended to ensure that an active party is entitled to obtain a copy of any document that the active party is entitled to inspect before or during a hearing.

#### *The right to inspect and obtain copies of documents after a hearing*

21.249 The Commission is also of the view that, after a hearing, an active party should have a right to obtain a copy of any document that he or she is entitled to inspect under section 103(2) of the *Guardianship and Administration Act 2000* (Qld). There are various circumstances in which an active party might seek post-hearing access, including where the person is considering whether to appeal a decision of the Tribunal or to apply for the review of an appointment made by the Tribunal.

21.250 Further, because of the range of reasons that an active party might have for wishing to access documents after a hearing, section 103(2) should be amended to remove the time restriction that currently applies for seeking access under that subsection. The removal of this restriction is also consistent with the principle of open justice, discussed later in this chapter.<sup>272</sup>

21.251 At present, section 103(2) restricts post-hearing access to documents that the Tribunal considered credible, relevant and significant to an issue in the proceeding. The Commission generally considers that this is an appropriate test and should be retained as the ordinary test governing an active party's right to

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<sup>270</sup> Submission 177.

<sup>271</sup> See [21.236] above.

<sup>272</sup> See the discussion commencing at [21.287] below.

inspect and obtain copies of documents. However, it is possible that an active party may wish to appeal a decision of the Tribunal on the ground that the Tribunal was in error in finding that a particular document was *not* credible, relevant and significant. Where that has occurred, an active party would not currently have an entitlement under section 103(2) to access the document, even though access to the document might be critical to the ability of the active party to appeal the Tribunal's decision (or to consider whether to appeal the Tribunal's decision).

21.252 Section 103 should therefore be amended to deal with this situation. The Commission does not consider that an active party should have an automatic right to access a document that the Tribunal did not consider credible, relevant and significant; rather, access to such a document should be in the Tribunal's discretion. Accordingly, section 103 should be amended 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.

*Relationship with section 230 of the QCAT Act*

21.253 As explained below, section 230 of the QCAT Act also provides for access to documents by parties and non-parties.<sup>273</sup> While the relationship between section 230 of the QCAT Act and section 103 of the *Guardianship and Administration Act 2000* (Qld) is of particular concern in relation to access by non-parties,<sup>274</sup> it is nevertheless desirable to avoid any doubt as to which provision governs access to documents in guardianship proceedings. Accordingly, section 103 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 103 applies despite section 230(2) of the QCAT Act.

*Summary of recommendations*

21.254 In light of the Commission's recommendations later in this chapter in relation to access to documents by non-parties, section 103 of the *Guardianship and Administration Act 2000* (Qld) should be amended to confine its application to access by active parties. The Commission also considers that the operation of the provision will be clearer if, instead of referring to 'access' to documents, it refers, where relevant, to inspecting documents and to obtaining copies of documents.

21.255 The draft provision set out below reflects the Commission's recommendations in relation to access to documents by active parties. In the Commission's view, 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—

<sup>273</sup> Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 230 is set out at [21.259] below.

<sup>274</sup> See the discussion commencing at [21.266] below.

- (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.

21.256 In recommending that an active party should be entitled to obtain copies of certain documents, the Commission is not making a recommendation about whether the copies should be provided free of charge. The Commission understands that the Tribunal does not currently charge for the documents provided to active parties, and that is obviously a desirable practice. Ultimately, however, the decision whether or not to charge for copies of documents is a resourcing issue for the Tribunal and the Department of Justice and Attorney-General. For that reason, the Commission does not make any recommendation about whether copies of documents should be provided to an active party free of charge or on payment of a prescribed fee.

## Access to documents by non-parties

### Introduction

21.257 Both the QCAT Act and the *Guardianship and Administration Act 2000* (Qld) include provisions dealing with non-party access to documents filed in proceedings. This section of the chapter considers the relationship between the two sets of provisions and the different approaches reflected in these provisions. It also outlines, by way of comparison, the position in relation to non-party access in other relevant proceedings before QCAT.

### QCAT Act

21.258 Section 230 of the QCAT Act requires the principal registrar of QCAT, for each proceeding, to keep a record containing all documents filed in the registry for the proceeding. The section also deals with the entitlement of non-parties (and parties) to inspect or obtain copies of those documents.

21.259 Section 230 provides:

#### **230 Record for proceeding**

- (1) The principal registrar must, for each proceeding, keep a record containing all documents filed in the registry for the proceeding.
- (2) A party to a proceeding may, without charge, inspect the record kept for the proceeding under subsection (1).
- (3) Another person may, on payment of the prescribed fee (if any)—
  - (a) inspect a record kept under subsection (1); or
  - (b) obtain a copy of a part of a record kept under subsection (1).
- (4) This section does not authorise, entitle or permit a person to access a part of a record containing anything whose publication or disclosure to the person is prohibited under a non-publication order.

21.260 Under section 230(3), a person who is not a party to a proceeding may, on payment of the prescribed fee, inspect the record for the proceeding that is kept under section 230(1) and obtain a copy of a part of that record. However, neither a non-party nor a party is entitled or permitted to access a part of a record containing anything whose publication or disclosure to the person is prohibited under a non-publication order.<sup>275</sup>

21.261 Section 230(3) does not require a non-party to have any particular interest in the matter in order to be entitled to inspect or obtain a copy of a part of a record; nor does it restrict a non-party's entitlement to any particular time.<sup>276</sup> It would

<sup>275</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 230(4). The Act provides for non-publication orders in s 66.

<sup>276</sup> Cf *Guardianship and Administration Act 2000* (Qld) s 103(2).



appear, therefore, that the right to inspect and obtain a copy of a part of a record may be exercised before, during and after a Tribunal hearing.

### ***Guardianship and Administration Act 2000 (Qld)***

21.262 As explained earlier, section 103 of the *Guardianship and Administration Act 2000* (Qld) provides for access to documents by active parties before and during a hearing, as well as for post-hearing access to documents by active parties and certain persons who are not active parties (referred to in this discussion as ‘non-parties’).<sup>277</sup>

21.263 Section 103 does not give a non-party any entitlement to access documents before or during a hearing.

21.264 A non-party’s right under section 103(2) to access documents after a hearing is much more limited than under section 230(3) of the QCAT Act. Under section 103(2) of the *Guardianship and Administration Act 2000* (Qld):

- the Tribunal must consider that the non-party has a sufficient interest in the proceeding;
- the period within which a non-party (or an active party) is entitled to access documents is ‘within a reasonable time after a hearing’; and
- access applies to ‘a document before the tribunal that the tribunal considered credible, relevant and significant to an issue in the proceeding’.

21.265 A non-party’s access to documents under section 103(2) is an exception to the general duty of confidentiality imposed by section 249A of the Act. Section 249A provides that a ‘relevant person’ (which includes a tribunal member, principal registrar, or registrar) must not ‘use’ (which includes disclosing or publishing)<sup>278</sup> ‘confidential information’ (which includes information about a person’s affairs)<sup>279</sup> other than as provided for by section 249. Section 249 permits disclosure ‘for the purposes’ of the *Guardianship and Administration Act 2000* (Qld) and in certain specified circumstances, including ‘if authorised or required under a regulation or another law’.<sup>280</sup>

### ***Which provisions govern non-party access to documents in guardianship proceedings?***

21.266 Because the *Guardianship and Administration Act 2000* (Qld) confers original jurisdiction on QCAT, it is an ‘enabling Act’ for the purposes of the QCAT

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<sup>277</sup> *Guardianship and Administration Act 2000* (Qld) s 103 is set out at [21.222] above.

<sup>278</sup> *Guardianship and Administration Act 2000* (Qld) s 246 (definition of ‘use’).

<sup>279</sup> *Guardianship and Administration Act 2000* (Qld) s 246 (definition of ‘confidential information’).

<sup>280</sup> *Guardianship and Administration Act 2000* (Qld) s 249(3)(a)–(b).

Act.<sup>281</sup> Section 6(7) of the QCAT Act provides that an enabling Act may ‘add to, otherwise vary, or exclude provisions’ of the QCAT Act about:

- the requirements about applications, referrals or appeals for jurisdiction conferred by the enabling Act;
- the conduct of proceedings for jurisdiction conferred by the enabling Act, including practices and procedures, and the Tribunal’s powers, for the proceedings; or
- the enforcement of the Tribunal’s decisions in a proceeding for jurisdiction conferred by the enabling Act.

21.267 Section 7 of the QCAT Act deals with the application of the QCAT Act where an enabling Act includes such a modifying provision. It provides:

**7 Application of Act if modifying provision in enabling Act**

- (1) This section applies if a provision of an enabling Act (the **modifying provision**) provides for—
  - (a) the tribunal’s functions in jurisdiction conferred by the enabling Act; or
  - (b) a matter mentioned in section 6(7).
- (2) The modifying provision prevails over the provisions of this Act, to the extent of any inconsistency between them.
- (3) This Act must be read, with any necessary changes, as if the modifying provision were a part of this Act.
- (4) Without limiting subsection (3)—
  - (a) in a provision of this Act relating to a person starting a proceeding, a reference to the person doing something under this Act is taken to be a reference to the person doing the thing under this Act or a modifying provision; and
  - (b) in a provision of this Act relating to the tribunal conducting a proceeding, a reference to the tribunal doing something under this Act is taken to be a reference to the tribunal doing the thing under this Act or a modifying provision.
- (5) This section does not prevent an enabling Act from expressly stating how this Act applies in relation to the modifying provision, including, for example, by stating that stated provisions of this Act do not apply, or apply subject to stated variations.
- (6) In this section—

**enabling Act** means an enabling Act that is an Act.

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Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 6(2)(a).

21.268 Although section 101 of the *Guardianship and Administration Act 2000* (Qld) specifically excludes the application of certain provisions of the QCAT Act to guardianship proceedings, it does not refer to section 230 of the QCAT Act; nor does section 103 of the *Guardianship and Administration Act 2000* (Qld) refer to section 230 of the QCAT Act. Accordingly, whether section 103 of the *Guardianship and Administration Act 2000* (Qld) modifies, and therefore prevails over, section 230 of the QCAT Act depends on the extent of the inconsistency between the two provisions.

#### *Access before or during a hearing*

21.269 On its face, section 230(3) of the QCAT Act is wide enough to deal with a non-party's access to documents before and during a hearing (as well as after a hearing). Whether that section governs a non-party's access to documents before and during a hearing in a guardianship proceeding depends again on the extent of any inconsistency with section 103 of the *Guardianship and Administration Act 2000* (Qld).

21.270 Since section 103 of the *Guardianship and Administration Act 2000* (Qld) does not make provision for non-party access to documents before or during a hearing, it is arguable that section 103 does not include a modifying provision that provides for a matter mentioned in section 6(7) of the QCAT Act,<sup>282</sup> and therefore does not prevail over section 230(3) of the QCAT Act. However, that construction produces the anomalous outcome that a non-party would have a greater entitlement to access documents before and during a hearing in a guardianship proceeding than an active party would have under section 103(1)(a) or (b) of the *Guardianship and Administration Act 2000* (Qld). Under section 103(1)(a) and (b), an active party is entitled to access the following documents:

- before the start of a hearing — a document before the Tribunal that the Tribunal considers is *relevant* to an issue in the proceeding; and
- during a hearing — a document or other information before the Tribunal that the Tribunal considers is *credible, relevant and significant* to an issue in the proceeding.

21.271 The alternative argument is that section 103 of the *Guardianship and Administration Act 2000* (Qld) is intended to cover the field in terms of a non-party's access to Tribunal documents in a guardianship proceeding. On that view, because section 103 restricts a non-party's access to post-hearing access, the section is inconsistent with section 230 of the QCAT Act and, therefore, prevails over it to the extent of that inconsistency.<sup>283</sup>

#### *Post-hearing access*

21.272 In relation to post-hearing access by a non-party to documents before the Tribunal:

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<sup>282</sup> Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 6(7) is considered at [21.266] above.

<sup>283</sup> Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 7(2).

- section 230 of the QCAT Act enables *any* non-party, on payment of a fee, to inspect and obtain a copy of *any* document that is part of a record (other than one that is subject to a non-publication order), without limitation as to time;
- section 103(2) of the *Guardianship and Administration Act 2000* (Qld) enables a non-party *who has a sufficient interest in the proceeding* to access, *within a reasonable time after a hearing*, a document before the Tribunal that the Tribunal considered was *credible, relevant and significant to an issue in the proceeding*.

21.273 The access provided to non-parties under section 103(2) of the *Guardianship and Administration Act 2000* (Qld) is narrower than that provided by section 230 of the QCAT Act in terms of the persons who are entitled to access (that is, persons with a sufficient interest in the proceeding), the documents that may be accessed, and the period of time within which a non-party may access the documents. In view of these inconsistencies, it appears that, at least in relation to *post-hearing* access to documents by a non-party, section 103 of the *Guardianship and Administration Act 2000* (Qld) modifies the operation of section 230 of the QCAT Act and prevails over that section.

### ***Non-party access in other relevant proceedings before QCAT***

21.274 As well as guardianship matters, QCAT also hears matters in which jurisdiction was previously exercised by the Anti-Discrimination Tribunal and the Children Services Tribunal.

21.275 The *Anti-Discrimination Act 1991* (Qld) does not include any provisions that deal with non-party (or party) access to, or inspection of, documents in Tribunal files. Accordingly, non-party access to documents filed in a proceeding under that Act is governed by section 230(3) of the QCAT Act.

21.276 In contrast, the *Child Protection Act 1999* (Qld) specifically excludes non-party access to documents in proceedings under that Act. Section 99ZF provides:

#### **99ZF Limited access to tribunal's record of proceedings**

- (1) This section applies to a record kept under the QCAT Act, section 230 for a proceeding before the tribunal to which this part applies.
- (2) Despite the QCAT Act, section 230(3) a person who is not a party to the proceeding may not inspect, or obtain a copy of, the record or a part of the record.

21.277 It should be noted that, generally, the *Child Protection Act 1999* (Qld) imposes a greater degree of confidentiality in relation to Tribunal proceedings than the *Guardianship and Administration Act 2000* (Qld). For example, section 99J provides that the hearing of a proceeding before the Tribunal must be held in private, although certain specified persons are permitted to be present. Section 99K provides that the Tribunal *may* allow a proceeding before the Tribunal to be

held in public if information identifying, or likely to lead to the identification of, a particular child will not be given in the proceeding.

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

21.278 The legislation in Tasmania, Victoria and Western Australia includes provisions dealing, in different ways, with the issue of non-party access to documents filed in guardianship proceedings.

#### *Tasmania*

21.279 In Tasmania, members of the public may inspect the Guardianship Board's register, which contains 'particulars' of applications, determinations, instruments appointing enduring guardians and registered interstate orders.<sup>284</sup>

#### *Victoria*

21.280 In Victoria, the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the 'VCAT Act') contains a provision that is similar to section 230 of the QCAT Act.<sup>285</sup> Section 146 of the VCAT Act provides:

#### **146 Proceeding files**

- (1) The principal registrar must keep a file of all documents lodged in a proceeding until the expiration of the period of 5 years after the final determination of the proceeding.
- (2) A party in a proceeding may inspect the file of that proceeding without charge.
- (3) On paying the prescribed fee (if any) any person may—
  - (a) inspect the file in that proceeding; and
  - (b) obtain a copy of any part of the file.
- (4) The rights conferred by this section are subject to—
  - (a) any conditions specified in the rules;
  - (b) any direction of the Tribunal to the contrary;
  - (c) any order of the Tribunal under section 101;
  - (d) any certificate under section 53 or 54.

21.281 The main difference between section 146 of the VCAT Act and section 230 of the QCAT Act is that the rights conferred by section 146 of the VCAT Act are

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<sup>284</sup> *Guardianship and Administration Act 1995* (Tas) s 89.

<sup>285</sup> The *Guardianship and Administration Act 1986* (Vic) does not include any provision dealing with non-party (or party) access to Tribunal files.

subject to a number of matters, including ‘any direction of the Tribunal to the contrary’.<sup>286</sup>

### *Western Australia*

21.282 In Western Australia, non-party access to material lodged with the Tribunal is dealt with under section 112 of the *Guardianship and Administration Act 1990* (WA). Whereas the Victorian provision discussed above provides that a non-party has a right to access documents unless the Tribunal has made an order to the contrary, the effect of section 112(3) and (4) of the Western Australian legislation is that a non-party *may not* access documents filed with the Tribunal unless the Tribunal has, by order, authorised the person to inspect or otherwise have access to the documents. Section 112 provides:

#### **112 Inspection of records**

- (1) A represented person, a person in respect of whom an application under this Act is made or a person representing any such person in any proceedings commenced under this Act is, unless the State Administrative Tribunal otherwise orders, entitled to inspect or otherwise have access to—
  - (a) any document or material lodged with or held by the Tribunal for the purposes of any application in respect of that person;
  - (b) any accounts submitted under section 80 by the administrator of the estate of that person.
- (2) Any other party to any proceedings commenced under this Act, or a person representing any such party, is, unless the State Administrative Tribunal otherwise orders, entitled to inspect or otherwise have access to any document or material lodged with or held by the Tribunal for the purpose of those proceedings, other than a document or material that is or contains a medical opinion not being an opinion concerning that party.
- (3) Except as provided in this section, no person (not being a member of the State Administrative Tribunal or a member of staff of the Tribunal) shall, unless he is authorised to do so by order of the Tribunal, inspect or otherwise have access to a document or material lodged with or held by the Tribunal for the purposes of any application, or to any accounts submitted under section 80.  
  
Penalty: \$2 000 or imprisonment for 9 months.
- (4) The State Administrative Tribunal may on the application of any person—
  - (a) by order, authorise any person, whether conditionally or unconditionally, to inspect or otherwise have access to any document or material lodged with or held by the Tribunal for the purposes of any application; and

<sup>286</sup>

*Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(4)(b).

- (b) make any other order contemplated by this section.
- (5) An application under subsection (4) may be made ex parte or the State Administrative Tribunal may give directions as to the persons to whom notice of the application shall be given and who shall be entitled to be heard.

### **Issues for consideration**

21.283 It is undesirable that there should be uncertainty about which provisions govern the issue of non-party access to documents filed with the Tribunal in relation to guardianship proceedings. In considering this issue, the Commission has not confined itself to the question of whether section 103(2) of the *Guardianship and Administration Act 2000* (Qld) or section 230 of the QCAT should govern the issue; rather, the Commission has considered the wider question of what access non-parties should have, without limiting itself to the two options reflected in the current provisions.

21.284 In considering this issue, the Commission has had regard to the principles that guided the Commission in the development of its recommendations for stage one of this review. In stage one, which concerned the confidentiality provisions of the guardianship legislation, the Commission recommended greater openness in the guardianship system to promote accountability and transparency, and to promote and safeguard the rights and interests of adults with impaired decision-making capacity. Those objectives were achieved by its recommendations:

- to replace the then current regime of ‘confidentiality orders’ with four new types of orders (collectively called ‘limitation orders’) that better reflect the nature of the particular decision being made by the Tribunal;
- to establish a legislative presumption of openness and require serious harm or injustice to be demonstrated before the Tribunal may make a limitation order; and
- generally to permit publication of information about tribunal proceedings, provided that the publication does not lead to identification of the adult.

21.285 In developing these recommendations, the Commission identified three matters that needed to be examined in determining the balance between openness and confidentiality in the guardianship system:<sup>287</sup>

- the principle of open justice;
- the requirements of procedural fairness; and
- the nature of the guardianship system.

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Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [3.20].

21.286 Where non-parties are concerned, the requirements of procedural fairness are not directly relevant to whether or not a statutory entitlement to access should be given.<sup>288</sup> Accordingly, the main considerations for the Commission have been the principle of open justice and the nature of the guardianship system.

*Open justice*

21.287 The principle of open justice has been described as ‘a fundamental axiom of the Australian legal system’.<sup>289</sup> It has been said to broadly encompass the following elements:<sup>290</sup>

- Public hearings — a right of attendance by the public and the media at court hearings;
- Reporting of proceedings — a derivative right of those in attendance to report on those proceedings;
- Identification — a requirement that the names of persons involved in a proceeding, such as the parties and witnesses, be openly available to the public; and
- Access to documents — the right to inspect documents, such as pleadings that have come into existence for the purposes of a trial.

21.288 The *Guardianship and Administration Act 2000* (Qld) gives effect to the principle of open justice by providing that hearings by the Tribunal must be held in public.<sup>291</sup> It also provides that, generally, information about a guardianship proceeding may be published, subject to the requirement that a person must not, without reasonable excuse, publish information to the public, or a section of the public, if the publication is likely to lead to the identification of the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published.<sup>292</sup>

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However, if a non-party has a statutory entitlement to access documents that is capable of being defeated by a Tribunal direction that access not be given, ‘the power to give such a direction is conditioned on the principles of natural justice’. Although the content of natural justice varies with the circumstances, it should be sufficient, in the ordinary case, ‘for the Tribunal to give written notice to the person seeking access that it is proposed to give a contrary direction, the effect of which would be to deny access, and to invite the access-seeker to advance argument (in writing) as to why such a direction should not be made’: *Herald & Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7, [40]–[41] (Maxwell P, with whom Eames and Nettle JJA agreed).

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*John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 525 (Spigelman CJ).

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J Jaconelli, *Open Justice: A Critique of the Public Interest Trial* (2002) 2–3. It was also suggested that, for criminal proceedings, there is the further requirement that the trial is to take place in the presence of the accused: *ibid* at 3.

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*Guardianship and Administration Act 2000* (Qld) s 105(1). The exception to this requirement is where the Tribunal makes an adult evidence order or a closure order: s 105(2).

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*Guardianship and Administration Act 2000* (Qld) s 114A(1)–(2).



21.289 However, the principle of open justice does not confer a freestanding right.<sup>293</sup> In considering the extent to which the principle of open justice favours the conferral on non-parties of an express right of access to Tribunal documents in guardianship proceedings, the Commission is mindful of the role that documents have at different stages of a proceeding.

21.290 In *John Fairfax Publications Pty Ltd v Ryde Local Court*,<sup>294</sup> Spigelman CJ held that the principle of open justice ‘is not engaged at the time of the filing of the proceedings’:<sup>295</sup>

It is only when relevant material is used in court that it becomes relevant. As Slicer J put it in *R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; Ex parte Davies Brothers Ltd* (at 293): ‘... The making of a complaint, without more, is no more than a statement by a party (often the state) that it wishes to have a particular grievance (public or private) determined by a court. ... The making of a complaint does not attract the requirement of “open justice” unless and until it becomes an issue between the parties’.

21.291 Spigelman CJ endorsed the ‘underlying principle’ as stated in *Smith v Harris*:<sup>296</sup>

[T]he policy which demands that the judicial process be open to public scrutiny does not demand that the subject matter of that process be available except in so far as this is necessary for the public to scrutinise the process itself.

21.292 In *Smith v Harris*,<sup>297</sup> Byrne J considered in detail the extent to which access to documents was in the public interest:<sup>298</sup>

The dominant right is that which says that the court’s proceedings must be open to the public, so that the public has confidence in their integrity. See *Webb v Times Publishing Co Ltd* [1960] 2 QB 535 at 559–62 where the reasons for the analogous common law privilege are usefully summarised. A document prepared for, filed and even served is not in that sense part of the court’s proceedings, at least until it is deployed as part of the judicial process. A like distinction between documents filed and served and documents deployed in court is observed with respect to discovered documents: *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, and witness statements: *Fairfield-Mabey Ltd v Shell UK Ltd* [1989] 1 All ER 576. This distinction may be applicable, too, to affidavits which are filed in court and which may be never read or tendered. It may be that the parties have compromised the proceeding before their use in court, perhaps in order that their private dealings contained in the pleadings or other documents be not made public. What good purpose would then be served for them or for the public if some reporter were permitted to broadcast these matters for the gratification of the curious public? Public interest is not to be equated with public curiosity: *Stephens v West Australian*

293 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521, 524 (Spigelman CJ).

294 (2005) 62 NSWLR 512.

295 *Ibid* 526.

296 *Ibid* citing *Smith v Harris* [1996] 2 VR 335, 350 (Byrne J).

297 [1996] 2 VR 335.

298 *Ibid* 341–2.

*Newspapers Ltd* (1994) 182 CLR 211 at 242 per Brennan J (dissenting), at 261 per McHugh J. There is, too, the possibility that the document, even when deployed in court, may be ordered to be confidential or some restraint may be imposed on it or, it may even be that the court may make an order that the hearing at which the document is used be in closed court pursuant to the *Supreme Court Act 1986* s 18 or its equivalent in other jurisdictions. The publication of a filed document before the hearing would defeat the purpose of such an order.

### *Nature of the guardianship system*

21.293 As the Commission observed in its 2007 report on confidentiality, the guardianship system has features that distinguish it from other areas of law and that may affect the extent to which it is appropriate for decision-makers within the guardianship system to adhere strictly to the principle of open justice.<sup>299</sup>

21.294 In that report, the Commission referred to the fact that the guardianship system empowers the Tribunal to make decisions about the fundamental rights of vulnerable adults. It suggested that the significance of these decisions may favour openness and transparency in decision-making rather than confidentiality.<sup>300</sup>

21.295 The Commission also referred to the adult-focused nature of the guardianship system. In this respect, the Commission suggested that the 'emphasis on promoting and safeguarding the rights and interests of the adult may warrant a greater recognition of confidentiality', although it also acknowledged that this feature of the system could point to openness as well.<sup>301</sup> The Commission elaborated:<sup>302</sup>

There are three elements of this adult-focused nature of the guardianship system that might favour a greater role for confidentiality than in other contexts: the primary focus on the adult's rights and interests, the consideration of the adult's private matters, and the scrutiny given to the otherwise private circumstances of others involved in the adult's life. A fourth element may instead favour greater openness: that the adult-focused nature of the jurisdiction may involve less contesting of issues.

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

#### *Access by a non-party before the start of a hearing*

21.296 In the Commission's view, before the start of a hearing, the principle of open justice does not constitute as compelling a reason to allow a non-party to access documents as it does during, or after, a hearing. Further, at this stage, there may be material filed that, although relevant to an issue in the proceeding, is

<sup>299</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [3.58].

<sup>300</sup> *Ibid* [3.59].

<sup>301</sup> *Ibid*. The Commission also considered that the inquisitorial powers of the Tribunal may affect the way in which the Tribunal accords procedural fairness to parties (at [3.59]), although this would not be a relevant issue in relation to non-parties.

<sup>302</sup> *Ibid* [3.66].

not ultimately found by the Tribunal to be credible, relevant and significant to an issue in the proceeding. For these reasons, the Commission does not consider that a non-party should have the same rights as an active party to inspect and obtain copies of documents filed in the proceeding.

21.297 However, the Commission also considers that section 103 of the *Guardianship and Administration Act 2000* (Qld), in not allowing a non-party to access documents under any circumstances before a hearing, is too restrictive.

21.298 The Commission favours the Western Australian approach to this issue. As explained earlier, section 112 of the *Guardianship and Administration Act 1990* (WA) generally prohibits pre-hearing access to documents by non-parties unless the State Administrative Tribunal orders that a non-party may inspect or otherwise have access to documents.<sup>303</sup>

21.299 The Commission therefore recommends that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, before a hearing, a non-party may not inspect or otherwise have access to a document before the Tribunal unless authorised by the Tribunal.

21.300 The Act should also be amended to provide that the Tribunal may, by order, authorise a non-party to inspect or obtain a copy of a document before the Tribunal that the Tribunal considers is relevant to an issue in the proceeding, including on terms the Tribunal considers appropriate. However, the Tribunal's power to authorise a party to inspect or obtain a copy of a document should not apply to a document, or part of a document, that is the subject of a confidentiality order.

#### *Access by a non-party during a hearing*

21.301 In relation to access to documents by a non-party during a hearing, the Commission is of the view that the principle of open justice requires that a non-party should have similar access to documents as that allowed to active parties under section 103 of the *Guardianship and Administration Act 2000* (Qld), as amended in accordance with the Commission's recommendations above. The fact that access by active parties is limited to documents that the Tribunal considers are credible, relevant and significant to an issue in the proceeding takes proper account of the nature of the guardianship system and the sensitive material that is commonly filed in guardianship proceedings.

21.302 Accordingly, the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that during a hearing, a non-party may, on payment of the prescribed fee (if any), inspect a document before the Tribunal that the Tribunal considers is credible, relevant and significant to an issue in the proceeding. It should also be amended to provide that a non-party is entitled, on payment of the prescribed fee (if any), to obtain a copy of any document that the non-party may inspect.

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*Guardianship and Administration Act 1990* (WA) s 112 is discussed at [21.282] above.

### *Access by a non-party after a hearing*

21.303 In relation to access to documents by a non-party after a hearing, the Commission is again of the view that the principle of open justice requires that a non-party should have access to any document before the Tribunal that the Tribunal considered credible, relevant and significant to an issue in the proceeding. Access to documents of this nature is a corollary to the requirement that Tribunal hearings be held in public.<sup>304</sup>

21.304 Further, the Commission considers that the current requirements in section 103(2) of the *Guardianship and Administration Act 2000* (Qld) that restrict non-party access to a person the Tribunal considers has a sufficient interest in the proceeding and also restrict the time within which access may be sought are inconsistent with the principle of open justice and should be omitted.

21.305 Accordingly, the Commission is of the view that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, after a hearing, a non-party may, on payment of the prescribed fee (if any), inspect a document before the Tribunal that the Tribunal considered credible, relevant and significant to an issue in the proceeding. It should also be amended to provide that a non-party is entitled, on payment of the prescribed fee (if any), to obtain a copy of any document that the non-party may inspect.

21.306 However, the Commission does not consider it necessary to make provision for a non-party to apply to the Tribunal for access to a document that the Tribunal did not consider to be credible, relevant and significant to an issue in the proceeding, as has been recommended earlier in relation to active parties.<sup>305</sup> That provision is necessary to enable an active party to appeal the Tribunal's finding about a document, but is not relevant for a non-party.

### *Relationship with section 230 of the QCAT Act*

21.307 As explained earlier, section 230 of the QCAT Act also provides for access to documents by parties and non-parties.<sup>306</sup> To avoid any doubt about which provision governs access to documents by non-parties, the provision of the *Guardianship and Administration Act 2000* (Qld) that gives effect to the Commission's recommendations above should provide that the section applies despite section 230(3) of the QCAT Act.

### *Summary of recommendations*

21.308 The draft provision set out below reflects the Commission's recommendations in relation to access to documents by non-parties. In the Commission's view, the *Guardianship and Administration Act 2000* (Qld) should be amended to include a provision to the following effect:

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304 *Guardianship and Administration Act 2000* (Qld) s 105(1).

305 See [21.251]–[21.252] above.

306 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 230 is set out at [21.259] above.

**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.

21.309 The Commission's recommendations about non-party access to documents will enlarge the rights that non-parties currently have under section 103(2) of the *Guardianship and Administration Act 2000* (Qld). However, publication of material contained in documents that are obtained under the Commission's recommendations will still be subject to the prohibition in section 114A of the Act on publishing, without reasonable excuse, information about a guardianship proceeding to the public, or a section of the public, if the publication is likely to lead to the identification of the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published.

## SPECIAL WITNESS PROVISIONS

21.310 Section 99 of the QCAT Act empowers the Tribunal to make particular orders when a ‘special witness’ is giving evidence at a Tribunal hearing. That section provides:

### 99 Dealing with special witnesses

- (1) This section applies in relation to a special witness giving evidence at a hearing of a proceeding.
- (2) The tribunal may make any of the following orders—
  - (a) that only particular persons may be present when the special witness gives evidence;
  - (b) that only particular persons may ask questions of the special witness;
  - (c) that the questioning of the special witness must be restricted to a stated time limit;
  - (d) that a particular person must be obscured from the view of the special witness while the special witness is giving evidence;
  - (e) that a particular person must be excluded from the place where the hearing is held while the special witness is giving evidence;
  - (f) that the special witness must give evidence in a place other than where the hearing is held and in the presence of only stated persons or with stated persons being excluded from the room;
  - (g) that a person, including, for example, a support person under section 91,<sup>307</sup> must be present while the special witness is giving evidence to give emotional support to the special witness;
  - (h) that an audiovisual record of the evidence given by the special witness be made and that the record be viewed and heard at the hearing instead of the special witness giving direct testimony at the hearing.
- (3) The tribunal may make an order under subsection (2) on the application of a party to the proceeding or on its own initiative.
- (4) In this section—
 

**relevant matter**, for a person, means—

  - (a) the person’s age, education, level of understanding or cultural background; or

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Section 91 provides for a support person for a party or a witness in a hearing that is to be held in private.

- (b) the person's relationship to a party to the proceeding; or
- (c) the nature of the subject matter of the evidence; or
- (d) another matter the tribunal considers relevant.

**special witness** means a witness who is—

- (a) a child; or
- (b) another person who the tribunal considers would be likely, if the person were required to give evidence according to the tribunal's usual practices and procedures, to—
  - (i) be disadvantaged as a witness because of the person's mental, intellectual or physical impairment or a relevant matter; or
  - (ii) suffer severe emotional trauma; or
  - (iii) be so intimidated as to be disadvantaged as a witness.  
(note added)

21.311 Section 99 confers on the Tribunal discretionary powers to make various orders to facilitate the giving of evidence by vulnerable witnesses, including closing the court, allowing the presence of an approved support person when the witness gives evidence or directing that the evidence be given by way of video recording. These provisions are similar to the special witness provisions in section 21A of the *Evidence Act 1977* (Qld).

## Discussion Paper

21.312 In the Discussion Paper, the Commission observed that section 99 of the QCAT Act is expressed not to apply to 'proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld)'.<sup>308</sup> This is intended to clarify that, when the Tribunal is exercising its jurisdiction in such proceedings, it may exercise its power to close a hearing or to exclude particular people from a hearing only under the relevant provisions of the *Guardianship and Administration Act 2000* (Qld).<sup>309</sup> In this regard, the *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, the Tribunal may make an adult evidence order (which permits the Tribunal to speak with the adult in the absence of others) or a closure order (which permits the Tribunal to close a hearing or part of a

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308 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.127], referring to *Guardianship and Administration Act 2000* (Qld) s 101(c).

309 Explanatory Notes, Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Bill 2009 (Qld) 281.

hearing to all or some members of the public, or to exclude a particular person, including an active party, from a hearing or part of a hearing).<sup>310</sup>

21.313 However, the Commission also observed that another consequence of providing that section 99 of the QCAT Act does not apply in proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld) is that the Tribunal would have no power under that section to make other types of orders that may assist a vulnerable witness during a hearing, for example, to have a support person present.<sup>311</sup>

21.314 In its 2007 report on confidentiality, the Commission noted that the submissions it had received strongly supported the use by the Tribunal of mechanisms, such as those provided for special witnesses in the courts, to enhance ‘the comfort of adults during proceedings and at the same time ensure parties are accorded procedural fairness’.<sup>312</sup> In light of those submissions, the Commission, in that report, encouraged the Tribunal to ‘utilise such mechanisms, where available, to assist an adult or another vulnerable witnesses during a hearing’. The Commission also encouraged the Tribunal to adopt an approach that facilitates an active party’s ability to participate in hearings as much as possible and, where feasible, to use the least restrictive method for managing issues that arise during a hearing.<sup>313</sup> By way of example, the Commission suggested that, before making a closure order to exclude an active party, the Tribunal should consider whether, given the reasons for making the closure order, it is possible and appropriate for that party to view what occurs in his or her absence via video link.<sup>314</sup>

21.315 In the Discussion Paper, the Commission sought submissions on whether, subject to QCAT’s power to make a closure order or an adult evidence order under the *Guardianship and Administration Act 2000* (Qld), the special witness provisions under section 99 of the QCAT Act should expressly apply to proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld).<sup>315</sup>

## Submissions

21.316 Several respondents, including the Adult Guardian, the Public Trustee and Pave the Way, considered that the special witness provisions in the QCAT Act

<sup>310</sup> Section 106 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an adult evidence order. Section 107 of the Act empowers the Tribunal to make a closure order. These types of orders may be made only if the Tribunal is satisfied that it is necessary to avoid serious harm or injustice to a person: ss 106(1), 107(1). An adult evidence order can also be made if it is necessary to obtain relevant information the Tribunal would not otherwise receive: s 106(1).

<sup>311</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.128].

<sup>312</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [4.206].

<sup>313</sup> *Ibid* [4.207]–[4.208].

<sup>314</sup> *Ibid* [4.208].

<sup>315</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 89.



should apply to guardianship proceedings 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).<sup>316</sup> The Public Trustee commented that:<sup>317</sup>

Whilst the occasions might be rare that recourse is had to section 99 by QCAT exercising jurisdiction under the GAA there likely will be occasions when the special witness provisions will be appropriate in order to ensure that evidence is properly gathered and the adult's interests are protected.

### The Commission's view

21.317 The special witness provisions provide for a wider range of measures than those provided for under an adult evidence order or a closure order. The Tribunal's powers to make orders under the special witness provisions are important powers to facilitate the giving of evidence by vulnerable witnesses in Tribunal proceedings. The Commission therefore considers that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide expressly that the special witness provisions under section 99 of the QCAT Act 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

21.318 The provision of reasons for a decision is an integral part of ensuring transparent and accountable decision-making by the Tribunal. The obligation to give reasons has been described as a normal incident of the judicial process<sup>318</sup> and as being 'of the essence of the administration of justice'.<sup>319</sup> It is well recognised that there are many benefits in requiring reasons for decisions.<sup>320</sup> These include:

<sup>316</sup> Submissions 20A, 135, 156A, 164, 177.

<sup>317</sup> Submission 156A.

<sup>318</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); Justice MD Kirby, 'Ex Tempore Judgments' (1995) 25 *Western Australian Law Review* 213, 220.

<sup>319</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing H Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494. There is not, however, an absolute rule that a judge must give reasons for decisions. The statement of Gibbs CJ quoted above included the qualification that the provision of reasons is a normal 'but not a universal' incident of the judicial process: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667. The limited exceptions include situations such as the making of procedural decisions where the reasons are clear because of the context or the foregoing exchanges between the parties: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing Justice MD Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 694. See also *Perkins v County Court of Victoria* (2000) 2 VR 246, 272 (Buchanan JA); *Brittingham v Williams* [1932] VLR 237, 239.

<sup>320</sup> See Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 264–5; Queensland Law Reform Commission, *A New Approach to Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP No 60 (2006) vol 1, [6.41]–[6.49]. See also Administrative Review Council, *Commentary on the practical guidelines for preparing statements of reasons* (2000) 2; Hon RG Atkinson, Judgment Writing (Paper delivered at the Magistrates Conference, Gold Coast, 21 March 2002).

- contributing to the quality of Tribunal decisions by demanding that the Tribunal focus on all the relevant issues which must be considered before a determination can be made;
- providing guidelines for Tribunal members in the determination of future applications, thereby contributing to the consistency of Tribunal decisions;
- promoting the accountability of the Tribunal and enhancing its public acceptance;
- helping decision-makers understand their role; and
- assisting in the review process by explaining why an order was made and the expectations of the Tribunal at the time of the making of the order.

21.319 The *Guardianship and Administration Act 2000* (Qld) and the QCAT Act create a statutory right, in specified circumstances, for particular people involved in a proceeding to receive a copy of the Tribunal's decision and reasons.<sup>321</sup>

21.320 Section 156 of the *Guardianship and Administration Act 2009* (Qld) generally provides that, as soon as practicable after making its decision, the Tribunal must notify and give a copy of its decision to the adult concerned, any other active party in the proceeding, any other person given notice of the hearing of the application and any other person who requests a copy.<sup>322</sup> If the Tribunal's decision does not include its reasons, the Tribunal must give each of those persons a written notice stating that the person may request written reasons for its decision under the QCAT Act.<sup>323</sup>

21.321 The QCAT Act includes the following general provisions about giving decisions and reasons in Tribunal proceedings:

<sup>321</sup> This statutory right was conferred in s 156 of the *Guardianship and Administration Act 2000* (Qld) to implement the Commission's recommendation, made in its 2007 report on confidentiality, that the Tribunal's power to withhold from active parties to a proceeding a decision and the reasons for it be removed: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.86], [6.89].

<sup>322</sup> *Guardianship and Administration Act 2000* (Qld) s 156(2), (5). Section 156 does not apply in relation to the making of a limitation order: *Guardianship and Administration Act 2000* (Qld) s 156(1). For the purposes of giving a copy of its decision to a person (other than the adult, another active party or a person notified of the hearing of the application) who requests the copy, it is sufficient if the Tribunal gives the copy in a form that does not contravene s 114A of the *Guardianship and Administration Act 2000* (Qld): s 156(5). Section 114A provides that, subject to certain exceptions, a person, without reasonable excuse, must not publish information about a guardianship proceeding to the public or a section of the public if the publication is likely to lead to the identification of the relevant adult by a member of the public.

<sup>323</sup> *Guardianship and Administration Act 2000* (Qld) s 156(5). For the purposes of that section, the relevant provision of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) is s 122. Section 156(6) provides that the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122 applies to a request by a relevant person for written reasons as if a reference in that section to a party to a proceeding were a reference to a relevant person. Sections 119–123 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) set out the general requirements for giving decisions and written reasons in QCAT proceedings, including in relation to an application made under the *Guardianship and Administration Act 2000* (Qld).

- the Tribunal must give its decision in a proceeding, including its final decision, within a reasonable time;<sup>324</sup>
- final decisions (that is, the decision that finally decides the matters the subject of the proceeding) must be given in writing to stated persons, and the reasons for final decisions must be given either orally or in writing;<sup>325</sup>
- if the Tribunal makes a final or preliminary decision but does not give written reasons for the decision, written reasons may be requested;<sup>326</sup>
- a request for written reasons must be made within 14 days after the decision takes effect, and the Tribunal must comply with the request within 45 days after the request is made or, if the President extends the period, the extended period;<sup>327</sup> and
- for a decision or reasons required to be given in writing, it is enough for the Tribunal to give the person a written transcript or an audio recording of the part of the proceeding in which the decision is, or the reasons are, given orally.<sup>328</sup>

21.322 If the Tribunal gives written reasons for a decision, the Tribunal must give a copy of the reasons to each adult concerned, any other active party in the proceeding and any other person who requests a copy of the reasons.<sup>329</sup>

21.323 In limited circumstances, the Tribunal may postpone notifying and giving a copy of its decision to a person for up to 14 days.<sup>330</sup> This may be done only if it is necessary to avoid serious harm or the effect of the decision being defeated.<sup>331</sup>

21.324 These general provisions do not apply to limitation orders.<sup>332</sup> The Tribunal must give its decision as soon as practicable after the hearing to the adult, each other active party, every entity heard in the proceeding, the Public Advocate and

<sup>324</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 119, 121(1).

<sup>325</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 121(1), (4). However, s 121 does not apply to limitation orders: *Guardianship and Administration Act 2000* (Qld) s 113(6), as amended by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1446.

<sup>326</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(1)–(2).

<sup>327</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(2)–(3).

<sup>328</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 123.

<sup>329</sup> *Guardianship and Administration Act 2009* (Qld) s 158.

<sup>330</sup> *Guardianship and Administration Act 2000* (Qld) s 157(1)–(4). A postponement order may be renewed but only if the Tribunal is satisfied that there are exceptional circumstances justifying the renewal: s 157(5). Section 157 implements the Commission's recommendation, made in its 2007 report on confidentiality, that that the Tribunal may delay notification of a decision for a period up to 14 days to avoid serious harm to a person or the effect of the Tribunal's decision being defeated: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.123]–[6.125].

<sup>331</sup> *Guardianship and Administration Act 2000* (Qld) s 157(2).

<sup>332</sup> *Guardianship and Administration Act 2000* (Qld) ss 112–113.

anyone else who requests a copy.<sup>333</sup> The Public Advocate must be given all the information considered by the Tribunal in making the limitation order.<sup>334</sup> The Tribunal must also give written reasons for its decision to make a limitation order (other than an adult evidence order), and may give reasons for its decision to make an adult evidence order.<sup>335</sup> The same people to whom a copy of the decision is to be given must also be given a copy of the reasons for the decision within 28 days of the decision being made.<sup>336</sup>

21.325 Neither section 156 of the *Guardianship and Administration Act 2000* (Qld), as amended, nor the QCAT provisions dealing with requests for written reasons apply to limitation orders made in guardianship proceedings.<sup>337</sup>

### Availability of written reasons for decision

21.326 In its 2007 report on confidentiality, the Commission indicated that it would examine, in this stage of the review, whether the Act should require the Tribunal to produce written reasons for all of its decisions rather than parties to a hearing having to make a request for written reasons, as is currently the case under section 156 of the *Guardianship and Administration Act 2000* (Qld).<sup>338</sup>

21.327 However, in the Discussion Paper, the Commission noted that this issue is largely addressed by the new mechanism under the QCAT regime that enables parties to a hearing to receive the transcript or audio recording of the reasons for decision and the requirement that the reasons for final decisions must be given either orally or in writing. Therefore, the Commission has not further examined the issue of whether written reasons should be produced for all decisions in guardianship proceedings.

21.328 An important and related issue for consideration is how to ensure that the reasons provided to parties — whether in the form of formal written reasons, or in the form of a transcript or audio recording — are sufficient to satisfy what is necessary to produce adequate reasons.

### What the reasons for decision should contain

21.329 As noted above, the QCAT Act provides that, if the Tribunal makes a decision in a proceeding but does not give written reasons for the decision, a party to the proceeding may request written reasons. The Act also provides that, in satisfying such a request, it is enough for the Tribunal to give the person a

<sup>333</sup> *Guardianship and Administration Act 2000* (Qld) s 112(1)–(3).

<sup>334</sup> *Guardianship and Administration Act 2000* (Qld) s 112(5).

<sup>335</sup> *Guardianship and Administration Act 2000* (Qld) s 112(1)–(4).

<sup>336</sup> *Guardianship and Administration Act 2000* (Qld) s 113.

<sup>337</sup> *Guardianship and Administration Act 2000* (Qld) s 113(6).

<sup>338</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.129].

transcript, or audio recording, of part of the proceeding in which the decision is, or reasons are, given orally.<sup>339</sup>

21.330 One advantage of this approach, particularly in a sizeable jurisdiction such as the guardianship jurisdiction, is that it is a convenient and efficient way of providing to the parties an official record of the reasons for decision articulated by the Tribunal at the hearing.

21.331 On the other hand, given that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are reasonably complex pieces of legislation, which often involve the application of various related provisions (including an extensive number of legal definitions), it is arguable that particular care needs to be taken to ensure that the transcripts or audio recordings are in each case sufficient to satisfy the requirements of adequate reasons. It has been suggested that the production of adequate reasons requires that ‘the parties should be able to see what matters the decision-making body has taken into account and what view it has reached on the points of fact and law which arise’.<sup>340</sup>

21.332 The content of a general statutory duty to provide reasons is governed by section 27B of the *Acts Interpretation Act 1954* (Qld). Where legislation simply states that the decision-maker is required to give written reasons for a decision, as is the case under the current *Guardianship and Administration Act 2000* (Qld) and the QCAT Act, section 27B extends that obligation and requires that the reasons refer to the evidence, set out the material findings of fact and state the reasons for the decision. It provides:

**27B Content of statement of reasons for decision**

If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision, the instrument giving the reasons must also—

- (a) set out the findings on material questions of fact; and
- (b) refer to the evidence or other material on which those findings were based.

21.333 The ACT has a similar legislative provision.<sup>341</sup> In addition, section 60 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) generally requires the Tribunal to include certain other information in its written reasons for decision, namely any principles of law relied on by the Tribunal and the way in which the Tribunal applied the principles of law to the facts. That section provides:

<sup>339</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 123.

<sup>340</sup> JRS Forbes, *Justice in Tribunals* (2nd ed, 2002) [13.21], citing *Iveagh (Earl of) v Minister for Housing and Local Government* [1964] 1 QB 395, 410.

<sup>341</sup> *Legislation Act 2001* (ACT) s 179. That section is in similar terms to s 27B of the *Acts Interpretation Act 1954* (Qld).

**60 Statement of reasons**

- (1) This section applies if—
- (a) the tribunal makes an order on an application; and
  - (b) within 14 days after the day the order is made, a party asks for a statement of reasons for the making of the order.
- (2) The tribunal must give the party a written statement of reasons for the making of the order.
- (3) The statement of reasons must set out—
- (a) any principles of law relied on by the tribunal; and
  - (b) the way in which the tribunal applied the principles of law to the facts.

*Note* The *Legislation Act*, s 179 deals with what other information must be included in a statement of reasons.

- (4) This section does not apply to an order under section 53 (Interim orders).

*Note* The rules may prescribe a longer period for asking for a statement of reasons (see s 25 (1) (e) and (2)).

**Discussion Paper**

21.334 In the Discussion Paper, the Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the written reasons for a decision made in a proceeding in relation to an application made under the Act must set out any principles of law provided by the Tribunal and the way in which the Tribunal applied the principles of law to the facts. The Commission also sought submissions on whether an alternative option might be for these matters to be included in the QCAT Rules or provided for in a Practice Direction.<sup>342</sup>

**Submissions**

21.335 Several submissions considered that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the written reasons for a decision must set out any principles of law provided by the Tribunal and the way in which the Tribunal applied the principles of law to the facts.<sup>343</sup> For example, the Perpetual Group of Companies said that:<sup>344</sup>

<sup>342</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.149].

<sup>343</sup> Submissions 20A, 27A, 94I, 155, 163.

<sup>344</sup> Submission 155.

it is important for clarity, to ensure and to demonstrate the necessary discipline in arriving at decisions, and to assist in relation to any appeal process, that the written reasons for a decision must set out any principles of law provided by the tribunal and the way in which the tribunal applied the principles of law to the facts.

We consider it is so important in this context that it should be incorporated into the [*Guardianship and Administration Act 2000* (Qld)].

21.336 The Adult Guardian agreed that Tribunal decisions should be required to set out the application of the principles of law to the relevant facts, but considered that requirement should be dealt with in the QCAT rules.<sup>345</sup>

If a principle of law is raised at a tribunal hearing, it will need to be determined by the tribunal as part of its decision making process. The application of principles of law to the relevant facts is an integral part of the decision making process and should constitute part of the reasons for a decision. Given the appeal mechanisms that flow, it may be preferable that these matters should be provided for within the rules as opposed to the legislation.

21.337 *Pave the Way*, however, considered that there was no need for the *Guardianship and Administration Act 2000* (Qld) to regulate the content of Tribunal decisions:<sup>346</sup>

One difficulty with requiring that reasons set out specified principles and apply them in a set way is that reasons can begin to take on a proforma look, which militates against good, clear, decision-writing which follows an individual's style. No member should be appointed to this Tribunal unless they can demonstrate they are capable of writing clear and concise reasons which touch on all relevant issues.

21.338 *Pave the Way* suggested that, if required, guidelines for writing reasons for Tribunal decisions could be dealt with in a Practice Direction.

21.339 The Public Trustee considered that the provisions of the QCAT Act, and in particular section 122, are likely to be sufficient to ensure that reasons are given.<sup>347</sup> He also stated that:

It is imagined that before adequate reasons are given the principles of law applied by the Tribunal will need to be included as a matter of course.

[The suggestion that the legislation be amended to require written reasons for a decision in a guardianship proceeding must set out the principles of applicable law] would seem to be of general importance for the operations of QCAT particularly should there be doubt that those principles should be reflected in a decision.

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345 Submission 164.

346 Submission 135.

347 Submission 156A.

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

21.340 Given the complexity of the guardianship legislation and the desirability of providing transparent and sufficient reasons for decisions, the QCAT Rules should be amended to require that the Tribunal, in its 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.

21.341 As this is a procedural matter, the Commission considers that it is appropriate that this requirement be included in the QCAT Rules, rather than the *Guardianship and Administration Act 2000* (Qld).

### **The timeframe for requesting written reasons**

21.342 In its 2007 report on confidentiality, the Commission indicated that it would examine in this stage of the review the adequacy of the timeframe for requesting written reasons for a decision of the Tribunal. At that stage of the Commission's review, the timeframe was 28 days.<sup>348</sup>

21.343 As noted above, the QCAT Act provides that, if the Tribunal makes a final or preliminary decision but does not give written reasons for the decision, written reasons may be requested.<sup>349</sup> The request must be made within 14 days after the decision takes effect, and the Tribunal must comply with the request within 45 days after the request is made or, if the President extends the period, the extended period.<sup>350</sup> These provisions apply generally to QCAT proceedings, including proceedings on applications made under the *Guardianship and Administration Act 2000* (Qld).

21.344 The QCAT Act has therefore reduced the period of time for requesting written reasons in guardianship proceedings from 28 days to 14 days.

21.345 The QCAT Act has also extended the timeframe within which the Tribunal is required to provide its written reasons from the period of 28 days to 45 days. However, the fact that the QCAT Act permits the Tribunal to give decisions or reasons in the form of a written transcript or audio-recording may well enable the Tribunal to comply with a request for written reasons within a shorter timeframe.

### **Discussion Paper**

21.346 In the Discussion Paper, the Commission noted that, under the new QCAT provisions, the timeframe for requesting written reasons in a guardianship

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<sup>348</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [6.130].

<sup>349</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(1).

<sup>350</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(2).



proceeding has been substantially reduced from 28 days to 14 days.<sup>351</sup> This is consistent with the timeframe for requesting written reasons in other QCAT proceedings. The Commission noted, however, that, depending on the circumstances, a shorter timeframe may be a disadvantage for some parties in a proceeding.

21.347 The Commission sought submissions on what the timeframe should be for requesting written reasons for a decision in a guardianship proceeding.<sup>352</sup>

### **Submissions**

21.348 The Adult Guardian considered that 'because of the nature of the jurisdiction which often involves adults who are highly vulnerable, who frequently lack capacity and may need some time to consider how to proceed, and often fraught and contentious family issues, the period for requesting reasons should be extended to 28 days'.<sup>353</sup> Another respondent made a similar observation.<sup>354</sup>

21.349 Pave the Way commented that:<sup>355</sup>

Adults, their families and other representatives and advocates need adequate time to seek advice if they are dissatisfied with a decision. While they will undoubtedly be told about the time limit for seeking reasons, the Tribunal hearings can be very overwhelming and 14 days can pass very quickly.

21.350 The Public Trustee, while considering that the provisions generally applying to QCAT are appropriate, suggested that it would be preferable to have a 28 day period rather than a 14 day period 'but consistency of approach might favour a 14 day period'.<sup>356</sup>

21.351 Two respondents considered that the timeframe should be 14 days.<sup>357</sup>

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

21.352 The Commission considers that 14 days is an appropriate timeframe for requesting written reasons for the Tribunal's decision in a guardianship proceeding. This is consistent with the general regime under the QCAT Act in relation to giving written reasons for decisions in other types of proceedings heard by the Tribunal.

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<sup>351</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [16.152].

<sup>352</sup> Ibid 96.

<sup>353</sup> Submission 164.

<sup>354</sup> Submission 20A.

<sup>355</sup> Submission 135.

<sup>356</sup> Submission 156A.

<sup>357</sup> Submissions 94I, 177.

## OTHER ISSUES RELATING TO TRIBUNAL PROCEEDINGS

21.353 During the course of this review, a number of submissions have raised concerns about other matters relating to Tribunal proceedings.<sup>358</sup> Some of these concerns have related to perceptions about aspects of the Tribunal's practices and procedures, and concern the adequacy of information given to active parties about the nature of the processes to be followed in Tribunal proceedings, whether parties in some instances have been given a proper opportunity to be heard, and whether some Tribunal members have been biased in their conduct of proceedings. The other concerns have largely related to the reception of evidence in Tribunal hearings, including the relative weight given to the evidence of health professionals in relation to the assessment of the adult's capacity and to that given by lay persons, and the weight given to hearsay evidence or unsubstantiated evidence generally.

21.354 It would be fair to say that many of the issues raised are essentially complaints that the Tribunal has erred in its exercise of a discretionary power. In addition, at the time many of these issues were raised, GAAT was still in operation. Since that time, GAAT has been abolished and QCAT now exercises jurisdiction in guardianship proceedings. In these circumstances, the Commission is not in a position to comment about the substance of many of these concerns, particularly those made in relation to individual cases. However, the Commission notes that the transfer of the guardianship jurisdiction from GAAT to QCAT has resulted in a number of legislative changes that have had a direct bearing on these issues. Some of these changes are likely to address some of the concerns that have been raised in submissions.

21.355 For example, the QCAT Act contains more comprehensive provisions about the Tribunal's practices and procedures than was the case when GAAT exercised the jurisdiction. In particular, sections 28 and 29 of the QCAT Act are intended to ensure that Tribunal proceedings are accessible, fair and informal.<sup>359</sup>

21.356 The QCAT Act requires Tribunal members and adjudicators to participate in particular professional development or continuing education or training activities, as directed by the President of the Tribunal,<sup>360</sup> and provides for the removal of a member or an adjudicator if he or she fails to comply with such a direction without a reasonable excuse.<sup>361</sup> In contrast, the *Guardianship and Administration Act 2000* (Qld) previously only imposed a duty on the President of GAAT to 'ensure tribunal members are adequately and appropriately trained to enable the tribunal to perform its functions effectively and efficiently'.<sup>362</sup>

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358 Submissions C4, C11A, C11D, C13, C16B, C24, 1, 3, 6A, 14, 16, 20, 26, 53, 58, 63, 64, 75, 77A, 79, 94, 183.

359 Sections 28 and 29 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) are discussed at [21.23]–[21.25] above.

360 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 173(1).

361 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 173(3), 188, 203.

362 *Guardianship and Administration Act 2000* (Qld) s 89, which was repealed by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1445.

21.357 Another significant change is that the QCAT Act confers on the Tribunal a comprehensive internal appellate jurisdiction. That new appeal mechanism is more accessible and less expensive than that the previous appeal mechanism under the *Guardianship and Administration Act 2000* (Qld), which only provided for appeals to the Supreme Court.

21.358 It should be also noted that, in this review, the Commission's focus has been on ensuring that the legislative provisions governing the conduct of guardianship proceedings in the Tribunal are adequate and appropriate for that purpose. It is in this context that the Commission has examined the provisions in the QCAT Act and *Guardianship and Administration Act 2000* (Qld) for Tribunal proceedings.

## RECOMMENDATIONS

### ***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

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### INTRODUCTION

22.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including 'the processes for review of decisions'.<sup>363</sup> In undertaking the review, the Commission is to have regard to a number of specified matters, including 'the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts'.<sup>364</sup>

22.2 This chapter examines the mechanisms that are available under the QCAT Act for an appeal against a decision of the Tribunal in a guardianship proceeding and for the reopening of a hearing of a guardianship proceeding. It also examines the provisions of the *Guardianship and Administration Act 2000* (Qld) that deal with the review of the appointments of guardians and administrators.

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

364 Ibid.

## APPEALING A TRIBUNAL DECISION

### The law in Queensland

#### *Persons eligible to appeal*

22.3 The *Guardianship and Administration Act 2000* (Qld) provides that an eligible person may appeal against a Tribunal decision, other than a non-appellable decision, in a proceeding as provided under the QCAT Act and for that purpose the person is taken to be a party to the proceeding.<sup>365</sup>

22.4 The Act provides that each of the following persons is an 'eligible person' for the purpose of appealing against a Tribunal decision:<sup>366</sup>

- the person whose capacity for a matter was under consideration in the proceeding;
- the applicant in the proceeding;
- a person proposed for appointment by the proceeding;
- a person whose power as guardian, administrator or attorney was changed or removed by the Tribunal decision;
- the Adult Guardian;
- the Public Trustee;
- the Attorney-General;
- a person given leave to appeal by the Appeal Tribunal, or the Court of Appeal, under the QCAT Act; and
- for a Tribunal decision to make a limitation order, other than a non-appellable decision — an active party or entity adversely affected by the limitation order.

#### *Appeals to the Appeal Tribunal against a Tribunal decision*

22.5 The QCAT Act provides that a party to a proceeding may appeal to the Appeal Tribunal against a decision of the Tribunal in the proceeding unless a judicial member<sup>367</sup> constituted the Tribunal in the proceeding.<sup>368</sup>

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<sup>365</sup> *Guardianship and Administration Act 2000* (Qld) s 163(1). 'Non-appellable decision' is defined to mean a Tribunal decision to make a limitation order under s 110: s 163(3)(b).

<sup>366</sup> *Guardianship and Administration Act 2000* (Qld) s 163(3) (definition of 'eligible person').

<sup>367</sup> 'Judicial member' is defined in sch 3 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to mean:

- the President, the Deputy President or a supplementary member who is a Supreme Court judge or District Court judge; and

22.6 The Appeal Tribunal is to be constituted for an appeal, or for an application for leave to appeal, by one, two or three judicial members.<sup>369</sup> If the President considers it appropriate for a particular appeal or application for leave to appeal, the President may choose one, two or three suitably qualified members to constitute the Tribunal for the appeal or application, whether or not in combination with a judicial member.<sup>370</sup>

22.7 If an appeal is on a question of fact, or a question of mixed law and fact, the Appeal Tribunal's leave to appeal must be obtained.<sup>371</sup> This is similar to the requirement for leave that previously applied under the *Guardianship and Administration Act 2000* (Qld).<sup>372</sup>

22.8 An application for leave to appeal or an appeal must:<sup>373</sup>

- be in a form substantially complying with the rules;
- state the reasons for the application or appeal; and
- be accompanied by the prescribed fee, which, for an appeal relating to a guardianship application, is \$500.<sup>374</sup>

22.9 If leave to appeal is required, an application for the Appeal Tribunal's leave must be filed within 28 days after the relevant day,<sup>375</sup> and an appeal must be filed within 21 days after the leave is given.<sup>376</sup> If leave to appeal is not required, an

- 
- for the exercise of a power of the Tribunal to make an order or give a direction — includes a senior member or ordinary member who is a former judge and is nominated by the president to exercise the power.

368 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(1). However, a party to a proceeding cannot appeal to the Appeal Tribunal against a Tribunal decision under s 35 of the Act (being a decision of the Tribunal to accept or reject an application or referral) or a cost-amount decision: s 142(2).

369 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 166(1).

370 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 166(2).

371 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(3)(b). The Appeal Tribunal's leave must also be obtained if the appeal is against a decision in relation to a costs order: s 142(3)(a)(iii). Note that s 142(3)(a)(ii) does not apply to a proceeding under ch 7 of the *Guardianship and Administration Act 2000* (Qld) (where the Tribunal is exercising its original jurisdiction): *Guardianship and Administration Act 2000* (Qld) s 101(f).

372 *Guardianship and Administration Act 2000* (Qld) s 164(2) (repealed), Reprint 4A.

373 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(2).

374 *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) s 7(1)(f).

375 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(3). Section 143(5) defines '**relevant day**, for an application or appeal' to mean:

- (a) the day the person is given written reasons for the decision being appealed against; or
- (b) if a person makes an application under part 7, division 5, 6 or 7 about the decision being appealed against within 28 days after the person is given written reasons for the decision—the day that application is finally dealt with under that division.

376 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(4)(a).

appeal must be filed within 28 days of the 'relevant day'.<sup>377</sup>

22.10 If the President of the Tribunal considers that an appeal made to the Appeal Tribunal could be more effectively or conveniently dealt with by the Court of Appeal, the President may transfer the appeal to the Court of Appeal with the court's leave.<sup>378</sup>

22.11 In deciding an appeal against a decision on a question of law only, the Appeal Tribunal may.<sup>379</sup>

- confirm or amend the decision;
- set aside the decision and substitute its own decision;
- set aside the decision and return the matter for reconsideration with or without the hearing of additional evidence as directed by the Appeal Tribunal and with the other directions that the Appeal Tribunal considers appropriate; or
- make any other order it considers appropriate.

22.12 If an appeal is made to the Appeal Tribunal against a decision on a question of fact only, or on a question of mixed law and fact, the appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the Appeal Tribunal.<sup>380</sup> In deciding the appeal, the Appeal Tribunal may confirm or amend the decision or set aside the decision and substitute its own decision.<sup>381</sup>

22.13 Generally, each party to an appeal to the Appeal Tribunal must bear his or her own costs of the appeal.<sup>382</sup> However, the Appeal Tribunal may make an order requiring a party to an appeal to pay all or a stated part of the costs of another party to the appeal if it considers that the interests of justice require it to make the order.<sup>383</sup>

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377 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 143(4)(b).

378 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 144(1)–(2).

379 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 146.

380 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 147(1)–(2).

381 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 147(1), (3).

382 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100. Note, however, that s 100 does not apply to a proceeding under ch 7 of the *Guardianship and Administration Act 2000* (Qld) (where the Tribunal is exercising its original jurisdiction): see *Guardianship and Administration Act 2000* (Qld) s 101(d).

383 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(1). In deciding whether to award costs under s 102(1), the Appeal Tribunal may have regard to the matters specified in s 102(3). Section 102 does not apply to a proceeding under ch 7 of the *Guardianship and Administration Act 2000* (Qld) (where the Tribunal is exercising its original jurisdiction), except to the extent that it applies for s 103 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld): see *Guardianship and Administration Act 2000* (Qld) s 101(e).

## **Appeals to the Court of Appeal**

### *Appeal against a Tribunal decision*

22.14 The QCAT Act provides that, if a judicial member constituted the Tribunal in the original proceeding, a party to the proceeding may appeal to the Court of Appeal against a decision of the Tribunal.<sup>384</sup>

22.15 However, an appeal to the Court of Appeal on a question of fact, or on a question of mixed law and fact, may be made only if the party has obtained the court's leave to appeal.<sup>385</sup>

### *Appeal against an Appeal Tribunal decision*

22.16 The QCAT Act also provides that an appeal lies to the Court of Appeal against certain decisions of the Appeal Tribunal.

22.17 Section 150(1) provides that a person may appeal to the Court of Appeal against a decision of the Appeal Tribunal to refuse an application for leave to appeal to the Appeal Tribunal.

22.18 Further, section 150(2) provides that a party to an appeal to the Appeal Tribunal may appeal to the Court of Appeal against the following decisions of the Appeal Tribunal:<sup>386</sup>

- a cost-amount decision; and
- the final decision.

22.19 However, an appeal under section 150(1) or (2) may be made only on a question of law and only if the party has obtained the Court of Appeal's leave.<sup>387</sup>

### *Requirements for an application for leave or an appeal to the Court of Appeal*

22.20 An application for the Court of Appeal's leave, or an appeal to the Court of Appeal, must be made under the *Uniform Civil Procedure Rules 1999* (Qld) and within 28 days after the 'relevant day' unless the Court of Appeal orders otherwise.<sup>388</sup>

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384 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149(2). A party to a proceeding may also appeal to the Court of Appeal against a 'cost-amount' decision of the Tribunal, whether or not a judicial member constituted the Tribunal in the proceeding: s 149(1).

385 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149(3)(b). However, an appeal to the Court of Appeal against a cost-amount decision of the Tribunal may be made only on a question of law and only if the party has obtained the court's leave to appeal: s 149(3)(a).

386 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 150(2).

387 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 150(3).

388 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 151(1)–(2). Section 151(3) defines '**relevant day**, for an application or appeal by a person,' to mean:

*Effect of appeal on decision*

22.21 In deciding an appeal against a decision of the Tribunal on a question of law only, the Court of Appeal may:<sup>389</sup>

- confirm or amend the decision;
- set aside the decision and substitute its own decision;
- set aside the decision and return the matter to the Tribunal for reconsideration with or without the hearing of additional evidence as directed by the court and with the other directions that the court considers appropriate; or
- make any other order it considers appropriate.

22.22 If an appeal is made to the Court of Appeal against a decision of the Tribunal on a question of fact only, or on a question of mixed law and fact, the appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the Court of Appeal.<sup>390</sup> In deciding the appeal, the Court of Appeal may confirm or amend the decision or set aside the decision and substitute its own decision.<sup>391</sup>

**The law in other jurisdictions*****Australian Capital Territory***

22.23 In the ACT, where guardianship proceedings are heard by the ACT Civil and Administrative Tribunal ('ACAT'), a party to an original application may appeal a decision of ACAT to the ACAT Appeal Tribunal.<sup>392</sup> A notice of appeal must be filed within 28 days after the day the decision is made, or such further time as ACAT allows.<sup>393</sup> The Appeal Tribunal may deal with an appeal as a new application or as a review of all or part of the original decision.<sup>394</sup>

- 
- (a) the day the person is given written reasons for the decision being appealed against; or
- (b) if a person makes an application under part 7, division 5, 6 or 7 about the decision being appealed against within 28 days after the person is given written reasons for the decision—the day that application is finally dealt with under that division.

389 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 153(1)–(2).

390 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 154(1)–(2).

391 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 154(1), (3).

392 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 79.

393 *ACT Civil and Administrative Tribunal Procedure Rules 2009* (ACT) r 12(1).

394 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 82.



22.24 In addition, a party to an application for an appeal may, with the leave of the Supreme Court, appeal to the Supreme Court on a question of law or fact from:<sup>395</sup>

- a decision of the Appeal Tribunal; or
- if the Appeal President dismissed the appeal under section 80 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT)<sup>396</sup> — the original decision of ACAT.

22.25 The applicant for leave to appeal must file the application for leave to appeal, the accompanying affidavit, and the draft notice of appeal, in the Supreme Court not later than 28 days after the day the order appealed from is made, or not later than any further time allowed by the court.<sup>397</sup>

### **New South Wales**

22.26 In New South Wales, section 67 of the *Guardianship Act 1987* (NSW) provides that a party to a proceeding before the Guardianship Tribunal may appeal to the Supreme Court against a decision of the Tribunal. An appeal may be instituted as of right on a question of law, and with the Supreme Court's leave on any other question.<sup>398</sup> Depending on the nature of the decision that is appealed against, the appeal is to be instituted within 28 days after the decision was made or within 28 days after the decision was furnished to the party instituting the appeal.<sup>399</sup>

22.27 Section 67A of the *Guardianship Act 1987* (NSW) also provides that an appeal against specified decisions of the Guardianship Tribunal may be made by a party to the proceeding to the Administrative Decisions Tribunal ('ADT'). An appeal to the ADT may be made as of right on any question of law, or by leave of the ADT Appeal Panel hearing the appeal on any other grounds.<sup>400</sup> An appeal must be made within 28 days after the decision-maker provides, in accordance with the Act under which the external appeal is made, the party with written reasons for the decision, or within such further time as the Appeal Panel may allow.<sup>401</sup>

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<sup>395</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 86.

<sup>396</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 80(1) provides that the Appeal President may give an applicant for an appeal written notice that the subject matter of the appeal is substantively similar to other appeals rejected by ACAT, that the Appeal President proposes to dismiss the appeal, and that the applicant may make representation within 21 days after the day the notice is given. The Appeal President may dismiss the application if, among other things, he or she is satisfied that it is in the public interest for ACAT not to consider the appeal and the Appeal President has sufficient information to make an informed decision to dismiss the application.

<sup>397</sup> *Court Procedures Rules 2006* (ACT) r 5072.

<sup>398</sup> *Guardianship Act 1987* (NSW) s 67(1).

<sup>399</sup> *Guardianship Act 1987* (NSW) s 67(2).

<sup>400</sup> *Administrative Decisions Tribunal Act 1997* (NSW) s 118B(1).

<sup>401</sup> *Administrative Decisions Tribunal Act 1997* (NSW) s 118B(2).

22.28 A person who has appealed to the ADT under section 67A of the Act may not appeal to the Supreme Court under section 67 in respect of the same decision unless the appeal under section 67A has been withdrawn with the approval of the ADT for the purpose of enabling the Supreme Court to deal with the matter.<sup>402</sup> Similarly, a person who has appealed to the Supreme Court under section 67 of the Act may not appeal to the ADT under section 67A in respect of the same decision unless the appeal under section 67 has been withdrawn with the approval of the Supreme Court for the purpose of enabling the ADT to deal with the matter.<sup>403</sup>

### **Northern Territory**

22.29 In the Northern Territory, where guardianship proceedings are heard by the Local Court,<sup>404</sup> a party to a proceeding before the court who is aggrieved by a decision or determination of the court may appeal against the decision or determination to the Supreme Court.<sup>405</sup> An appeal is to be made in the time and in the manner prescribed by the *Supreme Court Rules* (NT).<sup>406</sup> An appeal against a decision of the Local Court is to be instituted within 28 days after the date on which the decision was given.<sup>407</sup>

### **South Australia**

22.30 In South Australia, an appeal against a decision, direction or order of the Guardianship Board may be made to the Administrative and Disciplinary Division of the District Court ('ADD').<sup>408</sup> Generally, it is necessary to obtain the permission of the Board or the ADD.<sup>409</sup> However, that restriction does not apply if the appeal is against a decision or order for, or affirming, the detention of a person or relating to the giving of consent to a sterilisation or a termination of pregnancy.<sup>410</sup> An appeal against an order of the Board for, or affirming, the detention of a person or relating to the giving of consent to a sterilisation must be made within 28 days of the making of the order or within 28 days of being furnished, pursuant to a request made within seven days of the making of the order, with the reasons for the order.<sup>411</sup> However, an appeal against a decision or order of the Board made on an

402 *Guardianship Act 1987* (NSW) s 67(1A).

403 *Guardianship Act 1987* (NSW) s 67A(3).

404 *Adult Guardianship Act* (NT) s 11.

405 *Adult Guardianship Act* (NT) s 24(1).

406 *Adult Guardianship Act* (NT) s 24(1).

407 *Supreme Court Rules* (NT) rr 83.01 (definitions of 'Acts', 'material date', 'tribunal below'), 83.04(a).

408 However, a right of appeal does not lie against a decision of the Board not to authorise the publication of a report of proceedings before the Board or a decision or order made by the registrar in exercising the jurisdiction of the Board: *Guardianship and Administration Act 1993* (SA) s 67(2).

409 *Guardianship and Administration Act 1993* (SA) s 67(1)(g). An application for permission to appeal must be made within 28 days of the making of the decision, direction or order or within 28 days of being furnished, pursuant to a request made within seven days of the making of the decision, direction or order, with the reasons for the decision, direction or order: s 67(3).

410 *Guardianship and Administration Act 1993* (SA) s 67(1)(f).

411 *Guardianship and Administration Act 1993* (SA) s 67(4).

application for the Board's consent to a termination of pregnancy must be instituted within two working days of the decision or order being made.<sup>412</sup>

22.31 In addition, a party to a proceeding before the ADD who is dissatisfied with a decision, direction or order of the ADD in the proceeding may, with the permission of the ADD or the Supreme Court, appeal to the Supreme Court against the decision, direction or order.<sup>413</sup> However, there is no appeal to the Supreme Court in relation to the following decisions or orders:<sup>414</sup>

- a decision to refuse permission to appeal to the ADD;
- a decision or order made in relation to an application for consent to a termination of pregnancy;
- a decision not to authorise publication of a report of a proceeding before the ADD; or
- a decision or order made on an appeal against a decision of the Board in the exercise of its appellate jurisdiction under the *Mental Health Act 1993* (SA).

### **Tasmania**

22.32 In Tasmania, specified persons may appeal to the Supreme Court against a determination of the Guardianship and Administration Board.<sup>415</sup> An appeal may be brought as of right on a question of law.<sup>416</sup> However, an appeal on any other question may be brought only with the leave of the Supreme Court.<sup>417</sup>

22.33 Generally, an appeal is to be instituted within 28 days after the day on which the determination was made.<sup>418</sup> However, if the appeal is against a determination made in respect of an application for consent to the carrying out of a termination of pregnancy, the appeal must be instituted within two days after the making of the determination.<sup>419</sup>

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412 *Guardianship and Administration Act 1993* (SA) s 67(5).

413 *Guardianship and Administration Act 1993* (SA) s 70(1).

414 *Guardianship and Administration Act 1993* (SA) s 70(2).

415 *Guardianship and Administration Act 1995* (Tas) ss 3(1) (definitions of 'Board', 'Court'), 76(1). The persons who may appeal are specified in s 76(1).

416 *Guardianship and Administration Act 1995* (Tas) s 76(2)(a).

417 *Guardianship and Administration Act 1995* (Tas) s 76(2)(b).

418 *Guardianship and Administration Act 1995* (Tas) s 76(3)(a).

419 *Guardianship and Administration Act 1995* (Tas) s 76(3)(b).

## Victoria

22.34 In Victoria, guardianship proceedings are heard by the Victorian Civil and Administrative Tribunal ('VCAT').<sup>420</sup>

22.35 If VCAT makes an order in respect of an application under the *Guardianship and Administration Act 1986* (Vic), other than an interim order or a temporary order, a party or a person entitled to notice of the application may apply to VCAT for a rehearing of the application.<sup>421</sup> Further, if VCAT makes an order on a reassessment under section 61 of the Act on its own initiative,<sup>422</sup> a party or person entitled to notice of the reassessment may apply to VCAT for a rehearing of the reassessment if VCAT gives leave.<sup>423</sup> An application for a rehearing, or for leave to apply for a rehearing, must be made within 28 days after the day of the order.<sup>424</sup>

22.36 In addition, a party to a proceeding may appeal, on a question of law, from an order of VCAT. If VCAT was constituted for the purpose of making the order by the President or a Vice President, whether with or without other members, an appeal lies to the Court of Appeal if the Court of Appeal gives leave to appeal. In any other case, an appeal lies to the trial division of the Supreme Court if the Court gives leave to appeal.<sup>425</sup>

22.37 An application for leave to appeal must be made within 28 days after the day of VCAT's order<sup>426</sup> and, if leave is granted, the appeal must be instituted within 14 days after the day on which leave is granted.<sup>427</sup>

## Western Australia

22.38 In Western Australia, where guardianship proceedings are heard by the State Administrative Tribunal,<sup>428</sup> the avenues for the review of, or appeal against, a determination of the Tribunal depend on how the Tribunal was constituted for the proceeding.

22.39 If the Tribunal was constituted by a single member, a party who is aggrieved by the determination may request the President to arrange for a Full

420 See *Guardianship and Administration Act 1986* (Vic) s 3(1) (definition of 'Tribunal').

421 *Guardianship and Administration Act 1986* (Vic) s 60A(1). However, s 60A(6) provides that a person cannot apply for a rehearing of certain applications, including an application where VCAT was constituted for the hearing by the President, whether with or without other members.

422 An assessment under s 61 of the *Guardianship and Administration Act 1986* (Vic) is similar to the review of an appointment under s 29 of the *Guardianship and Administration Act 2000* (Qld).

423 *Guardianship and Administration Act 1986* (Vic) s 60A(3A).

424 *Guardianship and Administration Act 1986* (Vic) s 60A(4).

425 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).

426 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(2)(a).

427 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(3)(a).

428 *Guardianship and Administration Act 1990* (WA) s 13.

Tribunal to review the determination, and the President must comply with the request.<sup>429</sup> A request for a review by the Full Tribunal must be made within 28 days of the date of the determination or within such further time as the Full Tribunal allows.<sup>430</sup>

22.40 If the Tribunal was constituted for the proceeding by three members not including the President, an appeal lies to a single judge of the Supreme Court.<sup>431</sup> If the Tribunal was constituted by three members including the President, an appeal lies to the Court of Appeal.<sup>432</sup> In both cases, leave to appeal is required.<sup>433</sup> An application for leave to appeal may be made on the ground or grounds that the Tribunal made an error of law or fact, or of both law and fact, or acted without or in excess of jurisdiction, or that there is some other reason that is sufficient to justify a review of the determination.<sup>434</sup> An application for leave to appeal must be made within 28 days of the determination appealed from unless a judge extends the period for making the application.<sup>435</sup>

## The appropriate forum for an appeal

### *Issue for consideration*

22.41 An issue that arises for consideration is whether the QCAT Act provides an appropriate forum for appealing against a Tribunal decision made in a proceeding under the *Guardianship and Administration Act 2000* (Qld).

22.42 When the QCAT Act commenced, it significantly changed the avenues for appeal that were available under the *Guardianship and Administration Act 2000* (Qld). Previously, an appeal from a decision of GAAT lay to the Supreme Court.<sup>436</sup>

22.43 Under the QCAT Act, it is generally possible to appeal from a Tribunal decision to the Appeal Tribunal.<sup>437</sup> It is necessary to appeal to the Court of Appeal only if a judicial member constituted the Tribunal in the original proceeding.<sup>438</sup> In addition, it is possible, in limited circumstances, to appeal from a decision of the Appeal Tribunal to the Court of Appeal.<sup>439</sup>

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429 *Guardianship and Administration Act 1990* (WA) s 17A(1).

430 *Guardianship and Administration Act 1990* (WA) s 17A(2).

431 *Guardianship and Administration Act 1990* (WA) s 19(a).

432 *Guardianship and Administration Act 1990* (WA) s 19(b).

433 *Guardianship and Administration Act 1990* (WA) s 19.

434 *Guardianship and Administration Act 1990* (WA) s 21.

435 *Guardianship and Administration Act 1990* (WA) s 20(4).

436 *Guardianship and Administration Act 2000* (Qld) s 164(1) (repealed), Reprint 4A.

437 See [22.5] above.

438 See [22.14] above.

439 See [22.16]–[22.19] above.

### **Discussion Paper**

22.44 The Commission noted in the Discussion Paper that, before the QCAT Act was enacted, it had received several submissions that commented on the appeal mechanism that was then available under the *Guardianship and Administration Act 2000* (Qld).<sup>440</sup> It referred to a submission by the Guardianship and Administration Reform Drivers ('GARD')<sup>441</sup> to the Attorney-General and Minister for Justice, which commented that the expense and formality of appealing from a GAAT decision to the Supreme Court was prohibitive in most cases.<sup>442</sup> GARD therefore suggested that there should be provision under the *Guardianship and Administration Act 2000* (Qld) to apply to the Tribunal for a rehearing by three members of the Tribunal where the President was not sitting at the original hearing.<sup>443</sup> The Commission noted that other respondents had also expressed the view that an appeal to the Supreme Court was an obstacle and that an affordable and accessible review mechanism was required.<sup>444</sup>

22.45 In the Discussion Paper, the Commission sought submissions on whether the QCAT Act provides an appropriate appeal mechanism for guardianship matters.<sup>445</sup>

### **Submissions**

22.46 The submissions were generally supportive of the appeal mechanism provided by the QCAT Act.<sup>446</sup>

22.47 Pave the Way commented:<sup>447</sup>

The inclusion of an 'internal' Appeal Tribunal of QCAT has merit, in that (presumably) the hearing of appeals by this Tribunal will be less formal, and conducted by members with more specialist expertise, than the Supreme Court.

22.48 However, this respondent was concerned about the requirement for an appeal from the decision of a judicial member to be heard by the Court of Appeal:

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440 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [17.45].

441 GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents for People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network.

442 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [17.46].

443 Ibid.

444 Ibid.

445 Ibid 109.

446 Submissions 20B, 135, 156A, 164.

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

An obvious problem ... is that an appeal against a decision by a QCAT judicial member can be heard only by the Court of Appeal, with the obvious cost implications to those who, by chance, are involved in a QCAT hearing involving a judicial member.

We believe that an appropriate alternative would be for appeals against decisions heard by a tribunal panel including one or more judicial members to be heard by the QCAT Appeal Tribunal constituted by three other judicial members. This would be similar to appeals against decisions of a single Supreme Court judge being heard by three of their peers.

22.49 Another respondent, who generally considered the appeal mechanism in the QCAT Act to be a 'big step forward', also expressed some concern about the expense involved where an appeal lies to the Court of Appeal. He suggested, as an alternative, that the appeal should be heard by three District Court judges.<sup>448</sup>

22.50 One respondent commented that the QCAT Act does not provide a satisfactory appeal mechanism. In his view, an appeal should be exempt from a filing fee; the appeal panel should be constituted by three members who have expertise in disciplines such as disability, social work or psychology; and a party to an appeal should be entitled to be legally represented.<sup>449</sup>

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

22.51 In the Commission's view, the QCAT Act provides an appropriate mechanism for appealing against a Tribunal decision made in a guardianship proceeding. The fact that an appeal can generally be made to the Appeal Tribunal means that the process for appealing a Tribunal decision is significantly more accessible than was the case under the *Guardianship and Administration Act 2000* (Qld) where the only avenue of appeal from a GAAT decision was to the Supreme Court.

22.52 Although it will be necessary for an appeal to be made to the Court of Appeal if a judicial member of the Tribunal constituted the Tribunal at the original hearing, the Commission considers it appropriate, in that limited situation, for an appeal to lie to the Court of Appeal. Given that the President of QCAT is a Supreme Court judge and the Deputy President is a District Court judge, it would not be appropriate, as suggested by one respondent, for an appeal from a judicial member to lie to the District Court.

## **The requirement for leave to appeal**

### ***Issue for consideration***

22.53 An issue that arises for consideration is whether it is appropriate that leave is required for an appeal to the Tribunal on a question of fact or on a question of mixed law and fact.

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448 Submission 20B.

449 Submission 27A. Legal representation is considered in Chapter 21 of this Report.

### **Discussion Paper**

22.54 In the Discussion Paper, the Commission referred to the GARD submission, which commented on the requirement (then under the *Guardianship and Administration Act 2000* (Qld)) to obtain the court's leave if an appeal was not on a question of law. GARD considered that the requirement for leave was a further barrier to appealing a Tribunal decision, and suggested that provision should be made 'for interested parties, as a matter of right, to be able to apply to the Magistrates Court for a *de novo* hearing, after a hearing before the Tribunal'.<sup>450</sup>

22.55 The Commission noted that the leave of the relevant appellate body is a common requirement in the other Australian jurisdictions, especially for an appeal made other than on a question of law.<sup>451</sup> Nevertheless, the Commission sought submissions on whether it is appropriate that, for an appeal on a question of fact or on a question of mixed law and fact, leave to appeal is required.<sup>452</sup>

### **Submissions**

22.56 The Adult Guardian, the Public Trustee and Pave the Way considered it appropriate that the QCAT Act requires leave for an appeal on a question of fact or on a question of mixed law and fact.<sup>453</sup> The Adult Guardian commented:<sup>454</sup>

This requirement is in line with other jurisdictions. Until the efficacy of the system is tested, there is no apparent feature of guardianship that would indicate that it is an inappropriate mechanism.

22.57 However, two respondents were of the view that there should be a right of appeal, even where the appeal was on a question of fact or on a question of mixed law and fact.<sup>455</sup>

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

22.58 An unrestricted right of appeal on questions of fact, or on questions of mixed law and fact, could impose an unjustifiable burden on the Appeal Tribunal and the Court of Appeal. The Commission is therefore of the view that it is appropriate that the QCAT Act imposes a requirement to obtain the leave of the Appeal Tribunal or the Court of Appeal, as the case may be, for an appeal on a question of fact or on a question of mixed law and fact.

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450 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [17.48].

451 Ibid [17.49]. See [22.24], [22.26], [22.30]–[22.31], [22.32], [22.36], [22.40] above.

452 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 109.

453 Submissions 135, 156A, 164.

454 Submission 164.

455 Submissions 20B, 27A.



## REOPENING A PROCEEDING

### Reopening a proceeding under the QCAT Act

22.59 Under the QCAT Act, it is possible for a party to a proceeding, in limited circumstances, to apply for a reopening of the proceeding.

#### *The application for reopening*

22.60 The QCAT Act provides that a party to a proceeding<sup>456</sup> that has been heard and decided by the Tribunal may apply to the Tribunal for the proceeding to be reopened if the party considers that a 'reopening ground' exists for the party.<sup>457</sup> An application for reopening must:<sup>458</sup>

- state the reopening ground on which it is made;
- be made within the period and in the way stated in the rules; and
- be accompanied by the prescribed fee (if any).<sup>459</sup>

22.61 The QCAT Rules provide that an application for a proceeding to be reopened must be made within 28 days after the 'relevant day'.<sup>460</sup> The relevant day means:<sup>461</sup>

- if the party making the application has requested written reasons for the decision under section 122 of the Act — the day the party is given the written reasons;<sup>462</sup> or
- otherwise — the day the party is given notice of the decision.

#### *The current grounds for reopening a proceeding*

22.62 The QCAT Act provides for two grounds of reopening:<sup>463</sup>

- that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or

<sup>456</sup> The provisions in relation to reopening do not apply to an appeal that has been heard and decided by the Appeal Tribunal under pt 8, div 1 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld): s 136.

<sup>457</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 138(1).

<sup>458</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 138(2).

<sup>459</sup> However, no fee is payable for an application to reopen a guardianship proceeding: *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) s 6(1)(b)(i).

<sup>460</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 92.

<sup>461</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) sch (definition of 'relevant day').

<sup>462</sup> The giving of reasons for decisions is considered in Chapter 21 of this Report.

<sup>463</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 137.

- that the party would suffer a substantial injustice if the proceeding was not reopened because significant new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.

### ***The decision whether to reopen a proceeding***

22.63 Under the QCAT Act, if a party applies for the reopening of a Tribunal decision, the Tribunal must consider any written submissions made by a party to the proceeding.<sup>464</sup> The QCAT Act further provides that the Tribunal ‘may decide whether or not to reopen the proceeding entirely on the basis of documents, without a hearing or meeting of any kind’.<sup>465</sup>

22.64 The Explanatory Notes for the Queensland Civil and Administrative Tribunal Bill 2009 (Qld) outline the purpose of the reopening provisions:<sup>466</sup>

The purpose of this provision is to ensure fairness to a party absent from the hearing through no fault of their own and, in relation to the second ground, to avoid unnecessary costs to the parties and the tribunal involved in an appeal where the ground could be more effectively or conveniently dealt with by a reopening of the matter. In most cases, it would not be necessary to have a hearing on these issues. The evidence should be able to be sufficiently identified in the submissions which the tribunal is required to consider.

22.65 The Tribunal may grant the application only if it considers that:<sup>467</sup>

- a reopening ground exists for the applicant party; and
- the ground could be effectively or conveniently dealt with by reopening the proceeding under chapter 2, part 7, division 7 of the QCAT Act, whether or not an appeal under chapter 2, part 8 of the Act relating to the ground may also be started.

22.66 The Tribunal’s decision whether or not to reopen a proceeding is final and cannot be challenged, appealed against, reviewed, set aside, or called into question in another way, whether under the *Judicial Review Act 1991* (Qld) or otherwise.<sup>468</sup> The Explanatory Notes for the Queensland Civil and Administrative Tribunal Bill 2009 (Qld) acknowledge that this provision potentially breaches the fundamental legislative principle under section 4(3)(a) of the *Legislative Standards Act 1992* (Qld) that ‘legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is subject to appropriate

464 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(3)(a).

465 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(3)(b).

466 Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 9.

467 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(4).

468 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 139(5).

review'.<sup>469</sup> The Explanatory Notes state, however, that the breach of this principle is considered justified because:<sup>470</sup>

- the re-opening provision provides an option for a party that is in addition to the party's right to appeal the original decision of the tribunal
- the parties' usual appeal rights from the original decision of the tribunal are not affected
- allowing an appeal or a review of the tribunal's decision on whether or not a matter should be re-opened will unnecessarily lengthen proceedings, duplicate the normal appeal process and result in additional costs to the party and to the tribunal contrary to the objects of the Bill.

### ***Effect of decision to reopen***

22.67 If the Tribunal decides that a proceeding should be reopened, 'the tribunal must decide the issues in the proceeding that must be heard and decided again'.<sup>471</sup> The issues must be heard and decided by way of a fresh hearing on the merits.<sup>472</sup>

22.68 Once the Tribunal has heard and decided the issues, it may.<sup>473</sup>

- confirm or amend its previous final decision in the proceeding; or
- set aside its previous final decision in the proceeding and substitute a new decision.

22.69 If a proceeding has been reopened and the Tribunal has heard and decided the issues again, the decision of the Tribunal as confirmed, amended or substituted is the Tribunal's final decision in the proceeding,<sup>474</sup> and the proceeding cannot be reopened again under the reopening provisions of the Act.<sup>475</sup>

22.70 If a party to a proceeding has made an application for the reopening of the Tribunal's final decision in a proceeding, the party is not precluded from appealing the decision. However, an appeal, or an application for leave to appeal, against the Tribunal's final decision cannot be made until the application for reopening has been finally dealt with.<sup>476</sup>

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469 Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 7, 14.

470 Ibid 15.

471 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(1).

472 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(2).

473 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(4).

474 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(5).

475 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(6).

476 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 141.

### The law in other jurisdictions

22.71 In Victoria, the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides for the reopening of a proceeding on slightly more limited grounds than are available under the QCAT Act.

22.72 Section 120(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that a person in respect of whom an order is made may apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at which the order was made. Section 120(4) provides that VCAT may hear and determine the application if it is satisfied that the applicant had a reasonable excuse for not attending or being represented at the hearing and, if it thinks fit, may order that the order be revoked or varied.

22.73 No other Australian jurisdiction has an equivalent provision.

### The appropriateness of the reopening grounds for a party to a proceeding

#### *Issue for consideration*

22.74 As explained above, the QCAT Act provides two grounds for the reopening of a proceeding:

- that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or
- that the party would suffer substantial injustice if the proceeding was not reopened because new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.

22.75 The first ground for reopening will be as relevant to a guardianship proceeding as it is to any other type of proceeding that is heard by the Tribunal. However, the second ground is likely to be more relevant to a proceeding before the Tribunal that is a contest between the parties' respective rights — for example, a proceeding brought in the Tribunal's minor civil disputes jurisdiction. In the case of a guardianship proceeding, where the adult's interests are the primary focus, the party seeking the reopening might not be able to establish that he or she would suffer substantial injustice, but might be able to establish that the adult concerned would suffer substantial injustice.

#### *Discussion Paper*

22.76 In the Discussion Paper, the Commission noted that the stated rationale for the reopening procedure is 'to avoid unnecessary costs to the parties and the tribunal involved in an appeal where the ground could be more effectively or conveniently dealt with by a reopening of the matter'.<sup>477</sup> It suggested that, if it is generally considered desirable to have a procedure that can avoid the costs of an

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Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [17.66].

appeal in an appropriate case, then arguably the QCAT Act should be amended to include a further ground for reopening that is relevant to the specific nature of the guardianship jurisdiction conferred on QCAT — for example, that the adult concerned would suffer a substantial injustice.<sup>478</sup>

22.77 Accordingly, the Commission sought submissions on whether section 137 of the QCAT Act should be amended to include a further ground for reopening that is appropriate to the specific nature of the Tribunal's guardianship jurisdiction and on how such a reopening ground should be framed.<sup>479</sup>

### **Submissions**

22.78 The Adult Guardian and Pave the Way both supported an amendment that would allow a reopening on the ground that the adult concerned would suffer a substantial injustice.<sup>480</sup>

22.79 The Public Trustee commented, however, that at this early stage of the operations of QCAT, he did not see a need for a further ground of reopening.<sup>481</sup>

22.80 The Guardianship Tribunal of New South Wales queried how the reopening provisions would interact with a person's right to request a review of a guardianship or administration order. The Tribunal commented:<sup>482</sup>

It could be argued that this right, which is in effect a request for the matter to be heard afresh rather than an administrative merits review, obviates the need for reopening provisions to apply to the guardianship jurisdiction.

In NSW, the requested review provisions are used by applicants where new evidence was not available at the first hearing or where the applicant did not appear at the initial hearing. The Tribunal has the ability to refuse a requested review if certain circumstances apply, for example, the order has previously been reviewed (see s 25M NSW *Guardianship Act 1987*). The combined effect of these provisions is that parties are able to have a guardianship or financial management issue revisited by the Tribunal by requesting a review and the Tribunal maintains its ability to refuse these in instances where repeated, unsuccessful review requests have been made.

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

22.81 Guardianship proceedings differ from many of the other types of proceedings for which the Tribunal has jurisdiction in that they are not a contest between the rights of the active parties, but are instead about the interests of the adult concerned. Accordingly, there will be cases where an active party who is concerned about the effect of a Tribunal decision on an adult will not be able to

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478 Ibid.

479 Ibid 113.

480 Submissions 135, 164.

481 Submission 156A.

482 Submission 147.

satisfy the reopening ground that that active party would suffer a substantial injustice.

22.82 The QCAT Act reflects a policy decision to allow a reopening in certain circumstances where the party's remedy might otherwise be an appeal. Given that approach within the legislation, the Commission is of the view that 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:

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

### **Whether reopening should be available to certain persons who are not parties**

#### ***Issue for consideration***

22.83 The existing grounds for reopening a proceeding under the QCAT Act apply to a 'party' to a proceeding.<sup>483</sup>

22.84 An issue that may also be relevant to the grounds for reopening was raised at two of the Commission's community forums. People at two forums referred to the situation where the applicant for an order omits to include complete information on the application form (either intentionally or inadvertently) about the members of the adult's family, which has the result that family members do not receive notice of the hearing.<sup>484</sup> A person at another forum referred to the situation where, as a result of an oversight in the registry, she was not notified of a hearing even though her details were recorded on the application form.<sup>485</sup>

22.85 As explained in Chapter 21 of this Report, an application for a proceeding under the *Guardianship and Administration Act 2000* (Qld) must include, to the best of the applicant's knowledge, information about a number of specified persons, including members of the adult's family and any primary carer of the adult.<sup>486</sup> This information is required to enable the Tribunal to give notice of the proceeding to those persons and must consist of each person's name and contact details or, if the applicant does not know the contact details for a particular person, a way known to the applicant of contacting that person.<sup>487</sup> Section 118(1) of the *Guardianship and*

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483 See [22.62] above.

484 Forums 9, 12. It was suggested that the application form might be amended to ask the applicant to indicate if he or she genuinely does not know this information.

485 Forum 15.

486 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 109(1)(a).

487 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 109(2).

*Administration Act 2000* (Qld) requires the Tribunal, at least seven days before the hearing of an application, to give notice of the hearing to a list of specified persons. This list includes, among others, the members of the adult's family and any primary carer of the adult.<sup>488</sup>

22.86 However, a member of the adult's family or a primary carer of the adult is not automatically an active party under section 119 of the Act. A member of the adult's family or a primary carer of the adult becomes an active party only if he or she is joined as a party to the proceeding by the Tribunal. The opportunity to attend a hearing is therefore critical because it enables a person who is not otherwise an active party<sup>489</sup> to seek to be joined as a party, in which case the person becomes an 'active party'.<sup>490</sup>

22.87 If the Tribunal does not give notice of a hearing to a member of an adult's family or a primary carer for an adult, whether as a result of the applicant's omission to include the person's details in the application form or an oversight within the Tribunal registry, the result is that the hearing will occur in the absence of the person, who will not, in the circumstances, have an opportunity to become an 'active party'. The consequence of not becoming an active party to the proceeding is that the existing reopening grounds will not be available to the person.

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

22.88 As explained above, a family member of an adult or a primary carer for an adult becomes an active party for a proceeding only if he or she is joined as a party to the proceeding by the Tribunal under section 119 of the *Guardianship and Administration Act 2000* (Qld).<sup>491</sup> It is therefore important that there is a reopening ground that is available to such a person if he or she is not given notice of the hearing of a guardianship proceeding and, as a result, does not become an active party.

22.89 The QCAT Act should therefore 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). This does not mean that in every case of this kind the Tribunal will be required to reopen the proceeding.<sup>492</sup> However, by providing a reopening ground that is available to a person who is not a party to the proceeding, the Tribunal will have the power to reopen a proceeding in an appropriate case.

488 *Guardianship and Administration Act 2000* (Qld) s 118(1)(b)–(c).

489 In contrast, each of the other persons mentioned in s 118(1) of the *Guardianship and Administration Act 2000* (Qld) is automatically an active party under s 119 of the Act. Accordingly, if there was a failure to notify one of those persons of the hearing, that person would be able to rely on the first ground of reopening under s 137 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) — that is, that the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing.

490 *Guardianship and Administration Act 2000* (Qld) s 119(g).

491 See [22.86] above.

492 See [22.63]–[22.65] above.

## PERIODIC REVIEW OF APPOINTMENTS

### The law in Queensland

22.90 Section 28(1) of the *Guardianship and Administration Act 2000* (Qld) provides for the regular review of the appointment of guardians and private administrators.<sup>493</sup> If the Tribunal makes an appointment because an adult has impaired capacity, but it does not consider that the adult's impaired capacity is permanent, it must state in its order when it considers it appropriate for the appointment to be reviewed.<sup>494</sup> If the Tribunal makes such an order, it must review the appointment in accordance with the review period stated in its order, but at least every five years.<sup>495</sup> In any other case, the Tribunal must review the appointment at least every five years.<sup>496</sup>

22.91 A review of the appointment of an administrator or guardian is heard on the papers by a member of the Tribunal, unless the member allocated to hear the matter recommends that it is more appropriate that it is dealt with by an oral hearing.<sup>497</sup>

22.92 The requirement for periodic review does not apply if the administrator is the Public Trustee or a trustee company under the *Trustee Companies Act 1968* (Qld).<sup>498</sup> Consequently, the appointment of the Public Trustee or a trustee company may be made for an indefinite period.<sup>499</sup> However, the Tribunal has a policy of randomly reviewing 3 to 5 per cent of these appointments each year.<sup>500</sup>

### The law in other jurisdictions

22.93 There is considerable variation in the review periods of the other Australian jurisdictions.

<sup>493</sup> However, s 28 of the *Guardianship and Administration Act 2000* (Qld) does not apply to the appointment of a guardian for a restrictive practice matter under ch 5B of the Act: *Guardianship and Administration Act 2000* (Qld) s 28(2). The Tribunal must review the appointment of a guardian for a restrictive practice matter at least once before the term of the appointment ends: *Guardianship and Administration Act 2000* (Qld) s 29(2).

<sup>494</sup> *Guardianship and Administration Act 2000* (Qld) s 14(5).

<sup>495</sup> *Guardianship and Administration Act 2000* (Qld) s 28(1)(a).

<sup>496</sup> *Guardianship and Administration Act 2000* (Qld) s 28(1)(b).

<sup>497</sup> QCAT Practice Direction No 8 of 2010: *Directions relating to guardianship matters*, para 3b <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 13 August 2010.

<sup>498</sup> This was not always the case. See [22.116] below.

<sup>499</sup> *Guardianship and Administration Act 2000* (Qld) s 28(1)(a).

<sup>500</sup> *Presidential Direction No 1 of 2004: Random Review of the Appointment of Trustee Companies* (adopted as a practice direction under the QCAT Act by QCAT Practice Direction No 8 of 2010: *Directions relating to guardianship matters*, para 2 <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 13 August 2010. In 2007–08, GAAT undertook 221 random reviews of appointments of the Public Trustee or trustee companies as administrators: *Guardianship and Administration Tribunal, Annual Report 2007–2008* (2008) 43.



22.94 In the Northern Territory, a guardianship order is required to be reviewed within two years of the making of the order or at the expiry of such shorter period as may have been specified in the order.<sup>501</sup>

22.95 In the ACT, ACAT must review an order appointing a guardian or manager at least once every three years.<sup>502</sup> Similarly, in South Australia, the Guardianship Board must review the circumstances of a protected person at least once every three years for the purpose of ascertaining whether the order or orders to which the person is subject are still appropriate.<sup>503</sup> In Victoria, VCAT must conduct a reassessment of an order within 12 months of the making of the order unless VCAT otherwise orders and, in any case, at least once within each three year period after making the order unless VCAT orders otherwise.<sup>504</sup>

22.96 In New South Wales, a guardianship order must be reviewed at the end of the period for which the order has effect.<sup>505</sup> Generally, the relevant period is 12 months in the case of an initial guardianship order and three years in the case of an order that is renewed.<sup>506</sup> However, the NSW Guardianship Tribunal may specify a period not exceeding three years for an initial order and five years for an order that is renewed if it is satisfied that the adult has permanent disabilities, it is unlikely that the adult will become capable of 'managing his or her person', and there is a need for an order of longer duration than would otherwise be available.<sup>507</sup> There is no fixed period for the review of a financial management order or for the review of the appointment of a manager.<sup>508</sup>

22.97 In Western Australia, when the State Administrative Tribunal makes a guardianship order or an administration order it must specify a period, not exceeding five years, within which the order is to be reviewed, and ensure that the order is reviewed accordingly.<sup>509</sup>

22.98 In Tasmania, the legislation is framed slightly differently. The *Guardianship and Administration Act 1995* (Tas) provides that a guardianship order and an administration order will lapse after three years unless, on review, the

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501 *Adult Guardianship Act* (NT) s 23(1). There is no similar requirement under the *Aged and Infirm Persons' Property Act* (NT) in relation to an order appointing a person as the manager of a protected estate.

502 *Guardianship and Management of Property Act 1991* (ACT) s 19(2).

503 *Guardianship and Administration Act 1993* (SA) s 57(1)(b). However, if a protected person is being detained in any place pursuant to an order of the Board, the person's circumstances must be reviewed within six months of the making of the order and subsequently at intervals of not more than one year: s 57(1)(a).

504 *Guardianship and Administration Act 1986* (Vic) s 61(1).

505 *Guardianship Act 1987* (NSW) s 25(2)(b). However, the Tribunal is not required to review a guardianship order in accordance with s 25(2)(b) if the order contains a statement to the effect that the order will not be reviewed at the expiration of the period for which it has effect: s 25(3)(b).

506 *Guardianship Act 1987* (NSW) s 18(1).

507 *Guardianship Act 1987* (NSW) s 18(1A)–(1B).

508 See *Guardianship Act 1987* (NSW) ss 25N, 25S.

509 *Guardianship and Administration Act 1990* (WA) s 84.

Guardianship and Administration Board continues the order under section 68 of the Act.<sup>510</sup>

## The appropriate period for review

### *Issue for consideration*

22.99 When making an order for the appointment of a guardian or an administrator, the Tribunal is required, among other things, to exercise its powers under the Act in the way least restrictive of the adult's rights.<sup>511</sup> The regular review of an order appointing a guardian or an administrator provides a mechanism by which the restrictions on the adult's autonomy may be reduced or removed if appropriate.<sup>512</sup> A requirement for a periodic review also provides the Tribunal with an opportunity to determine whether the original order is working properly and to make any necessary modifications. However, it does not prevent an interested person for the adult from seeking a review after a shorter interval.<sup>513</sup>

22.100 Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*, which deals with the measures to be taken to ensure that people with disabilities enjoy equal legal capacity with other people, requires States Parties to ensure that those measures:<sup>514</sup>

are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

22.101 As noted earlier, the *Guardianship and Administration Act 2000* (Qld) provides for an order for appointment to be reviewed at least every five years, or at an earlier time if the Tribunal orders.<sup>515</sup>

22.102 In its original 1996 report, the Commission recommended the periodic review of an initial appointment after two years and of any subsequent order after three years.<sup>516</sup>

22.103 The issue of the frequency with which appointment orders should be reviewed raises competing considerations. A shorter statutory review period may

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510 *Guardianship and Administration Act 1995* (Tas) ss 24, 52.

511 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c).

512 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.66].

513 See *Guardianship and Administration Act 2000* (Qld) s 29(1)(b)(ii).

514 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006 <<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>> at 13 August 2010.

515 *Guardianship and Administration Act 2000* (Qld) s 28. See [22.90] above.

516 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 216.

impose a considerable burden on the Tribunal's resources.<sup>517</sup> However, a lengthy review period may not sufficiently protect the adult's interests.<sup>518</sup>

### **Discussion Paper**

22.104 In the Discussion Paper, the Commission referred to the GARD submission, which suggested that the five-yearly review period that applies in Queensland is 'far too long' and noted that, with the exception of Western Australia, the other Australian jurisdictions conduct reviews on a more frequent basis than occurs in Queensland.<sup>519</sup> GARD suggested that the *Guardianship and Administration Act 2000* (Qld) should be amended to require the initial review of the appointment of a guardian or an administrator to be made within two years of the appointment and to require a subsequent review to be conducted within three years of the most recent review. It also suggested that the scope of reviews should include a consideration of whether the guardian or administrator has applied the General Principles and, in appropriate circumstances, the quality of the decisions being made.<sup>520</sup>

22.105 The Commission sought submissions on what would be an appropriate period for the periodic review of the appointment of a guardian or an administrator.<sup>521</sup>

### **Submissions**

22.106 The Adult Guardian considered that the current maximum period of five years for the appointment of a guardian or an administrator was appropriate, given the existing safeguards:<sup>522</sup>

In the experience of this office most appointments are not plenary appointments but of limited scope and most periods of appointment are for shorter than the maximum five year period. In the experience of the Adult Guardian allowing the tribunal to make appointments for up to five years is an appropriate discretion which is generally exercised having regard to the stability of the adult's circumstances. Given the other safeguards which are in place including applications to seek review of appointments, applications to give advice, directions and recommendations to guardians and administrators and the new

<sup>517</sup> In 2007–08, GAAT completed 484 reviews of guardianship. Of these, 58 were requested, 38 were initiated by the Tribunal, and 388 were periodic reviews that occurred because the appointment was due to expire. For the same period, GAAT completed 1296 reviews of administration. Of these, 100 were requested, 141 were initiated by the Tribunal, and 834 were periodic reviews that occurred because the appointment was due to expire. The remaining 221 were random reviews conducted by the Tribunal reviewing the appointment of the Public Trustee and other trustee companies: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 43.

<sup>518</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 212. See also Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.67].

<sup>519</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 122, referring to Submission C24.

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.* 122.

<sup>522</sup> Submission 164.

appeal provisions, the Adult Guardian regards the safeguards as being sufficient.

22.107 The Public Trustee was also of the view that the current period of five years was an appropriate maximum for appointments.<sup>523</sup>

The frequency of review of appointments remains a discretion for the Tribunal — QCAT. This is appropriate.

The maximum period for a review therefore represents just that — an upper limit and that upper limit is in part balanced by resources and largely informed by the particular matters that come before the Tribunal.

The Public Trustee does not see a need to change the current position.

22.108 The parent of an adult with impaired capacity also considered five years an appropriate period, commenting that, if there were any concerns before that time, application could be made for a review of the order.<sup>524</sup>

22.109 A person at one of the Commission's community forums commented that the periodic review of the appointment of parents as guardians or administrators for their adult children is exhausting and unnecessary.<sup>525</sup> However, another person at the same forum commented that reviews are needed because some family members may not act in the interests of the adult.

22.110 However, Pave the Way expressed the view that the current maximum of five years is too long. It suggested that appointments should be reviewed in the first instance within two years and, subsequently, within three years. It considered that such an approach would strike the right balance between meeting the administrative reality of managing a large number of appointments and protecting the interests of vulnerable people.<sup>526</sup>

22.111 Another respondent suggested that:<sup>527</sup>

- all appointments should initially be reviewed after 12 months;
- appointments of family members and friends should subsequently be reviewed every two or three years; and
- appointments of the Adult Guardian and the Public Trustee should be reviewed every 12 months.

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523 Submission 156A.

524 Submission 141.

525 Forum 15.

526 Submission 135.

527 Submission 20B.

22.112 Another respondent, who is the parent of an adult with impaired capacity, suggested that three years would be an appropriate maximum period for appointment.<sup>528</sup>

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

22.113 In the Commission's view, the current requirement to review the appointment of a guardian or an administrator at least every five years does not provide an adequate safeguard for ensuring that the appointment continues to be in the adult's interests. The Commission is concerned that the period of five years is too long in relation to an initial appointment, for which the process of periodic review is an important step in ensuring that the order is working well.

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

- an initial appointment of a guardian or an administrator must be reviewed within two years of the order making the appointment; and
- an appointment of a guardian or an administrator that has been renewed or extended must be reviewed within five years of the order.

### **Review of the appointment of the Public Trustee or a trustee company**

22.115 As mentioned earlier, section 28(1) of the *Guardianship and Administration Act 2000* (Qld), which deals with the periodic review of the appointment of guardians and administrators, does not apply to the appointment of the Public Trustee or a trustee company as an administrator. However, as noted earlier, the Tribunal may initiate a review of an appointment at any time, and it has a policy of randomly reviewing a certain percentage of these appointments each year.<sup>529</sup>

22.116 Section 28 of the *Guardianship and Administration Act 2000* (Qld) originally provided for the periodic review of the appointment of all guardians and administrators. However, that section was amended in 2003 to exclude the Public Trustee and trustee companies from the requirement for periodic review.<sup>530</sup> In the second reading speech for the *Guardianship and Administration and Other Acts Amendment Bill 2003* (Qld), the then Attorney-General explained the rationale for this change:<sup>531</sup>

This bill omits the necessity for the tribunal to review the appointment of the Public Trustee and other corporate trustees as administrators every five years. The time spent on reviewing corporate trustees, who already have to comply

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528 Submission 27A.

529 See [22.92] above.

530 *Guardianship and Administration and Other Acts Amendment Act 2003* (Qld) s 6.

531 Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 2003, 4366 (Rod Welford, Attorney-General and Minister for Justice).

with other legislative accountability standards is not a good use of the tribunal's time. This reform will save the tribunal an enormous amount of work but ensure that the rights of adults will not suffer. The bill provides that the adult without capacity and the corporate trustee, or any interested person can initiate a review of the appointment at any time as a safeguard. The tribunal has also developed a random review policy of corporate trustees to ensure that their work is of the highest standard.

22.117 An issue is whether the Public Trustee or trustee companies should be subject to the legislative requirement for periodic review that applies to other administrators. An argument against periodic review is that the Public Trustee and trustee companies are professional administrators whose activities are regulated by legislation.<sup>532</sup> In addition, having regard to the high volume of administration orders made appointing the Public Trustee (for example, in 2008–09, the Public Trustee was appointed as administrator for 1655 (78.2 per cent) of the 2116 adult for whom an administrator was appointed),<sup>533</sup> a requirement to review those orders periodically would have significant resource implications for the Tribunal. On the other hand, a requirement for the periodic review of these types of appointment may be an additional safeguard for an adult who is the subject of an order, particularly if there is no other interested person who may otherwise request a review.

### **Discussion Paper**

22.118 In the Discussion Paper, the Commission sought submissions on whether it is appropriate that the requirement for periodic review in section 28(1) of the *Guardianship and Administration Act 2000* (Qld) does not apply to an appointment of the Public Trustee or a trustee company as an administrator or whether the Public Trustee and trustee companies should be subject to the same requirement for periodic review as other administrators.

### **Submissions**

22.119 A number of respondents, including Pave the Way and the Endeavour Foundation, were of the view that the legislation should provide for the periodic review of the appointment of the Public Trustee<sup>534</sup> or a trustee company<sup>535</sup> as administrator.

22.120 Pave the Way commented:<sup>536</sup>

this was not the situation in the original legislation. The change was effected by amendments to the *Guardianship and Administration Act* in 2003.

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532 *Public Trustee Act 1978* (Qld); *Trustee Companies Act 1968* (Qld).

533 Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 41.

534 Submissions 20B, 27A, 135, 163, 171.

535 Submissions 20B, 27A, 135, 163.

536 Submission 135.

The rationale for this change given by the then Attorney-General, that the Public Trustee and trustee companies do not need to be subject to periodic review because they are subject to other accountability requirements, does not bear scrutiny. The real purpose of this change was to address a resources problem experienced by the Tribunal, namely, that it had insufficient resources to conduct periodic reviews of the large number of administration orders appointing the Public Trustee. At the time the Guardianship and Administration Act commenced in July 2000, the Public Trustee was administering the affairs of approximately 5000 people, through provisions under previous legislation. All these became deemed administration orders under the new legislation and therefore subject to periodic review at least every 5 years. Many concerned the most vulnerable people with disability in Queensland, those living in institutions without family or friends to look out for their interests and welfare.

Thus, immediately the new Guardianship and Administration Tribunal commenced it was faced with reviewing 5000 deemed administration orders within its first 5 years of operation, or 1000 per year. This was in addition to any fresh orders it would make, which would also be subject to periodic review.

Rather than provide the Tribunal adequate resources to allow it to conduct periodic reviews, the government removed the requirement for periodic review for the Public Trustee and trustee companies.

We strongly believe that this situation needs to be remedied by amending the legislation so that the Public Trustee and trustee companies are treated no differently from private trustees and are not exempt from the requirement for periodic review.

22.121 A person at one of the Commission's community forums also commented that the legislation should provide for appointments of the Public Trustee to be periodically reviewed.<sup>537</sup>

22.122 However, a respondent who is a long-term Tribunal member was of the view that the current position is satisfactory, as the appointments of the Public Trustee and trustee companies are randomly reviewed.<sup>538</sup>

22.123 The Trustee Corporations Association of Australia commented that there was no need to change the current position in relation to the appointment of trustee companies:<sup>539</sup>

the Tribunal's random review policy provides an additional safeguard in situations where an adult is the subject of an order but there is no other interested person who may otherwise request a review.

Accordingly, we see no case for changing the current arrangements.

22.124 The Adult Guardian did not express a view about this issue. However, she commented that, when she initiates an application to review her appointment, the

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537 Forum 15.

538 Submission 179.

539 Submission 158.

Tribunal will often initiate a review of any appointment of the Public Trustee for the adult.<sup>540</sup>

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

22.125 In the Commission's view, an appointment of the Public Trustee or a trustee company as an administrator should be subject to the same review mechanisms as any other administrator, including the requirement for periodic review.

22.126 The Commission acknowledges the resource implications of this recommendation for QCAT and also for the Public Trustee, which is appointed as the administrator in approximately 85 per cent of the cases in which an administrator is appointed.<sup>541</sup> However, the periodic review of all appointments of guardians and administrators is the only way to ensure that the least restrictive approach continues to apply to the adult.

22.127 Although an interested person may apply for the review of an appointment at any time, the existence of that mechanism provides a safeguard for an adult only if the adult has family or friends who are aware of their power to apply for a review, recognise the need for an application to be made, and have the ability and confidence to make the application. It is apparent from the views expressed at the Commission's community forums that many people are apprehensive about guardianship proceedings. For many people, that apprehension is likely to operate as a disincentive against initiating the review of an appointment.

22.128 Further, as explained in Chapter 29 of this Report, as a result of recent amendments to the *Corporations Act 2001* (Cth), the remuneration of trustee companies has been largely deregulated. Periodic review of the appointment of a trustee company is especially important to ensure that, having regard to the fees charged by the trustee company, it continues to be an appropriate appointee.

22.129 Section 28(1) of the *Guardianship and Administration Act 2000* (Qld) should therefore 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.

## **OTHER REVIEW OF APPOINTMENTS**

### **The law in Queensland**

22.130 Section 29 of the *Guardianship and Administration Act 2000* (Qld) provides for the review of an appointment of a guardian or an administrator at any time on the Tribunal's own initiative or on the application of a specified person. Section 29 provides:

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540 Submission 164.

541 See Table 25.1 at [25.7] below.



**29 Other review of appointment**

- (1) The tribunal may review an appointment of a guardian or administrator for an adult at any time—
  - (a) on its own initiative; or
  - (b) for a guardian (other than a guardian for a restrictive practice matter under chapter 5B) or an administrator—on the application of any of the following—
    - (i) the adult;
    - (ii) an interested person for the adult;
    - (iii) the public trustee;
    - (iv) a trustee company under the *Trustee Companies Act 1968*; or
  - (c) for a guardian for a restrictive practice matter under chapter 5B—on the application of any of the following—
    - (i) the adult;
    - (ii) an interested person for the adult;
    - (iii) a relevant service provider under chapter 5B providing disability services to the adult;
    - (iv) the chief executive (disability services);
    - (v) the adult guardian;
    - (vi) if the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—the director of mental health.
- (2) However, the tribunal must review the appointment of a guardian for a restrictive practice matter under chapter 5B at least once before the term of the appointment ends.

**Grounds for review**

22.131 The *Guardianship and Administration Act 2000* (Qld) does not set out the grounds on which a specified person may apply for the review of the appointment of a guardian or an administrator. Until 30 November 2009, GAAT Presidential Direction No 2 of 2002 addressed, in paragraph 9(a), the grounds for a requested review of an appointment made by the Tribunal. The Presidential Direction provided in part:<sup>542</sup>

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Guardianship and Administration Tribunal, *Presidential Direction No 2 of 2002*, <[http://www.gaat.qld.gov.au/files/2002\\_-\\_2\\_General.pdf](http://www.gaat.qld.gov.au/files/2002_-_2_General.pdf)> at 13 August 2010. Note, this Presidential Direction was not adopted by QCAT as a Practice Direction: see *QCAT Practice Direction No 8 of 2010: Directions relating to guardianship matters*, para 2 <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 13 August 2010.

**9. Requested review of an appointment made by the Tribunal**

- (a) A review of an appointment of a guardian and/or an administrator made by the Tribunal will be conducted at the end of the period of the appointment as ordered by the Tribunal except in cases where:
- (i) New and relevant information has become available since the hearing; or
  - (ii) A relevant change in circumstances has occurred since the hearing; or
  - (iii) Relevant information that was not presented to the Tribunal at the hearing has become available;

And, in accordance with s 31 *Guardianship and Administration Act 2000*:

- (iv) The current appointee is no longer competent; or
  - (v) Another person is more appropriate for appointment.
- (b) An application for review must be supported by a written report addressing:
- (i) The new and relevant information which has become available since the hearing; or
  - (ii) The relevant change in circumstances which has occurred since the hearing; or
  - (iii) The information that was not presented to the Tribunal at the hearing; and
  - (iv) The competence and appropriateness of the current appointee; and
  - (v) The competence and appropriateness of any proposed appointee/s; and
  - (vi) A report by any current appointee and, in the case of an administrator, a statement of accounts.
- (c) The Tribunal or Registrar may dismiss an application for Review which the Tribunal or Registrar determines:
- (i) Is not sufficiently supported by the written report required in paragraph 9 above; or
  - (ii) Is frivolous or vexatious.

22.132 The Presidential Direction stated that it 'sets out the minimum standard documentation required by the Tribunal prior to listing the specified applications for

hearing'.<sup>543</sup> The direction was made under section 102(d) of the *Guardianship and Administration Act 2000* (Qld), which empowered the President of GAAT to give directions about 'the tribunal's procedure'. It is arguable, however, that paragraph 9(a) of Presidential Direction 2 of 2002, in purporting to limit GAAT's discretion under section 29 of the Act, went beyond regulating GAAT's 'procedures'.<sup>544</sup>

22.133 QCAT Practice Direction No 8 of 2010, made on 23 June 2010, now sets out the grounds for the review of an appointment in similar terms to the previous GAAT Presidential Direction. Paragraph 4 provides:<sup>545</sup>

A review of an appointment of a guardian and/or an administrator made by the Tribunal will be conducted at the end of the period of the appointment as ordered by the Tribunal except in cases where:

- (i) New and relevant information has become available since the hearing; or
- (ii) A relevant change in circumstances has occurred since the hearing; or
- (iii) Relevant information that was not presented to the Tribunal at the hearing has become available;

And, in accordance with s.31 *Guardianship and Administration Act 2000*:

- (iv) The current appointee is no longer competent; or
- (v) Another person is more appropriate for appointment.

22.134 This Practice Direction is made under section 226(1) of the QCAT Act, which provides that the President of QCAT 'may make practice directions for the tribunal about the practices and procedures of the tribunal not provided for, or not sufficiently provided for, in this Act, an enabling Act or the rules'. A similar issue to that mentioned above<sup>546</sup> also arises as to whether this part of the practice direction properly relates to QCAT's 'practices and procedures'.

### ***The Tribunal's powers on a review***

22.135 The *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may conduct a review of an appointment of a guardian or an administrator in the way it considers appropriate.<sup>547</sup> At the end of the review, it must revoke its order making the appointment unless it is satisfied it would make an appointment if

<sup>543</sup> GAAT noted on its website that these requirements were intended to ensure that applications that are vexatious, lacking in substance or frivolous do not automatically proceed to hearing or delay other matters that might otherwise have been heard earlier: Guardianship and Administration Tribunal, Review <<http://www.gaat.qld.gov.au/271.htm>> at 1 October 2009.

<sup>544</sup> See *Herald and Weekly Times Ltd v VCAT* [2005] VSC 44, where the Supreme Court of Victoria declared that certain rules of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) were *ultra vires* because they went beyond merely regulating 'practice and procedure'.

<sup>545</sup> See <[http://www.qcat.qld.gov.au/Publications/PD8\\_2010\\_Guard.pdf](http://www.qcat.qld.gov.au/Publications/PD8_2010_Guard.pdf)> at 13 August 2010.

<sup>546</sup> See [22.132] above.

<sup>547</sup> *Guardianship and Administration Act 2000* (Qld) s 31(1).

a new application for an appointment were to be made.<sup>548</sup> If the Tribunal is satisfied that the appointment should continue, it may either continue its order making the appointment or change its order making the appointment. Such a change may include, for example, changing the terms of the appointment, removing an appointee or making a new appointment.<sup>549</sup> However, the Tribunal may make an order removing an appointee only if it considers that the appointee is no longer competent or another person is more appropriate for appointment.<sup>550</sup> This test is considered in Chapter 14 of this Report.

### The law in other jurisdictions

22.136 As in Queensland, the legislation in most of the other Australian jurisdictions also provides for the review of appointments on application or on the initiative of the relevant body that has jurisdiction to make and revoke appointments.<sup>551</sup>

22.137 The relevant provisions do not generally specify the grounds on which an application for the review of an appointment may be made. In Western Australia, the persons who may apply for a review include 'a person to whom leave has been granted under section 87'.<sup>552</sup> Section 87(1) provides that any person may apply to the State Administrative Tribunal for leave to apply for the review of a guardianship order or an administration order. Section 87(5)(b) provides that the Tribunal may grant leave to the person to apply for the review, either unconditionally or subject to any condition, 'if it is satisfied that because of a change of circumstances or for any other reason a review should be held'.

### Discussion Paper

22.138 In the Discussion Paper, the Commission observed that, although section 29 of the *Guardianship and Administration Act 2000* (Qld) provides that specified persons may apply for the review of an appointment, the section does not prescribe the grounds for such an application. In this respect, it noted that section 29 is consistent with the provisions in most of the other jurisdictions that provide

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548 *Guardianship and Administration Act 2000* (Qld) s 31(2).

549 *Guardianship and Administration Act 2000* (Qld) s 31(3).

550 *Guardianship and Administration Act 2000* (Qld) s 31(4). An appointee is no longer competent if, for example, a relevant interest of the adult has not been, or is not being, adequately protected, the appointee has neglected the appointee's duties or abused the appointee's powers, the appointee is an administrator appointed for a matter involving an interest in land and the appointee fails to advise the registrar of titles of the appointment as required under s 21(1), or the appointee has otherwise contravened the Act: s 31(5).

551 *Guardianship and Management of Property Act 1991* (ACT) s 19(1); *Guardianship Act 1987* (NSW) ss 25(1), (2)(a), 25N(4), 25S(1); *Adult Guardianship Act* (NT) s 23(2); *Guardianship and Administration Act 1995* (Tas) s 67; *Guardianship and Administration Act 1986* (Vic) s 61(2)–(3); *Guardianship and Administration Act 1990* (WA) ss 85, 86. In South Australia, the legislation is not expressed in the same terms. However, the Guardianship Board may, on application, vary or revoke a guardianship order or an administration order: *Guardianship and Administration Act 1993* (SA) ss 30, 36.

552 *Guardianship and Administration Act 1990* (WA) s 86(1)(c).

specifically for a requested review.<sup>553</sup>

22.139 The Commission referred to the previous Presidential Direction No 2 of 2002, which set out three grounds for review:<sup>554</sup>

- (i) New and relevant information has become available since the hearing;  
or
- (ii) A relevant change in circumstances has occurred since the hearing; or
- (iii) Relevant information that was not presented to the Tribunal at the hearing has become available;

22.140 The Commission suggested that the inclusion of grounds for review may be of some assistance to people who may not otherwise be aware of the circumstances in which they may apply for a review. It also suggested that the inclusion of specific grounds may also serve as a mechanism to filter out unmeritorious applications. However, it also acknowledged that, if the grounds on which a person may apply for a review are too narrow, the review process will be less useful as a means of ensuring that a particular order continues to be appropriate to the circumstances and needs of the adult concerned.<sup>555</sup>

22.141 The Commission therefore sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended to include the specific grounds on which application may be made for the review of the appointment of a guardian or an administrator.<sup>556</sup>

## Submissions

22.142 The Adult Guardian considered that the grounds proposed in the previous Presidential Direction seemed pertinent, although she suggested that paragraph (i) could perhaps be tightened to stipulate the purpose to which the new and relevant information should be directed.<sup>557</sup>

22.143 A respondent who is a long-term Tribunal member was of the view that the *Guardianship and Administration Act 2000* (Qld) should be amended to include the grounds on which application may be made for the review of the appointment of a guardian or an administrator.<sup>558</sup> Another respondent was also of this view.<sup>559</sup>

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553 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [17.97].

554 Ibid [17.98]. See [22.131]–[22.132] above for a discussion of the previous Presidential Direction No 2 of 2002.

555 Ibid [17.99].

556 Ibid 124.

557 Submission 164.

558 Submission 179.

559 Submission 20B.

22.144 The Public Trustee did not express a specific view about the grounds for review, but commented generally that, if there are to be grounds prescribed for a review:<sup>560</sup>

they should of course be inclusive but not limiting — other grounds must be open to prompt a review contingent upon the view of the Tribunal.

22.145 However, Pave the Way was opposed to the inclusion of specific grounds for the review of appointments:<sup>561</sup>

We do not believe that there is a need to amend the legislation to include specific grounds for review of orders to appoint guardians or administrators. As does the Commission in the discussion paper, we question whether Presidential Direction No 2 deals only with ‘procedure’, as it appears to limit the circumstances in which an application for review can be brought. We do not want to see such limitations in the legislation.

### The Commission’s view

22.146 In the Commission’s view, the *Guardianship and Administration Act 2000* (Qld) should be amended to set out the grounds on which application may be made for the review of the appointment of a guardian (including a guardian for a restrictive practice matter) or an administrator. Those grounds should be the grounds set out in paragraph 4 of QCAT Practice Direction No 8 of 2010, namely:

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

## RECOMMENDATIONS

### ***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).**

<sup>560</sup> Submission 156A.

<sup>561</sup> Submission 135.

***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

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## INTRODUCTION

23.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.<sup>562</sup>

23.2 In reviewing the legislation the Commission is to have regard to a number of specified matters, including 'the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts'.<sup>563</sup>

23.3 Chapter 8 of the *Guardianship and Administration Act 2000* (Qld) provides for the appointment of the Adult Guardian,<sup>564</sup> an independent officer<sup>565</sup> whose statutory role is to protect the rights and interests of adults who have impaired capacity.<sup>566</sup> The Adult Guardian has a broad range of protective and investigative functions and powers; as a result, the Adult Guardian forms an important part of the investigative and regulatory framework referred to in the terms of reference.

23.4 This chapter examines a number of issues in relation to the functions and powers of the Adult Guardian. It also examines the avenues currently available for reviewing personal decisions for an adult made by the Adult Guardian under the

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<sup>562</sup> The terms of reference are set out in Appendix 1.

<sup>563</sup> Ibid.

<sup>564</sup> *Guardianship and Administration Act 2000* (Qld) s 173.

<sup>565</sup> In performing the Adult Guardian's functions and exercising the Adult Guardian's powers, the Adult Guardian is not under the control or direction of the Minister: *Guardianship and Administration Act 2000* (Qld) s 176.

<sup>566</sup> *Guardianship and Administration Act 2000* (Qld) s 174(1).

*Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).

## THE ADULT GUARDIAN'S FUNCTIONS

### The law in Queensland

23.5 The Adult Guardian has a broad range of functions, which are set out in section 174 of the *Guardianship and Administration Act 2000* (Qld):

#### 174 Functions

- (1) The adult guardian's role is to protect the rights and interests of adults who have impaired capacity for a matter.
- (2) The adult guardian has the functions given to the adult guardian by this Act or another Act, including the following functions—
  - (a) protecting adults who have impaired capacity for a matter from neglect, exploitation or abuse;
  - (b) investigating complaints and allegations about actions by—
    - (i) an attorney; or
    - (ii) a guardian or administrator; or
    - (iii) another person acting or purporting to act under a power of attorney, advance health directive or order of the tribunal made under this Act;
  - (c) mediating and conciliating between attorneys, guardians and administrators or between attorneys, guardians or administrators and others, for example, health providers, if the adult guardian considers this appropriate to resolve an issue;
  - (d) acting as attorney—
    - (i) for a personal matter under an enduring power of attorney; or
    - (ii) under an advance health directive; or
    - (iii) for a health matter if authorised as a statutory health attorney; or
    - (iv) if appointed by the court or the tribunal;
  - (e) acting as guardian if appointed by the tribunal;
  - (ea) approving, under chapter 5B, part 4, the use of a restrictive practice in relation to an adult to whom that chapter applies;
  - (f) consenting to a forensic examination under section 198A;

- (g) seeking help (including help from a government department, or other institution, welfare organisation or provider of a service or facility) for, or making representations for, an adult with impaired capacity for a matter;
  - (h) educating and advising persons about, and conducting research into, the operation of this Act and the *Powers of Attorney Act 1998*.
- (3) In performing a function or exercising a power, the adult guardian must apply the general principles and the health care principle.
- (4) In subsection (2)(b) and (c)—

**attorney** means—

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

**power of attorney** means—

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

23.6 Of particular significance is the Adult Guardian's function as a guardian appointed by the Tribunal. At 30 June 2009, the Adult Guardian was the appointed guardian for 1194 adults with impaired capacity, an increase of 35 per cent from 30 June 2008.<sup>567</sup> The Adult Guardian is appointed for a significant proportion of all guardians appointed by the Tribunal, as indicated by Table 23.1 below.

Financial year	Adults for whom a guardian was appointed <sup>568</sup>	Adults for whom the Adult Guardian was appointed as the sole guardian	Percentage of appointments of the Adult Guardian
2008–09 <sup>569</sup>	1069	768	71.8%
2007–08 <sup>570</sup>	689	486	70.6%

<sup>567</sup> Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 13.

<sup>568</sup> The figures in Table 23.1 include original appointments and appointments on review.

<sup>569</sup> Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 41.

<sup>570</sup> Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 40.

2006–07 <sup>571</sup>	799	554	69.3%
2005–06 <sup>572</sup>	601	399	66%
2004–05 <sup>573</sup>	481	341	71%
2003–04 <sup>574</sup>	519	341	65.7%

Table 23.1

23.7 The Adult Guardian is sometimes referred to as the guardian of ‘last resort’ because the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.<sup>575</sup> The Adult Guardian is also the statutory health attorney for an adult if no other person with a higher priority is available and culturally appropriate to exercise power for a health matter.<sup>576</sup>

23.8 The Adult Guardian also has a significant role in investigating allegations of neglect, exploitation or abuse.

23.9 In 2009, the Government announced its intention to transfer to the Adult Guardian the function of systemic advocacy that is currently performed by the Public Advocate.<sup>577</sup> Issues related to the function of systemic advocacy are considered in Chapter 24 of this Report.

## The law in other jurisdictions

23.10 The guardianship legislation in all other Australian jurisdictions establishes a body with similar functions to the Queensland Adult Guardian. In the ACT, South Australia, Victoria and Western Australia, the relevant body is known as the Public Advocate.<sup>578</sup> In New South Wales, the Northern Territory and Tasmania, the relevant body is known as the Public Guardian.<sup>579</sup> At least in New South Wales

<sup>571</sup> Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 40.

<sup>572</sup> Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 37.

<sup>573</sup> Guardianship and Administration Tribunal, *Annual Report 2004–2005* (2005) 20–1.

<sup>574</sup> Guardianship and Administration Tribunal, *Annual Report 2003–2004* (2004) 20.

<sup>575</sup> *Guardianship and Administration Act 2000* (Qld) s 14(2). This limitation on the appointment of the Adult Guardian is considered in Chapter 14 of this Report.

<sup>576</sup> *Powers of Attorney Act 1998* (Qld) s 63(2).

<sup>577</sup> See *Government Response to the Report, Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* <<http://www.premiers.qld.gov.au/government/assets/government-response-to-part-b-report.pdf>> at 1 September 2010.

<sup>578</sup> *Public Advocate Act 2005* (ACT) s 6(1); *Guardianship and Administration Act 1993* (SA) s 18; *Guardianship and Administration Act 1986* (Vic) s 14(1); *Guardianship and Administration Act 1990* (WA) s 91(1).

<sup>579</sup> *Guardianship Act 1987* (NSW) s 77(1); *Adult Guardianship Act* (NT) s 5(1); *Guardianship and Administration Act 1995* (Tas) s 14.

and the Northern Territory, the difference in terminology reflects the slightly narrower role of the Public Guardian in these jurisdictions.

23.11 In each of the Australian jurisdictions the Public Advocate or the Public Guardian, as the case may be, is able to be appointed as a guardian for an adult (in most jurisdictions, as a guardian of last resort).<sup>580</sup>

23.12 In addition, except in New South Wales and the Northern Territory, the Public Advocate or Public Guardian generally has the following functions:

- providing community education and information about that jurisdiction's guardianship system<sup>581</sup> (including giving advice about the guardianship legislation);<sup>582</sup>
- investigating allegations of neglect, exploitation or abuse of adults;<sup>583</sup>
- representing adults in their dealings with service providers and government departments<sup>584</sup> (or court systems)<sup>585</sup> — that is, performing an individual advocacy function; and
- functions relating to systemic advocacy.<sup>586</sup>

580 *Guardianship and Management of Property Act 1991* (ACT) s 9(1), (4), *Public Advocate Act 2005* (ACT) s 10(h); *Guardianship Act 1987* (NSW) ss 15, 17; *Adult Guardianship Act* (NT) ss 5(2)(d), 14(4); *Guardianship and Administration Act 1993* (SA) s 29(4); *Guardianship and Administration Act 1995* (Tas) s 15(1)(h); *Guardianship and Administration Act 1986* (Vic) ss 16(1)(a), 23(4); *Guardianship and Administration Act 1990* (WA) ss 44(5), 97(1)(aa).

581 *Public Advocate Act 2005* (ACT) s 10(i); *Guardianship and Administration Act 1995* (Tas) s 15(1)(i); *Guardianship and Administration Act 1986* (Vic) s 15(c); *Guardianship and Administration Act 1990* (WA) s 97(1)(f).

582 *Guardianship and Administration Act 1993* (SA) s 21(1)(f); *Guardianship and Administration Act 1995* (Tas) s 15(1)(j); *Guardianship and Administration Act 1986* (Vic) s 16(1)(g); *Guardianship and Administration Act 1990* (WA) s 97(1)(e).

583 *Public Advocate Act 2005* (ACT) s 11(1)(c)(ii) (specifically, investigating complaints and allegations about the actions of a guardian, manager or a person acting or purporting to act under an enduring power of attorney); *Guardianship and Administration Act 1995* (Tas) s 17 (specifically, investigating complaints and allegations about the actions of a guardian or an administrator or person acting or purporting to act under an enduring power of attorney and any matter that the Guardianship and Administration Board asks it to investigate); *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97(1)(c). In South Australia, the Public Advocate's function is more limited. Section 28 of the *Guardianship and Administration Act 1993* (SA) provides that the Public Advocate must, if the Guardianship Board so directs after an application has been lodged with the Board for an order under pt 4 of the Act, investigate the affairs of the person the subject of the application.

584 *Public Advocate Act 2005* (ACT) s 10(f); *Guardianship and Administration Act 1995* (Tas) s 15(1)(e); *Guardianship and Administration Act 1986* (Vic) s 16(1)(e)–(f); *Guardianship and Administration Act 1990* (WA) s 97(1)(d). In South Australia, s 21(1)(d) of the *Guardianship and Administration Act 1993* (SA) provides that one of the Public Advocate's functions is to 'speak for and negotiate on behalf of any mentally incapacitated person in the resolution of any problem faced by that person arising out of his or her mental incapacity'.

585 *Public Advocate Act 2005* (ACT) s 10(b)–(c); *Guardianship and Administration Act 1995* (Tas) s 15(1)(f); *Guardianship and Administration Act 1990* (WA) s 97(1)(b), (d).

586 *Public Advocate Act 2005* (ACT) s 10(a); *Guardianship and Administration Act 1993* (SA) s 21(1)(a)–(c), (e); *Guardianship and Administration Act 1995* (Tas) s 15(1)(a)–(c); *Guardianship and Administration Act 1986* (Vic) s 15(a)–(b); *Guardianship and Administration Act 1990* (WA) s 97(1)(g)–(h).

23.13 In New South Wales, the Public Guardian does not appear to have an investigative function or a function of systemic advocacy. The Public Guardian does, however, have a function of providing information to the public, and is required to ensure that information is readily available to the public about:<sup>587</sup>

- the provisions of the *Guardianship Act 1987* (NSW) in relation to the appointment of guardians and the exercise of their functions;
- the functions of the Public Guardian;
- the rights of persons under the *Guardianship Act 1987* (NSW) or any other Act or law in relation to the exercise by the Public Guardian of those functions; and
- any practice or procedure followed by the Public Guardian in the exercise of those functions.

23.14 In the Northern Territory, the Public Guardian does not have a function of providing information to the public, undertaking systemic advocacy, or investigating allegations of neglect, exploitation or abuse. However, the Local Court, which exercises jurisdiction in relation to guardianship matters, may require the Public Guardian to provide a report to the court on any matter relating to the proceedings before the court.<sup>588</sup>

## Discussion Paper

23.15 In the Discussion Paper, the Commission noted that the functions of the Adult Guardian in Queensland are generally more wide-ranging than those of the Adult Guardian's interstate counterparts.<sup>589</sup> It also commented that it was not aware of any additional functions that might be given to the Adult Guardian.<sup>590</sup>

23.16 The Commission sought submissions on the following questions:<sup>591</sup>

- Are the functions of the Adult Guardian, as provided for by section 174 of the *Guardianship and Administration Act 2000* (Qld), appropriate to enable the Adult Guardian to perform the role of protecting the rights and interests of adults with impaired capacity?
- If not, what function or functions should be given to, or removed from, the Adult Guardian?

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587 *Guardianship Act 1987* (NSW) s 79.

588 *Adult Guardianship Act* (NT) s 12(3).

589 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.82].

590 *Ibid.*

591 *Ibid* 148.

## Submissions

23.17 The Adult Guardian, Pave the Way and the Endeavour Foundation were all of the view that the functions of the Adult Guardian under the *Guardianship and Administration Act 2000* (Qld) are appropriate and do not need to be changed.<sup>592</sup>

## The Commission's view

23.18 The Commission is generally of the view that the Adult Guardian's functions, as set out in section 174 of the *Guardianship and Administration Act 2000* (Qld), are appropriate and do not require amendment.

23.19 However, the requirement in section 174(3) for the Adult Guardian to apply the General Principles and the Health Care Principle should be clarified. That subsection currently provides that, in performing a function or exercising a power, the Adult Guardian must apply the General Principles and the Health Care Principle. Section 174(3) should be amended to make it clear that the requirement to apply the Health Care Principle applies only if the Adult Guardian is performing a function or exercising a power in relation to a health matter.

23.20 Further, the Commission has recommended in Chapter 28 of this Report that section 174 be amended to include, as an additional function, acting as the litigation guardian of an adult in a proceeding that does not relate to the adult's financial or property matters.<sup>593</sup>

## THE ADULT GUARDIAN'S POWERS

### The law in Queensland

23.21 The Adult Guardian has the powers given under the *Guardianship and Administration Act 2000* (Qld) or another Act,<sup>594</sup> and may also 'do all things necessary or convenient to be done to perform the adult guardian's functions'.<sup>595</sup>

23.22 The specific investigative and protective powers that support the Adult Guardian's functions are considered below.

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592 Submissions 135, 163, 164. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

593 See Recommendation 28-3(a) of this Report.

594 *Guardianship and Administration Act 2000* (Qld) s 175(1). For example, if the Adult Guardian is the guardian of an adult ('the aggrieved') and the Adult Guardian considers that the aggrieved does not have capacity to make an application for a protection order, the Adult Guardian may make the application: *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)(d), (4)(b).

595 *Guardianship and Administration Act 2000* (Qld) s 175(2).



### **The investigation of complaints**<sup>596</sup>

23.23 Section 180 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may investigate any complaint or allegation that an adult with impaired capacity:

- is being, or has been, neglected, exploited or abused; or
- has inappropriate or inadequate decision-making arrangements.

23.24 If the Adult Guardian decides to investigate a complaint or allegation, he or she may generally delegate to an appropriately qualified person the Adult Guardian's investigative powers under chapter 8, part 2 of the *Guardianship and Administration Act 2000* (Qld).<sup>597</sup>

23.25 If a delegate is given power to carry out an investigation, the delegate must, after carrying out the investigation, make a written report and give a copy of the report to the Adult Guardian.<sup>598</sup> It is a lawful excuse for the publication of any defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for the *Guardianship and Administration Act 2000* (Qld).<sup>599</sup>

23.26 The Adult Guardian's Annual Report for 2008–09 gives the breakdown of the allegations investigated during that year:<sup>600</sup>

Nature of allegation	Percentage
Financial	50%
Other personal matters	36%
Physical abuse	4%
Self neglect	3%
Other	3%
Emotional abuse	2%

<sup>596</sup> Issues in relation to the investigation of complaints are considered later in this chapter. See the discussion commencing at [23.121], [23.133] below.

<sup>597</sup> *Guardianship and Administration Act 2000* (Qld) s 181(1). However, the Adult Guardian may not delegate the power to give notices under ss 185(1) or 189 of the Act: s 181(1).

<sup>598</sup> *Guardianship and Administration Act 2000* (Qld) s 181(4).

<sup>599</sup> *Guardianship and Administration Act 2000* (Qld) s 181(5).

<sup>600</sup> Office of the Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 41.

Health care	1%
Sexual abuse	1%

**Table 23.2**

23.27 The Adult Guardian's Annual Report for 2008–09 notes that 79 per cent of its investigations that year were completed within six months.<sup>601</sup>

### **Records and audit**

23.28 Section 182 provides that the Adult Guardian may, by written notice to an attorney who has power for financial matters for an adult or to an administrator for an adult, require the attorney or administrator by a given date to file with the Adult Guardian a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, for the adult for a specified period.<sup>602</sup>

23.29 The attorney or administrator must comply with the notice unless he or she has a reasonable excuse.<sup>603</sup>

23.30 A summary of accounts filed may be audited by an auditor appointed by the Adult Guardian.<sup>604</sup>

### **Power to require information to be given for an investigation or audit**

23.31 In conducting an investigation or audit, the Adult Guardian has extensive powers to require that information be given to the Adult Guardian.

#### *The Adult Guardian's right to information*

23.32 Section 183 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian has a right to 'all information necessary to investigate a complaint or allegation or to carry out an audit'.<sup>605</sup> The Adult Guardian may, by written notice given to a person who has custody or control of the information, require the person:<sup>606</sup>

- (a) to give the information to the adult guardian; and
- (b) if the person is an attorney or administrator and the information is contained in a document—to give the document to the adult guardian; and

<sup>601</sup> Office of the Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 40.

<sup>602</sup> *Guardianship and Administration Act 2000* (Qld) s 182(1).

<sup>603</sup> *Guardianship and Administration Act 2000* (Qld) s 182(3). Section 182(3) provides for a maximum penalty of 100 penalty units, that is, \$10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

<sup>604</sup> *Guardianship and Administration Act 2000* (Qld) s 182(4).

<sup>605</sup> *Guardianship and Administration Act 2000* (Qld) s 183(1).

<sup>606</sup> *Guardianship and Administration Act 2000* (Qld) s 183(2).

- (c) if the person is not an attorney or administrator and the information is contained in a document—to allow the adult guardian to inspect the document and take a copy of it.

23.33 A person to whom such a notice is given must comply with the notice unless he or she has a reasonable excuse.<sup>607</sup> Section 183(4) preserves the privilege against self-incrimination, and provides expressly that it is a reasonable excuse for a person to fail to comply with the notice that complying with the notice might tend to incriminate the person.<sup>608</sup>

23.34 The Adult Guardian's right to information under section 183 is extremely broad. Section 183(5) provides:

**183 Right to information**

...

- (5) Subject to subsection (4), this section overrides—
  - (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
  - (b) any claim of confidentiality or privilege, including a claim based on legal professional privilege.

23.35 With the exception of the privilege against self-incrimination, the Adult Guardian's right to information under section 183 overrides any other restriction about the disclosure or confidentiality of the information or any claim of confidentiality or privilege. Accordingly, the Adult Guardian would have a right to require an attorney or administrator to give a document to the Adult Guardian even though the document was the subject of legal professional privilege. Similarly, in relation to a document held by a person other than an attorney or administrator, the Adult Guardian would have the right to inspect and take a copy of the document even though the document was the subject of legal professional privilege.

*The power to require information to be given by statutory declaration*

23.36 Section 184 of the *Guardianship and Administration Act 2000* (Qld) provides that, if a person is required to give information to the Adult Guardian under the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian may, by written notice to the person, require the person to give the information by statutory declaration.<sup>609</sup> The person must comply with the notice unless he or she has a reasonable excuse.<sup>610</sup>

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<sup>607</sup> *Guardianship and Administration Act 2000* (Qld) s 183(3). Section 183(3) provides for a maximum penalty of 100 penalty units, that is, \$10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

<sup>608</sup> *Guardianship and Administration Act 2000* (Qld) s 183(4).

<sup>609</sup> *Guardianship and Administration Act 2000* (Qld) s 184(1).

<sup>610</sup> *Guardianship and Administration Act 2000* (Qld) s 184(2). Section 184(2) provides for a maximum penalty of 100 penalty units, that is, \$10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

23.37 The significance of the power to require information to be given by statutory declaration lies in the criminal sanctions that apply if false information is given. If a person makes a statement in a statutory declaration that is, to the person's knowledge, false in any material particular and the person was required by law to make the statement by way of a statutory declaration, the person is guilty of a crime and is liable to imprisonment for up to seven years.<sup>611</sup>

*The power to require a person's attendance as a witness*

23.38 Section 185 of the *Guardianship and Administration Act 2000* (Qld) provides that, for the performance of the Adult Guardian's functions, the Adult Guardian may, by written notice, require a person to attend before the Adult Guardian to give information and answer questions, or to produce stated documents or things:

**185 Witnesses**

- (1) For the performance of the adult guardian's functions, the adult guardian may, by written notice given to a person, require the person to attend before the adult guardian at a stated time and place to give information and answer questions, or produce stated documents or things.
- (2) The person must comply with the notice, unless the person has a reasonable excuse.

*Editor's note—*

See section 188 (Self-incrimination not a reasonable excuse).

Maximum penalty—100 penalty units.

- (3) The adult guardian may—
  - (a) require the person either to take an oath or make an affirmation; and
  - (b) administer an oath or affirmation to the person, or, if technology allowing reasonably contemporaneous and continuous communication is to be used, make the arrangements the adult guardian considers appropriate in the circumstances for administering an oath or affirmation to the person; and
  - (c) allow the person to give information by tendering a written statement, verified, if the adult guardian directs, by oath or affirmation.
- (4) The person must comply with a requirement under subsection (3)(a), unless the person has a reasonable excuse.

Maximum penalty—100 penalty units.

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Criminal Code (Qld) s 193.

- (5) The adult guardian must pay or tender to the person an amount equivalent to the fees and expenses allowable under the *Uniform Civil Procedure Rules 1999* if the person were a witness appearing in a Magistrates Court.

23.39 The Adult Guardian may not delegate the power to give a notice under section 185(1).<sup>612</sup>

23.40 Section 186 of the *Guardianship and Administration Act 2000* (Qld) provides that, if a person, without reasonable excuse, fails to comply with a notice given by the Adult Guardian under section 185(1), a Magistrates Court may, at the request of the Adult Guardian, issue a subpoena<sup>613</sup> requiring the person's attendance before the court.<sup>614</sup>

23.41 The court may require the person either to take an oath or make an affirmation.<sup>615</sup> If the person attends the court under a subpoena to give evidence or a subpoena for production and to give evidence, the Adult Guardian may examine the person.<sup>616</sup>

23.42 If a person who was subpoenaed under section 186 attends before the court and, without reasonable excuse, refuses to be sworn or to affirm, refuses to answer a question put to the person, or fails to give an answer to the court's satisfaction, the court may treat the person's refusal or failure as a contempt of court.<sup>617</sup>

23.43 Section 188 of the *Guardianship and Administration Act 2000* (Qld) abrogates the privilege against self-incrimination for the purpose of sections 185(1) and 186. However, subject to specified exceptions, section 188(3) provides a derivative use immunity in relation to the person's answer or the document or thing that is produced.<sup>618</sup> The effect of that immunity is that evidence of, or directly or indirectly derived from, the person's answer, or the production of the document or thing, that might tend to incriminate the person is not generally admissible in evidence against the person in a civil or criminal proceeding.

23.44 Section 188 provides:

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612 *Guardianship and Administration Act 2000* (Qld) s 181(1).

613 For the purpose of s 186 of the *Guardianship and Administration Act 2000* (Qld), 'subpoena' means a subpoena for production, a subpoena to give evidence, or a subpoena for production and to give evidence: s 186(6).

614 *Guardianship and Administration Act 2000* (Qld) s 186(1)–(2). The *Uniform Civil Procedure Rules 1999* (Qld), other than rr 417, 418 and 420, apply in relation to the subpoena: s 186(3).

615 *Guardianship and Administration Act 2000* (Qld) s 186(4).

616 *Guardianship and Administration Act 2000* (Qld) s 186(5).

617 *Guardianship and Administration Act 2000* (Qld) s 187.

618 For a discussion of a derivative use immunity, see Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No 59 (2004) 19–20, 82–4.

**188 Self-incrimination not a reasonable excuse**

(1) This section applies to—

- (a) a person who fails to comply with a notice under subsection 185(1) to give information and answer questions or to produce documents or things; or
- (b) a person subpoenaed under section 186 who attends before a Magistrates Court and refuses to answer a question put to the person or fails to give an answer to the court's satisfaction.

(2) It is not a reasonable excuse for the person to—

- (a) fail to comply with the notice; or
- (b) refuse to answer the question or fail to give an answer to the court's satisfaction;

because compliance with the notice, answering the question or giving an answer to the court's satisfaction might tend to incriminate the person.

(3) However, evidence of, or directly or indirectly derived from, a person's answer or production of a document or thing that might tend to incriminate the person is not admissible in evidence against the person in a civil or criminal proceeding, other than—

- (a) a proceeding for an offence about the falsity of the answer, document or thing; or
- (b) if the answer or production is relevant to the person's employment—a proceeding brought by or for the person against the person's employer; or
- (c) if the answer or production is relevant to the person's professional registration or licence—a proceeding about the registration, licence or approval; or
- (d) if the answer or production is relevant to the person's registration, licence or approval as proprietor or operator of a service or facility involved in the care of adults with impaired capacity for a matter—a proceeding about the registration, licence or approval.

*Offences*

23.45 The *Guardianship and Administration Act 2000* (Qld) creates several offences in relation to the provision of false or misleading statements or documents to the Adult Guardian and the obstruction of an investigation or audit.

23.46 It is an offence for a person:

- to state anything to the Adult Guardian that the person knows is false or misleading in a material particular;<sup>619</sup>
- to give the Adult Guardian a document containing false information that the person knows is false or misleading in a material particular, unless the person, when giving the document:<sup>620</sup>
  - tells the Adult Guardian, to the best of the person’s ability, how the document is false or misleading; and
  - if the person has, or can reasonably obtain, the correct information — gives the correct information;
- to obstruct or improperly influence the conduct of an investigation or audit.<sup>621</sup>

23.47 The maximum penalty for each of these offences is 100 penalty units, that is, \$10 000.<sup>622</sup>

### **Cost of investigations and audits**

23.48 Section 189 of the *Guardianship and Administration Act 2000* (Qld) deals with the cost of an investigation or audit undertaken by the Adult Guardian. It provides that, in two situations, the Adult Guardian may require a person to pay the amount that the Adult Guardian considers appropriate for the investigation or audit.

23.49 The first situation is where the Adult Guardian undertakes an investigation about a financial matter or an audit at the request of a person. Section 189(1) provides that, if the Adult Guardian is satisfied that the request was frivolous or vexatious or otherwise without good cause, the Adult Guardian may, by written notice, require the person who requested the investigation or audit to pay to the Adult Guardian the amount that the Adult Guardian considers appropriate for the cost of the investigation or audit.

23.50 The second situation is where the Adult Guardian undertakes an investigation about a financial matter or an audit and considers that the attorney or administrator concerned has contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). Section 189(2) provides that, in that case, the Adult Guardian may, by written notice, require the attorney or administrator personally to pay to the Adult Guardian the amount that the Adult Guardian considers appropriate for the cost of the investigation or audit.

<sup>619</sup> *Guardianship and Administration Act 2000* (Qld) s 190(1). It is sufficient for a complaint for an offence against s 190(1) to state that the statement made was ‘false or misleading’ to the person’s knowledge, without stating which: s 190(2).

<sup>620</sup> *Guardianship and Administration Act 2000* (Qld) s 191(1). It is sufficient for a complaint for an offence against s 191(1) to state that the document contained information that was ‘false or misleading’ to the person’s knowledge, without stating which: s 191(3).

<sup>621</sup> *Guardianship and Administration Act 2000* (Qld) s 192(1).

<sup>622</sup> See *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

23.51 The Adult Guardian may also, by written notice, require a person who requests an investigation or audit to pay to the Adult Guardian the amount that the Adult Guardian considers appropriate as security for a payment under section 189(1).<sup>623</sup>

**Adult Guardian's report after investigation or audit**

23.52 After the Adult Guardian has carried out an investigation or audit in relation to an adult, the Adult Guardian must make a written report and give a copy of the report to:<sup>624</sup>

- the person at whose request the investigation or audit was carried out; and
- every attorney, guardian or administrator, for the adult.

23.53 The Adult Guardian must also allow an 'interested person' to inspect a copy of the report at all reasonable times and, at the person's own expense, to be given a copy of the report.<sup>625</sup>

23.54 It is a lawful excuse for the publication of a defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for the purpose of the *Guardianship and Administration Act 2000* (Qld).<sup>626</sup>

23.55 If a report made by the Adult Guardian contains information about a person and the Adult Guardian considers it appropriate to protect the person's identity, the Adult Guardian may remove, from the copy of the report to be given or inspected, information likely to result in the person's identification.<sup>627</sup>

**Specific powers in relation to health matters**

23.56 If the Adult Guardian is appointed by the Tribunal as an adult's guardian, is appointed under an enduring power of attorney as an adult's attorney for personal matters, or is an adult's statutory health attorney, the Adult Guardian may make decisions about health matters for the adult in accordance with the priority set out in section 66 of the *Guardianship and Administration Act 2000* (Qld).

23.57 In addition, the *Guardianship and Administration Act 2000* (Qld) confers specific powers on the Adult Guardian to make decisions about health matters for an adult, even though the Adult Guardian is not the adult's guardian, attorney or statutory health attorney.

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623 *Guardianship and Administration Act 2000* (Qld) s 189(3).

624 *Guardianship and Administration Act 2000* (Qld) s 193(1).

625 *Guardianship and Administration Act 2000* (Qld) s 193(3).

626 *Guardianship and Administration Act 2000* (Qld) s 193(2).

627 *Guardianship and Administration Act 2000* (Qld) s 193(4).



*Where substitute decision-makers disagree about a health matter*

23.58 Section 42 of the *Guardianship and Administration Act 2000* (Qld) provides that, if there is a disagreement about a health matter for an adult and the disagreement cannot be resolved by mediation by the Adult Guardian, the Adult Guardian may exercise power for the health matter. The section includes the following definition of ‘disagreement about a health matter’:<sup>628</sup>

**disagreement** about a health matter means—

- (a) a disagreement between a guardian or attorney<sup>629</sup> for an adult and another person who is a guardian or attorney for the adult about the way power for the health matter should be exercised; or
- (b) a disagreement between or among 2 or more eligible statutory health attorneys for an adult about which of them should be the adult’s statutory health attorney or how power for the health matter should be exercised. (note added)

23.59 If the Adult Guardian exercises power under section 42 in relation to a health matter for an adult, the Adult Guardian must advise the Tribunal in writing of the following details: the name of the adult; an outline of the disagreement; the name of each guardian, attorney or eligible statutory health attorney involved in the disagreement; and the decision made by the Adult Guardian.<sup>630</sup>

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

23.60 Section 43(1) of the *Guardianship and Administration Act 2000* (Qld) provides that, if a guardian or an attorney<sup>631</sup> for a health matter for an adult:

- refuses to make a decision about the health matter and the refusal is contrary to the Health Care Principle; or
- makes a decision about the health matter and the decision is contrary to the Health Care Principle;

the Adult Guardian may exercise power for the health matter.

23.61 If the Adult Guardian exercises power under section 43 in relation to a health matter for an adult, the Adult Guardian must advise the Tribunal in writing of the following details: the name of the adult; the name of the guardian or attorney; a

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<sup>628</sup> *Guardianship and Administration Act 2000* (Qld) s 42(3).

<sup>629</sup> *Guardianship and Administration Act 2000* (Qld) s 42(3) defines ‘attorney’ to mean an attorney under an enduring document (that is, an enduring power of attorney or an advance health directive) or a statutory health attorney.

<sup>630</sup> *Guardianship and Administration Act 2000* (Qld) s 42(2).

<sup>631</sup> For s 43 of the *Guardianship and Administration Act 2000* (Qld), ‘attorney’ means an attorney under an advance health directive, an attorney under an enduring power of attorney, or a statutory health attorney: s 43(3).

statement as to why the refusal or decision is contrary to the Health Care Principle; and the decision made by the Adult Guardian.<sup>632</sup>

***Advice and supervision of attorneys, guardians and administrators***

23.62 Section 179(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may:

- give advice to an attorney, guardian or administrator;
- by written notice, make an attorney, guardian or administrator subject to the Adult Guardian's supervision for a reasonable period if the Adult Guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney, guardian or administrator has contravened the Act or his or her duties, but has not done so wilfully; and
- require an attorney appointed in relation to financial matters, or an administrator, to present a plan of management for approval.

23.63 If the Adult Guardian has exercised a power under section 179 in relation to an attorney, guardian or administrator, that person may apply to the Tribunal about:

- the Adult Guardian's advice;
- a notice by the Adult Guardian making the attorney, guardian or administrator subject to the Adult Guardian's supervision; or
- the Adult Guardian's requirement for a financial plan.

23.64 The Tribunal may, on such an application, make such order as it considers appropriate.<sup>633</sup>

***Proceedings for the protection of an adult's property***

23.65 Section 194 of the *Guardianship and Administration Act 2000* (Qld) deals with the situation where the Adult Guardian considers that:

- property of an adult with impaired capacity is wrongfully held, detained converted or injured; or
- money is payable to the adult.

23.66 It provides that the Adult Guardian may, by application to the Supreme Court,<sup>634</sup> made in either the name of the Adult Guardian or the adult, claim and

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<sup>632</sup> *Guardianship and Administration Act 2000* (Qld) s 43(2).

<sup>633</sup> *Guardianship and Administration Act 2000* (Qld) s 179(2).

<sup>634</sup> See *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'court').

recover possession of the property, damages for conversion of or injury to the property, or payment of the money.

***Suspension of an attorney's power under an enduring power of attorney or advance health directive***<sup>635</sup>

23.67 Section 195 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may, by written notice to an attorney, suspend the operation of all or some of an attorney's power under an enduring power of attorney or an advance health directive for up to three months if the Adult Guardian 'suspects, on reasonable grounds, that the attorney is not competent'.<sup>636</sup> The Act provides that:<sup>637</sup>

An attorney is not competent if, for example—

- (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
- (b) the attorney has neglected the attorney's duties or abused the attorney's powers, whether generally or in relation to a specific power; or
- (c) the attorney has otherwise contravened this Act or the *Powers of Attorney Act 1998*.

23.68 The Adult Guardian may lift the suspension on the terms he or she considers appropriate.<sup>638</sup> An attorney whose power has been suspended may apply to the Tribunal and the Tribunal may make such order as it considers appropriate.<sup>639</sup>

23.69 During the suspension of the operation of an attorney's power, the attorney must not exercise the power.<sup>640</sup> If the power that is suspended is for a personal matter, the Adult Guardian is taken to be the attorney during the suspension of the power.<sup>641</sup> If the power that is suspended is for a financial matter, the Public Trustee is taken to be the attorney during the suspension of the power.<sup>642</sup>

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635 Issues in relation to the suspension of an attorney's power are considered at [23.161]–[23.198] below.

636 *Guardianship and Administration Act 2000* (Qld) s 195(1), (3), (6). Section 195 is set out at [23.161] below.

637 *Guardianship and Administration Act 2000* (Qld) s 195(2).

638 *Guardianship and Administration Act 2000* (Qld) s 195(4).

639 *Guardianship and Administration Act 2000* (Qld) s 195(5).

640 *Guardianship and Administration Act 2000* (Qld) s 196(1). Section 196(1) provides for a maximum penalty of 100 penalty units, that is, \$10 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

641 *Guardianship and Administration Act 2000* (Qld) s 196(2).

642 *Guardianship and Administration Act 2000* (Qld) s 196(3).

### **Power to apply for an entry and removal warrant**

23.70 Section 197 of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Adult Guardian considers that there are reasonable grounds for suspecting that there is ‘an immediate risk of harm, because of neglect (including self neglect), exploitation or abuse,’ to an adult with impaired capacity, the Adult Guardian may apply to the Tribunal for a warrant to enter a place and to remove the adult.

23.71 The Tribunal’s power to issue a warrant is found in section 149 of the *Guardianship and Administration Act 2000* (Qld), which is considered in Chapter 20 of this Report.

23.72 As soon as practicable after an adult has been removed under a warrant, the Adult Guardian must apply to the Tribunal for orders that the Adult Guardian considers appropriate about:<sup>643</sup>

- the adult’s personal welfare;
- a power of attorney or an advance health directive of the adult; and
- a guardian, administrator or attorney of the adult.

### **Power to consent to a forensic examination**

23.73 Section 198A of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may consent to the forensic examination<sup>644</sup> of an adult with impaired capacity if:

- the Adult Guardian reasonably considers that the examination is in the adult’s best interests; and
- any of the following applies:
  - no guardian or attorney for the adult is appointed or available to consent to the examination;
  - any guardian or attorney for the adult who is available has failed to consent;

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643 *Guardianship and Administration Act 2000* (Qld) s 151.

644 *Guardianship and Administration Act 2000* (Qld) sch 4 defines ‘forensic examination’ in the following terms:

**forensic examination** of an adult means a medical or dental procedure for the adult that is carried out for forensic purposes, other than because the adult is suspected of having committed a criminal offence.

*Note—*

For procedures in relation to an adult suspected of having committed an indictable offence, see the *Police Powers and Responsibilities Act 2000*, chapter 17 (Forensic procedures), part 3 (Forensic procedure orders).

- the Adult Guardian reasonably considers that the adult's interests would not be adequately protected if the consent of any guardian or attorney for the adult were sought.

23.74 The section gives, as an example of a forensic examination that may be in the adult's best interest, 'a forensic examination to obtain evidence that a criminal offence has been committed against the adult'.

23.75 A person who carries out a forensic examination that is authorised by a guardian or an attorney for the adult, or by the Adult Guardian under section 198A, is not liable for an act or omission to any greater extent than if the adult were an adult with capacity to consent and the act or omission happened with the adult's consent.<sup>645</sup>

### **Delegation of the Adult Guardian's powers**

23.76 The *Guardianship and Administration Act 2000* (Qld) makes provision for the delegation of the Adult Guardian's powers. Generally, the Adult Guardian may delegate his or her powers to an appropriately qualified member of the Adult Guardian's staff.<sup>646</sup> In addition, the Adult Guardian may delegate his or her mediation and conciliation powers to an appropriately qualified person.<sup>647</sup>

23.77 In addition, section 177(4) of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Adult Guardian has the power to make decisions about personal matters for an adult, the Adult Guardian may delegate the power to make day-to-day decisions about those matters to one of the following:

- an appropriately qualified carer of the adult;<sup>648</sup>
- a health provider of the adult;
- an attorney under an enduring document;
- one of the persons who could be eligible to be the adult's statutory health attorney.

23.78 Section 177(5) includes the following definition of 'day-to-day decision':

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<sup>645</sup> *Guardianship and Administration Act 2000* (Qld) s 248A(1), (3); *Powers of Attorney Act 1998* (Qld) s 104(1). The legislation also provides that a forensic examination authorised by a guardian or an attorney for the adult, or by the Adult Guardian under s 198A, is not unlawful: *Guardianship and Administration Act 2000* (Qld) s 248A(2); *Powers of Attorney Act 1998* (Qld) s 104(2).

<sup>646</sup> *Guardianship and Administration Act 2000* (Qld) s 177(1). However, the Adult Guardian may not delegate the power to give notices under ss 185(1) or 189 of the Act. The Adult Guardian's power to give notices under those provisions is considered at [23.38]–[23.39] and [23.48]–[23.51] above.

<sup>647</sup> *Guardianship and Administration Act 2000* (Qld) s 177(2).

<sup>648</sup> *Guardianship and Administration Act 2000* (Qld) s 177(5) provides that 'appropriately qualified, for a person to whom a power may be delegated' includes 'having the qualifications, experience or standing appropriate to exercise the power'.

**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.

*Example of day-to-day decision—*

a decision about podiatry, physiotherapy, non-surgical treatment of pressure sores and health care for colds and influenza

23.79 Because the *Guardianship and Administration Act 2000* (Qld) does not expressly authorise a delegate of the Adult Guardian to subdelegate any of these powers, a person to whom the Adult Guardian delegates a power may not subdelegate the power.<sup>649</sup>

### The law in other jurisdictions

23.80 The investigative and protective powers of the interstate Public Advocates and Public Guardians are generally more limited than the powers of the Queensland Adult Guardian.

#### *Australian Capital Territory*

23.81 In the ACT, the Public Advocate may investigate complaints and allegations about.<sup>650</sup>

- matters in relation to which he or she has a function; or
- the actions of a guardian or manager<sup>651</sup> or a person acting under, or purporting to act under, an enduring power of attorney.

23.82 If the principal for an enduring power of attorney has impaired decision-making capacity, the Public Advocate may, by written notice to the person appointed as attorney under the enduring power of attorney, require the person to give the Public Advocate stated books, accounts or other records of transactions carried out by the person for the principal.<sup>652</sup> However, the Public Advocate does not have the power to give a similar notice to a manager.

23.83 In specified circumstances, the ACT Civil and Administrative Tribunal may issue a warrant authorising the Public Advocate, with the police officers who may be required, and using the force that is necessary and reasonable, to enter a particular place to remove an adult with impaired capacity from that place.<sup>653</sup>

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649 See *Acts Interpretation Act 1954* (Qld) s 27A(12).

650 *Public Advocate Act 2005* (ACT) s 11(1)(c). A manager is the ACT equivalent of an administrator under the *Guardianship and Administration Act 2000* (Qld).

651 A manager is the ACT equivalent of an administrator under the *Guardianship and Administration Act 2000* (Qld).

652 *Guardianship and Management of Property Act 1991* (ACT) s 64.

653 *Guardianship and Management of Property Act 1991* (ACT) s 68.

### Tasmania

23.84 In Tasmania, the *Guardianship and Administration Act 1995* (Tas) provides that the Public Guardian may investigate complaints and allegations concerning the actions of a guardian or an administrator or a person acting or purporting to act under an enduring power of attorney.<sup>654</sup> However, the Act does not confer any specific investigative powers on the Public Guardian.

23.85 If the Guardianship and Administration Board receives information that a person with a disability is being unlawfully detained against his or her will or is likely to suffer damage to his or her physical, emotional or mental health or well-being unless immediate action is taken, and the Board considers it necessary to do so in order to secure access to the person, the Board may empower the Public Guardian, or some other person specified in the order, to visit the person with a disability in the company of a police officer for the purpose of preparing a report for the Board.<sup>655</sup>

### Victoria

23.86 In Victoria, the *Guardianship and Administration Act 1986* (Vic) provides that the Public Advocate may investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.<sup>656</sup> The Act provides that, for the purpose of such an investigation, the Public Advocate may require a person, government department, public authority, service provider, institution or welfare organisation to provide information.<sup>657</sup> However, it is a reasonable excuse for a person to refuse or fail to provide information that the person would otherwise be required to provide if providing the information would tend to incriminate the person.<sup>658</sup>

23.87 Section 18A of the Act also gives the Public Advocate the power to enter premises on which certain institutions<sup>659</sup> are situated and.<sup>660</sup>

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654 *Guardianship and Administration Act 1995* (Tas) s 17(1).

655 *Guardianship and Administration Act 1995* (Tas) s 29(1).

656 *Guardianship and Administration Act 1986* (Vic) s 16(1)(h).

657 *Guardianship and Administration Act 1986* (Vic) s 16(1)(ha).

658 *Guardianship and Administration Act 1986* (Vic) s 16(1A).

659 *Guardianship and Administration Act 1986* (Vic) s 18A(5) defines 'institution' for the purpose of s 18A to mean any of the following:

- (a) a disability service provider within the meaning of section 3(1) of the *Disability Act 2006*;
- (b) a designated public hospital or supported residential service within the meaning of the *Health Services Act 1988*;
- (c) a residential service, residential institution or residential treatment facility within the meaning of section 3(1) of the *Disability Act 2006*;
- (d) a mental health service within the meaning of Division 5 of Part 6 of the *Mental Health Act 1986*.

660 *Guardianship and Administration Act 1986* (Vic) s 18A(1).

- inspect those premises;
- see any person who is a resident of those premises or who is receiving any service from the institution;
- make enquiries relating to the admission, care, detention, treatment or control of any such person; and
- inspect any document relating to any such person or any record required to be kept under the *Guardianship and Administration Act 1986* (Vic), the *Health Services Act 1988* (Vic), the *Disability Act 2006* (Vic) or the *Mental Health Act 1986* (Vic).<sup>661</sup>

23.88 The person in charge and the members of staff or management of the institution must provide the Public Advocate with any reasonable assistance that the Public Advocate requires to perform or exercise any power, duty or function under section 18A.

23.89 A person in charge or a member of the staff or management of an institution must not:<sup>662</sup>

- unreasonably refuse or neglect to give assistance when required to do so by the Public Advocate;
- refuse or fail to give full and true answers to the best of that person's knowledge to any questions asked by the Public Advocate in the performance or exercise of any power, duty or function under section 18A; or
- assault, obstruct or threaten the Public Advocate in the performance or exercise of any power, duty or function under section 18A.

23.90 The Public Advocate may apply to the Victorian Civil and Administrative Tribunal ('VCAT') for an order that an attorney under an enduring power of attorney lodge with the Tribunal accounts or other documents relating to the exercise of the power or that the accounts be examined or audited by a person appointed by VCAT.<sup>663</sup> However, unlike the Queensland Adult Guardian, the Public Advocate does not have the power to require that the documents be produced in order to conduct an audit.

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661 However, the Public Advocate may not inspect a person's medical records without the person's consent and may not inspect the personnel records of a person unless the person to whom they relate consents: *Guardianship and Administration Act 1986* (Vic) s 18A(2).

662 *Guardianship and Administration Act 1986* (Vic) s 18A(4). Section 18A(4) provides for a maximum penalty of 25 penalty units, that is \$2986: *Monetary Units Act 2004* (Vic) ss 5(2)–(3), 7(2), (4); *Victorian Government Gazette*, G 10, 11 March 2010, 449 (which fixed the value of a penalty unit at \$119.45).

663 *Instruments Act 1958* (Vic) s 125ZB.



### ***New South Wales, Northern Territory and South Australia***

23.91 In New South Wales and the Northern Territory, the legislation does not confer investigative or protective powers on the Public Guardian.

23.92 In South Australia, although the Public Advocate has a limited investigative function,<sup>664</sup> the legislation does not confer any investigative or protective powers on the Public Advocate.

### **Discussion Paper**

23.93 In the Discussion Paper, the Commission stated that the Adult Guardian has extensive investigative and protective powers under the *Guardianship and Administration Act 2000* (Qld). The Commission commented that these powers are considerably more extensive than those that may be exercised by the Adult Guardian's interstate counterparts. It also stated that it was not aware of any additional powers that might be needed to support the Adult Guardian's protective and investigative functions.<sup>665</sup>

23.94 The Commission sought submissions on the following questions:<sup>666</sup>

- 18-3 Are the powers of the Adult Guardian, as conferred by the *Guardianship and Administration Act 2000* (Qld), appropriate to enable the Adult Guardian to:
- (a) protect adults with impaired capacity from neglect, exploitation or abuse; and
  - (b) investigate allegations of neglect, exploitation or abuse?
- 18-4 If no to Question 18-3, what power or powers should be given to, or removed from, the Adult Guardian?

### **Submissions**

23.95 The Adult Guardian considered that the powers of the Adult Guardian under the *Guardianship and Administration Act 2000* (Qld) are generally appropriate.<sup>667</sup>

23.96 However, Pave the Way expressed the view that it is neither necessary nor desirable for the Adult Guardian to have the following powers:<sup>668</sup>

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664 See n 583 above.

665 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.84].

666 Ibid 149–50.

667 Submission 164. The Adult Guardian raised as an issue the desirability of amending the legislation to give the Tribunal enforcement powers where a person fails to comply with a decision of the Adult Guardian, for example, a decision about where the adult is to live. See the discussion commencing at [20.211] above.

- the power to demand information in the form of a statutory declaration;
- the power to require people to attend before the Adult Guardian to give information and answer questions or produce documents;
- the power to require people to pay the costs of investigations; or
- the power to suspend an attorney's powers.<sup>669</sup>

23.97 It suggested that these powers should be removed:

Removal of these powers will still leave the Adult Guardian with extensive powers to investigate and supervise attorneys, be appointed into substitute decision-making roles, apply for an entry warrant, commence Supreme Court proceedings to recover money or property, and consent to a forensic examination of an adult. If the Adult Guardian experiences difficulties obtaining the information they seek for an investigation, they have the option of applying to the Tribunal (which has powers to request information) or, if necessary and appropriate, placing the matter in the hands of the police.

23.98 Another respondent also commented that the Adult Guardian has excessive powers, although he did not identify which power or powers should be removed.<sup>670</sup>

23.99 Queensland Advocacy Incorporated did not specifically address the issue of the Adult Guardian's powers. However, it commented that, because the Adult Guardian is the guardian of last resort and staff within the Office have a heavy case load, heavy reliance is placed on information from people who are paid service providers for the adult.<sup>671</sup>

The reality in practice can be that staff of the Office of the Adult Guardian do not have the time or capacity to get to know the person well and therefore are often reliant on contact with paid service workers to provide information about the needs and well being of the person.

Such heavy reliance on service providers to give information about the person can be fraught with difficulties, especially if the person is in a new situation and/or is not known well. This lack of safeguards can put the person at further risk through poor knowledge and uninformed decision-making of people in the role of Adult Guardian.

If a person relies on a formal service to meet their life needs, other safeguards will need to be in place otherwise the person's best interest may not be recognised and acted upon.

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668 Submission 135.

669 The Adult Guardian's power under s 195 of the *Guardianship and Administration Act 2000* (Qld) to suspend all or some of an attorney's power is considered separately. See the discussion commencing at [23.161] below.

670 Submission 108.

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

As is widely known, services are imperfect in providing a life and cannot meet all human needs, especially the fundamental human needs for relationships, affection and security, which are unable to be provided by formal service structures.

The assumption here is not that service providers do not care, but rather that the love and bonding of a family cannot be replaced by a paid relationship. Service standards, quality assurance policies and principles of user and human rights do not change this fact and are not sufficient safeguards alone.

23.100 Queensland Advocacy Incorporated suggested that, to address this concern, the *Guardianship and Administration Act 2000* (Qld) could embed the following requirements for guardians within the Office of the Adult Guardian:

The Adult Guardian will prior to any life changing or major decision making:

- meet the person;
- gain information from others external to the service who know the person;
- weigh up evidence from the service to assess its credence;
- reflect on the person's situation against the compliance benchmarks set in the General Principles of the Act, the practice of working in the person's best interest and the Convention on the Rights of Persons with Disabilities; and
- revisit the person to review the outcomes for the person within 3 months.

23.101 One respondent, who was the subject of an investigation, did not specifically address the extent of the Adult Guardian's investigative powers. He was, however, critical of the Adult Guardian's investigation because the investigating officer told him that the exact nature of the complaint against him could not be disclosed to him.<sup>672</sup>

23.102 The former Acting Public Advocate suggested that there is a need to develop legislative provisions or policies that apply to the Adult Guardian's investigative processes and practices, especially in relation to the time frames for undertaking investigations:<sup>673</sup>

There is also a need for the development of appropriate legislative provisions or policies and practices regarding investigation processes, to ensure complaints are assessed expeditiously, and investigations are thorough, consistent and timely. It is considered that this is required because in the past there have been instances where delays have occurred in the OAG investigating allegations of abuse, neglect and exploitation and/or inappropriate or inadequate decision-making arrangements for adults with [impaired decision-making capacity]. It is recommended that consideration be given to the

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672 Submission 108.

673 Submission 160.

introduction of legislative time frames in which preliminary consideration and investigation of a complaint/referral to the Office of the Adult Guardian must occur. Time frames are essential in order to ensure that referrals are acted upon urgently, delays in investigations are prevented, and to protect vulnerable adults from abuse, neglect and exploitation.

## The Commission's view

### General view

23.103 The Commission is generally of the view that the Adult Guardian's powers under the *Guardianship and Administration Act 2000* (Qld) are appropriate. Although these powers are quite extensive, the Commission considers that they are necessary given the Adult Guardian's important functions of:<sup>674</sup>

- protecting adults who have impaired capacity from neglect, exploitation or abuse; and
- investigating complaints and allegations about the actions of attorneys, guardians and administrators, and persons acting, or purporting to act, under an enduring document or order of the Tribunal.

23.104 The Commission notes the view expressed by Pave the Way that the Adult Guardian's powers are excessive, and that particular coercive powers in relation to the Adult Guardian's power to obtain information should be removed, and should instead be conferred on the Adult Guardian by the Tribunal on a case-by-case basis. The Commission disagrees with that view. Given the Adult Guardian's statutory functions, the Commission considers that such an approach would hinder the Adult Guardian in carrying out the important protective and investigative functions of that office.

23.105 The Commission notes the suggestion that has been raised in the submission by Queensland Advocacy Incorporated about amending the legislation to embed certain requirements that guardians within the Office of the Adult Guardian would need to follow in making decisions for adults. In the Commission's view, the suggested process is not an appropriate matter for inclusion in the legislation.

23.106 The Commission has also considered the suggestion made by the former Acting Public Advocate that the *Guardianship and Administration Act 2000* (Qld) might be amended to include time frames for considering complaints and referrals. In the Commission's view, the imposition of mandatory time frames would be too inflexible, especially given the range of investigations undertaken and the increasing complexity of investigations into allegations of financial abuse. Accordingly, the Commission does not make any recommendation in relation to the time frames for investigations.

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See *Guardianship and Administration Act 2000* (Qld) s 174(1)(a)–(b).

23.107 However, the Commission considers that the Adult Guardian's powers should be modified as explained below.

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

23.108 The guardianship legislation requires a guardian, attorney or statutory health attorney who is exercising power for a health matter to apply both the General Principles and the Health Care Principle.<sup>675</sup>

23.109 As explained earlier,<sup>676</sup> section 43(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may exercise power for a health matter for an adult if a guardian or an attorney for the adult:

- (a) refuses to make a decision about the health matter for the adult and the refusal is contrary to the health care principle; or
- (b) makes a decision about the health matter for the adult and the decision is contrary to the health care principle.

23.110 Although section 43(1) gives the Adult Guardian power where a refusal to make a decision, or where a decision, is contrary to the Health Care Principle, the section does not confer decision-making power on the Adult Guardian where the substitute decision-maker's refusal, or decision, is contrary to the General Principles.

23.111 Given that guardians, attorneys and statutory health attorneys are required to apply both the General Principles and the Health Care Principle in exercising power for a health matter, section 43(1)(a) of the *Guardianship and Administration Act 2000* (Qld) should be amended to refer to a refusal that is contrary to the General Principles or the Health Care Principle and section 43(1)(b) should similarly be amended to refer 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***

23.112 As explained earlier, section 177(4) of the *Guardianship and Administration Act 2000* (Qld) enables the Adult Guardian to delegate the power to make day-to-day decisions about a personal matter for an adult to one of certain specified persons.<sup>677</sup>

23.113 In the Commission's view, section 177(4) should be amended so that, in addition to the persons currently mentioned in that subsection, the Adult Guardian may also delegate the power to make day-to-day decisions about a personal matter for an adult to any other person the Adult Guardian, in his or her discretion, considers appropriate. Given the oversight to which the Adult Guardian is subject, including the Commission's recommendation in this chapter concerning the

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675 *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34; *Powers of Attorney Act 1998* (Qld) s 76.

676 See [23.60]–[23.61] above.

677 See [23.77]–[23.78] above

Tribunal's power to review a decision to delegate such a power,<sup>678</sup> the Commission considers it appropriate for the categories of persons mentioned in section 177(4) to be widened in this way.

23.114 However, given that the Public Trustee, as an administrator, may exercise power for financial matters only, and that the Commission has recommended that the Public Trustee should be able to be appointed as an attorney for financial matters only,<sup>679</sup> the Commission's recommendations in relation to widening the Adult Guardian's power to delegate the power to make day-to-day decisions about a personal matter should not enable the Adult Guardian to delegate that power to the Public Trustee.

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

23.115 As explained earlier, section 183 of the *Guardianship and Administration Act 2000* (Qld) gives the Adult Guardian a statutory right to 'all information necessary to investigate a complaint or allegation or to carry out an audit'.

23.116 The *Information Privacy Act 2009* (Qld) requires an agency, other than the Health Department, to comply with the Information Privacy Principles ('IPPs') set out in the Act, and requires the Health Department to comply with the National Privacy Principles ('NPPs') set out in the Act.<sup>680</sup> IPP 11 and NPP 2 place limits on the disclosure, or on the use and disclosure, by an agency of personal information<sup>681</sup> about an individual except for certain specified purposes.

23.117 Relevantly, IPP 11(1)(d) does not prohibit disclosure if 'the disclosure is authorised or required under a law'.<sup>682</sup> Similarly, NPP 2(1)(f) does not prohibit use or disclosure if 'the use or disclosure is authorised or required by or under a law'. There is therefore no impediment to the disclosure of personal information by an agency if the personal information is required under a law.

23.118 It may be necessary for the Adult Guardian to require information from an agency when investigating a complaint or an allegation in relation to an adult. Section 183(5) provides that that the section overrides 'any restriction, in an Act or the common law, about the disclosure or confidentiality of information'. However, while the Adult Guardian's power in section 183(1) is stated in very broad terms, it does not expressly refer to personal information about an individual, which may raise a doubt about whether the extent of the power under section 183(1) is

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678 See [23.279] below.

679 See Recommendations 9-2 and 16-2 of this Report.

680 *Information Privacy Act 2009* (Qld) ss 27, 31.

681 *Information Privacy Act 2009* (Qld) s 12 defines personal information:

**12 Meaning of personal information**

Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

682 *Information Privacy Act 2009* (Qld) sch 3, IPP 11(1)(d).

sufficient to permit the disclosure of information to be made under IPP 11(1)(d) or NPP 2(1)(f).

23.119 To avoid any doubt about this issue, the Commission is of the view that 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.

### **Power to act as a litigation guardian**

23.120 Further, in Chapter 28 of this Report, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended 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.<sup>683</sup>

## **THE ADULT GUARDIAN'S DISCRETION TO INVESTIGATE COMPLAINTS**

### **Background**

23.121 The Adult Guardian has very wide powers to investigate complaints and allegations that an adult with impaired capacity is being, or has been, neglected, exploited or abused. The Adult Guardian's Annual Report for 2008–09 notes that, of the allegations investigated during that year, 41 per cent of the allegations were made by family members of the adult, while 25 per cent were made by service providers.<sup>684</sup>

23.122 Matters may also be referred to the Adult Guardian by the Public Advocate and community visitors.

### **Discussion Paper**

23.123 In the Discussion Paper, the Commission noted that, under the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian has a discretion whether to investigate an allegation that has been referred for investigation. The Commission commented that, while this would generally seem to be appropriate, it raised the issue of whether there are any allegations that the Adult Guardian should have a duty to investigate, rather than merely a power to do so.<sup>685</sup> The Commission suggested that a duty to investigate might, for example, be appropriate in relation to allegations referred by the Public Advocate or a community visitor,<sup>686</sup> who have formal roles under the *Guardianship and*

<sup>683</sup> See Recommendation 28-3(b) of this Report.

<sup>684</sup> Office of the Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 40.

<sup>685</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.87].

<sup>686</sup> *Ibid.*

*Administration Act 2000* (Qld) of, respectively, promoting the protection of adults with impaired capacity from neglect, exploitation or abuse<sup>687</sup> and safeguarding the interests of consumers at visitable sites.<sup>688</sup> However, as explained earlier, the Government has announced its intention to transfer the Public Advocate's powers to the Adult Guardian.

23.124 The Commission sought submissions on whether the Adult Guardian should have a duty to investigate complaints and allegations that are referred by other agencies within the guardianship system, such as the Public Advocate or community visitors.<sup>689</sup>

## Submissions

23.125 The Adult Guardian commented that the Act should continue to provide that the Adult Guardian has a discretion whether to investigate matters that are referred for investigation. In her view, the imposition of a requirement to investigate certain matters could have an adverse effect on the Adult Guardian's ability to prioritise investigations.<sup>690</sup>

The risk in imposing an obligation to investigate matters referred by other agencies is that the Adult Guardian will lose her ability to prioritise competing referrals and may be obliged to investigate matters which she considers are either inappropriate for the office to investigate or which take resources from adults at more risk of abuse, neglect or exploitation than those referred by other agencies.

23.126 The Adult Guardian explained that the focus of her investigative work is on future risk:

even if there is a strong likelihood that abuse, neglect or exploitation may have occurred in the past, if we are satisfied that current arrangements are in place which adequately protect the adult, the Office of the Adult Guardian will decline to conduct an investigation.

23.127 The Endeavour Foundation suggested that the Adult Guardian should have a duty to investigate an allegation 'only where sufficient grounds are shown'.<sup>691</sup>

23.128 However, the former Acting Public Advocate considered that section 180 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Adult Guardian *must* investigate a complaint or an allegation of the kind mentioned in that section, although there should be a power to discontinue the

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687 *Guardianship and Administration Act 2000* (Qld) s 209(b).

688 *Guardianship and Administration Act 2000* (Qld) s 223(1). The role of community visitors is considered Chapter 26 of this Report.

689 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 160.

690 Submission 164.

691 Submission 163.



investigation of a complaint that is determined to be frivolous or vexatious, or lacking in substance:<sup>692</sup>

At present the Office of the Adult Guardian (OAG) has discretion to investigate complaints of abuse, neglect or exploitation of an adult, or inappropriate or inadequate decision-making arrangements. It is considered, due to the vulnerability of adults with [impaired decision-making capacity] to abuse, neglect, exploitation, and the Adult Guardian's primary function to protect the rights and interests of those adults, that the OAG should have a duty to investigate all complaints and allegations, regardless of the source of the complaint/referral, to provide greater protection to those adults.

If, on initially investigating the complaint, it is determined that the complaint is frivolous/vexatious, or lacking in substance/credibility, no further action need be taken, and the investigation could be discontinued.

Amendments to section 180 of the [*Guardianship and Administration Act 2000* (Qld)] to remove the Adult Guardian's discretion and provide that the Adult Guardian *must* investigate complaints should therefore be considered, as well as the provision of further resources to the OAG to enable it to carry out its investigative function. (original emphasis; notes omitted)

23.129 The Public Trustee noted in his submission that the Public Trustee is frequently appointed as an adult's administrator in circumstances where there has been a misappropriation of assets or funds. He explained that, in this situation, it can be difficult to ascertain what has occurred with the adult's finances. The Public Trustee considered that the legislation could require the Adult Guardian to exercise his or her investigatory powers if an administrator makes such a request and there are reasonable grounds to believe that there has been a breach of the legislation by either an attorney or administrator.<sup>693</sup>

Put shortly, administrators, and in particular the Public Trustee are often appointed after an initial investigation by the Adult Guardian into what might be broadly termed financial abuse.

The powers of the Adult Guardian are not always (given the balance of workload and demands on the Adult Guardian's time) exercised by that Office after the appointment of an administrator by policy (or at least further investigations have not occurred after the appointment of the Public Trustee as administrator to the best of the Public Trustee's knowledge). As an administrator then the Public Trustee is faced with the circumstance of investigating and litigating potentially in respect of that abuse when much time and expense might be saved if there was an exercise of the powers presently given to the Adult Guardian (to understand precisely that which has occurred with the adult's finances).

Such powers could be extended by a Tribunal order to administrators in this position (that is, where an administrator has been appointed quite clearly in circumstances where it is likely there has been misappropriation of funds or property). An alternative position might be that the Adult Guardian be obliged to exercise investigatory powers upon the request of an administrator provided

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692 Submission 160.

693 Submission 156A.

that there are reasonable grounds to believe that there has been a breach of the Act by the attorney (POA) or in the case of an administrator, the GAA.

23.130 Pave the Way was of the view that the Adult Guardian should be subject to a duty to investigate complaints and allegations that are made to that office, including those made by other agencies in the guardianship system.<sup>694</sup>

We believe that that Adult Guardian should have a duty to investigate complaints and allegations brought to it, including from other agencies within the guardianship system. Otherwise, the temptation not to investigate, on the grounds of limited resources, could prove too great.

### The Commission's view

23.131 In the Commission's view, section 180 of the *Guardianship and Administration Act 2000* (Qld) should continue to provide that the Adult Guardian has a discretion in relation to the complaints and allegations that are investigated. While, on one level, it may appear attractive to suggest that the Adult Guardian should be required to investigate complaints or allegations made by other agencies within the guardianship system, the Commission is concerned that, if the legislation were amended to impose a duty on the Adult Guardian to investigate complaints or allegations made by certain bodies, compliance with that duty could adversely affect the Adult Guardian's ability to prioritise referrals and to investigate those complaints and allegations where the adults concerned appear to be most at risk.

23.132 In addition, the imposition of a duty to investigate could create uncertainty about whether a complaint or an allegation has been sufficiently investigated to discharge the duty. For example, if the Adult Guardian is investigating what is, in essence, an allegation of fraud, where the adult's financial affairs involve complex financial structures, it might be difficult to say at what point the allegation has been 'investigated' — when an administrator has been appointed to secure the adult's assets, when sufficient evidence has been gathered to enable civil proceedings to be brought, or when sufficient evidence has been gathered to enable a prosecution to be brought.

## INVESTIGATION OF THE CONDUCT OF AN ATTORNEY OR ADMINISTRATOR AFTER THE ADULT HAS DIED

### Background

23.133 As noted above, the Adult Guardian has the function of investigating complaints and allegations about the actions of attorneys and administrators.<sup>695</sup> In particular, the Adult Guardian has the power to initiate an audit of the accounts of an attorney or administrator.<sup>696</sup>

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694 Submission 135.

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

696 *Guardianship and Administration Act 2000* (Qld) s 182.

23.134 However, the power to investigate the conduct of an attorney or administrator appears to cease when the adult dies. Section 182(1) of the *Guardianship and Administration Act 2000* (Qld) is expressed to apply to ‘an attorney for an adult under an enduring power of attorney who has power for a financial matter or to an administrator’. Section 51 of the *Powers of Attorney Act 1998* (Qld) provides that an enduring power of attorney is revoked when the principal dies.<sup>697</sup> As a result, a person who was an adult’s attorney would no longer hold that position after the adult’s death. Similarly, section 26(1)(d) of the *Guardianship and Administration Act 2000* (Qld) provides that the appointment of an administrator ends when the adult dies. As a result, a person who was an adult’s administrator would no longer be an administrator after the adult’s death.

23.135 The Adult Guardian has explained the focus of investigations in the following terms:<sup>698</sup>

The priority outcome sought from the investigations functions is the protection of an adult with impaired capacity from the risk of ongoing or future abuse, neglect or exploitation. Therefore, the focus is on achieving positive outcomes for the adult rather than the processes of investigation. The purpose of an investigation will not be to substantiate that abuse, neglect or exploitation has occurred with the perpetrator/s clearly identified, but to consider whether appropriate measures are in place, or need to be put into place, to ensure the ongoing protection of the rights and interests of the adult with impaired capacity.

23.136 This is consistent with the Adult Guardian’s primary statutory role which is ‘to protect the rights and interests of adults who have impaired capacity for a matter’.<sup>699</sup>

## Discussion Paper

23.137 In the Discussion Paper, the Commission raised the issue of whether the Adult Guardian should have power to investigate the actions of an attorney or administrator after the adult has died.

23.138 The Commission noted that the existence of such a power might operate as a measure to prevent neglect, exploitation or abuse. In particular, it suggested that the possibility that the actions of an attorney or administrator might be investigated after the adult has died might discourage the attorney or administrator from engaging in such conduct during the life of the adult.<sup>700</sup>

<sup>697</sup> It is an offence for an attorney to exercise a power that has been revoked: *Powers of Attorney Act 1998* (Qld) s 71. Section 71 provides for a maximum penalty of 200 penalty units, that is, \$20 000: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

<sup>698</sup> Office of the Adult Guardian, *Annual Report 2005–06* (2006) 20.

<sup>699</sup> *Guardianship and Administration Act 2000* (Qld) s 174(1).

<sup>700</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [23.102].

23.139 The Commission also acknowledged that the investigation of the conduct of an attorney or administrator and, in particular, the audit of accounts might be particularly important as a step in the process of seeking appropriate compensation for the adult's estate.<sup>701</sup> The Commission noted that section 106 of the *Powers of Attorney Act 1998* (Qld) provides, for example, that a court may order an attorney to compensate the principal or, if the principal has died, the principal's estate for a loss caused by the attorney's failure to comply with the legislation:

**106 Compensation for failure to comply**

- (1) An attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal's estate) for a loss caused by the attorney's failure to comply with this Act in the exercise of a power.
- (2) Subsection (1) applies even if the attorney is convicted of an offence in relation to the attorney's failure.
- (3) If the principal or attorney has died, the application for compensation must be made to a court within 6 months after the death.
- (4) If the principal and attorney have died, the application for compensation must be made to a court within 6 months after the first death.
- (5) A court may extend the application time.
- (6) Compensation paid under a court order must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.
- (7) In this section—

**attorney** means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

**court** means any court.

23.140 The Commission also noted that section 59 of the *Guardianship and Administration Act 2000* (Qld) similarly provides that the Tribunal or a court may order a guardian or an administrator for an adult to compensate the adult or, if the adult has died, the adult's estate for a loss caused by the guardian's or administrator's failure to comply with the legislation.<sup>702</sup>

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701 Ibid [23.103].

702 Ibid [23.105].

23.141 The Commission observed, however, that it may be only after the Adult Guardian has conducted an investigation or audit that a person would have sufficient grounds to seek compensation under either of those provisions.<sup>703</sup>

23.142 A further issue raised by the Commission was whether, if the Adult Guardian's power to investigate the conduct of an attorney or administrator is to continue after the adult has died, there should be a time limit on the Adult Guardian's ability to initiate an investigation. The Commission suggested that, from a practical point of view, it might be difficult for the Adult Guardian to conduct an investigation several years after the adult has died. However, it also noted that the legislation could be amended to provide that, within a specified period of time after an adult's death, the Adult Guardian may initiate an investigation of the conduct of the adult's attorney or administrator. In considering what is an appropriate period, the Commission suggested that a factor that might be relevant is the time within which an application to compensate an adult's estate must be made under section 106 of the *Powers of Attorney Act 1998* (Qld) or section 59 of the *Guardianship and Administration Act 2000* (Qld). Generally, an application must be made within six months after the adult's death.<sup>704</sup> However, if the attorney or administrator has also died, the application must be made within six months after the first death.<sup>705</sup>

23.143 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>706</sup>

- Should the Adult Guardian have power to investigate a complaint about the conduct of an attorney under an enduring power of attorney who had power for a financial matter, or an administrator, after the adult has died (including the power to require summaries and accounts under section 182 of the *Guardianship and Administration Act 2000* (Qld))?
- If so, should there be a time limit on the Adult Guardian's power to initiate such an investigation and, if so, what should that time limit be?

## Submissions

23.144 The Adult Guardian generally agreed with the tenor of the arguments outlined in the Commission's Discussion Paper in favour of enabling the Adult Guardian to investigate a complaint about the conduct of an attorney under an enduring power of attorney for a financial matter, or an administrator, after the adult has died.<sup>707</sup>

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<sup>703</sup> Ibid [23.106].

<sup>704</sup> *Powers of Attorney Act 1998* (Qld) s 106(3); *Guardianship and Administration Act 2000* (Qld) s 59(3).

<sup>705</sup> *Powers of Attorney Act 1998* (Qld) s 106(4); *Guardianship and Administration Act 2000* (Qld) s 59(4).

<sup>706</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 153.

<sup>707</sup> Submission 164.

23.145 The Department of Communities commented that the Adult Guardian 'should have the power to investigate a complaint for some time after an adult has died'.<sup>708</sup>

23.146 The former Acting Public Advocate considered that the conferral of such a power on the Adult Guardian would be appropriate.<sup>709</sup>

The power to investigate a complaint about the conduct of an attorney under an [enduring power of attorney] following the death of the adult is considered appropriate in order to enable compensation for the adult's estate to be sought, and to protect the interests of other vulnerable adults for whom the attorney may act/seek to act in the future. In some cases where financial abuse has occurred there may be no money available to compensate the estate as the attorney may have spent the funds.

23.147 The former Acting Public Advocate also suggested that it might be more appropriate for this power to be conferred on the Public Trustee:

It is further considered that such a power may more appropriately be given to the Public Trustee, given the investigation would relate to the conduct of the attorney as an administrator or attorney for financial decision-making.

23.148 A long-term Tribunal member was not opposed to giving the Adult Guardian the power to conduct investigations after the death of an adult, but queried how, if the adult had not previously been before the Tribunal, it would be established that the adult had impaired capacity.<sup>710</sup>

23.149 Pave the Way, the Endeavour Foundation and another respondent were also of the view that the Adult Guardian should have the power to investigate a complaint after the adult has died.<sup>711</sup> Pave the Way commented:<sup>712</sup>

The power to investigate complaints after an adult has died may be important for two reasons.

First, it will often be important that action which could benefit an adult's estate can be initiated or continued after the adult dies, particularly if significant assets are at stake. Typically this would be what the adult would have wanted.

Second, in many situations it will be important that a final determination can be made in response to allegations made against another family member or friend. If the investigation ceases before that final determination is made, that person's reputation could be tarnished without their having had an opportunity to clear their name.

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708 Submission 169.

709 Submission 160.

710 Submission 179.

711 Submissions 941, 135, 163.

712 Submission 135.

23.150 Another respondent commented that investigations of the Adult Guardian that are in progress when the adult dies should be completed. This respondent advised that he was the subject of an investigation, which terminated when the adult died, with the result that he was neither 'exonerated nor found guilty'. Of particular concern to him was that people who were contacted as part of the Adult Guardian's investigations may have assumed that he had been involved in some wrongdoing.<sup>713</sup>

23.151 The submissions suggested various time limits for initiating an investigation.

23.152 The Adult Guardian considered that, if such a power is conferred on the Adult Guardian, there should be a time limit on the Adult Guardian's power to initiate such an investigation, which should be a period of six months from the death of the adult.<sup>714</sup>

23.153 Similarly, the Department of Communities suggested that six months might be an appropriate time frame, as it would be consistent with the limitation period for making a claim for compensation.<sup>715</sup>

23.154 However, Pave the Way and the Endeavour Foundation suggested a time limit of 12 months,<sup>716</sup> while another respondent suggested a time limit of six years.<sup>717</sup>

### The Commission's view

23.155 The Commission considers it appropriate that the focus of the Adult Guardian's investigative powers is generally on the risk of ongoing, or future, neglect, exploitation or abuse to adults with impaired capacity.

23.156 In some situations, however, it may be desirable for the Adult Guardian to have the power to investigate the conduct of a person who was an adult's guardian, administrator or attorney, even though the adult has died. It is possible, for example, that the person's conduct could be relevant to whether another adult is at risk. The Commission also considers that there is some deterrent value in the Adult Guardian's investigative powers persisting after an adult's death.

23.157 For these reasons, the Commission is of the view that section 182 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that, notwithstanding the death of an adult, the Adult Guardian has the power to investigate the conduct of a person who was the adult's attorney with power for financial matters or who was the adult's administrator.

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713 Submission 108.

714 Submission 164.

715 Submission 169.

716 Submissions 135, 163.

717 Submission 94I.

23.158 Further, to avoid any doubt about the breadth of the investigative power conferred by section 180 of the *Guardianship and Administration Act 2000* (Qld), section 180 should be amended to provide that the Adult Guardian's power to investigate a complaint or an allegation is not limited by the death of the adult.

23.159 Given that the power to continue, or commence, an investigation after the death of an adult would be in the Adult Guardian's discretion, the Commission does not consider it necessary to impose a time limit for commencing an investigation. The length of time since an adult's death would no doubt be a relevant consideration for the Adult Guardian in deciding whether to commence an investigation, especially if witnesses had died or documents were no longer available.

23.160 Although the Commission's recommendations will ensure that the Adult Guardian has the power to investigate a complaint or an allegation even though the adult has died, the Commission accepts that, because adults with impaired capacity (as distinct from their beneficiaries) are the primary focus of the Adult Guardian's investigative powers, the extent to which the Adult Guardian may be able to initiate or continue an investigation after an adult has died may, in practical terms, be limited.

## **SUSPENSION OF AN ATTORNEY'S POWER UNDER AN ENDURING POWER OF ATTORNEY OR ADVANCE HEALTH DIRECTIVE**

### **The appropriateness of suspension by the Adult Guardian**

#### ***The law in Queensland***

23.161 As explained earlier in this chapter, section 195 of the *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, the Adult Guardian may, by written notice to an attorney, suspend the operation of all or some of an attorney's power under an enduring power of attorney or an advance health directive.<sup>718</sup> Section 195 provides:

#### **195 Suspension of attorney's power**

- (1) The adult guardian may, by written notice to an attorney, suspend the operation of all or some of an attorney's power for an adult if the adult guardian suspects, on reasonable grounds, that the attorney is not competent.
- (2) An attorney is not competent if, for example—
  - (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
  - (b) the attorney has neglected the attorney's duties or abused the attorney's powers, whether generally or in relation to a specific power; or

<sup>718</sup>

See [23.67]–[23.69] above.



- (c) the attorney has otherwise contravened this Act or the *Powers of Attorney Act 1998*.
- (3) The suspension may not be for more than 3 months.
- (4) The adult guardian may lift the suspension on the terms the adult guardian considers appropriate.
- (5) The attorney whose power has been suspended may apply to the tribunal and the tribunal may make the order it considers appropriate.
- (6) In this section—

**attorney** means an attorney under an enduring document.

23.162 In contrast, the Adult Guardian does not have any power to suspend the power of a guardian or an administrator. Instead, section 155 of the *Guardianship and Administration Act 2000* (Qld) confers on the Tribunal the power to suspend all or some of the power of a guardian or an administrator. That section provides:

**155 Suspension of guardianship order or administration order**

- (1) The tribunal may, by order,<sup>719</sup> suspend the operation of all or some of the power of a guardian or administrator (an **appointee**) for an adult if the tribunal suspects, on reasonable grounds, that the appointed person is not competent.
- (2) An appointee is not competent if, for example—
  - (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
  - (b) the appointee has neglected the appointee's duties or abused the appointee's powers, whether generally or in relation to a specific power; or
  - (c) the appointee has otherwise contravened this Act.
- (3) The tribunal may make an order under subsection (1) in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act.
- (4) The suspension may not be for more than 3 months.
- (5) During the suspension of the operation of power of a guardian, the adult guardian is taken to be the guardian for the adult for the exercise of the suspended power.

719

*Guardianship and Administration Act 2000* (Qld) s 115 provides that an application made to the Tribunal for, among other things, an order in relation to an adult about something in, or related to, the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) may be made by:

- the adult concerned; or
- unless the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) states otherwise — another interested person.

- (6) During the suspension of the operation of power of an administrator, the public trustee is taken to be the administrator for the adult for the exercise of the suspended power. (note added)

23.163 The different approaches between the two Acts in terms of the conferral of the power to suspend, on the one hand, the power of an attorney under an enduring document and, on the other hand, the power of a guardian or an administrator, may partly be explained by historical circumstances relating to the staged enactment of the guardianship legislation. The *Powers of Attorney Act 1998* (Qld) was the first of the two Acts to be passed. It made provision for an adult to make an enduring power of attorney and an advance health directive, and also created the office of the Adult Guardian.<sup>720</sup> The Act, as originally passed, conferred on the Adult Guardian the power to suspend an attorney's power under an enduring power of attorney or advance health directive.<sup>721</sup> At that time, the Guardianship and Administration Tribunal had not yet come into existence.

23.164 When the *Guardianship and Administration Act 2000* (Qld) was enacted some two years later, it established the Tribunal. It also omitted from the *Powers of Attorney Act 1998* (Qld) the provisions of that Act dealing with the establishment of the Adult Guardian and the Adult Guardian's powers.<sup>722</sup> Those provisions were relocated in the *Guardianship and Administration Act 2000* (Qld) as Chapter 8 of that Act. Although the power to suspend the power of an attorney is now found in section 195 of the *Guardianship and Administration Act 2000* (Qld), the scope of the power itself was not changed.

23.165 The fact that the Tribunal did not exist when the *Powers of Attorney Act 1998* (Qld) was passed might explain why the power to suspend an attorney's power was originally conferred on the Adult Guardian, although it does not, of course, explain why the power was not transferred to the Tribunal when it was established.

23.166 Although the Adult Guardian may suspend an attorney's power under an enduring power of attorney or advance health directive, only the Tribunal and the Supreme Court have the power to remove an attorney and appoint a new attorney, or revoke all or part of an enduring power of attorney or advance health directive.<sup>723</sup>

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

23.167 The guardianship legislation of the other Australian jurisdictions does not confer on the Public Advocate or the Public Guardian, as the case may be, the power to suspend all or some of an attorney's power.

<sup>720</sup> *Powers of Attorney Act 1998* (Qld) s 126 (Act as passed).

<sup>721</sup> *Powers of Attorney Act 1998* (Qld) s 142(2) (Act as passed).

<sup>722</sup> *Guardianship and Administration Act 2000* (Qld) s 263, sch 3 cl 29 (Act as passed), which omitted *Powers of Attorney Act 1998* (Qld) ch 7.

<sup>723</sup> *Powers of Attorney Act 1998* (Qld) ss 109A, 116(a), (d).

23.168 On the contrary, the legislation in three jurisdictions — New South Wales, Tasmania and Victoria — confers an express power on the Tribunal (or Board) to suspend an attorney's power.

#### *New South Wales*

23.169 In New South Wales, the Guardianship Tribunal has the power to review the appointment of an enduring guardian (the equivalent of an attorney under an enduring power of attorney for personal matters) on its own motion or on the request 'of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor'.<sup>724</sup> Before carrying out the review, the Tribunal may suspend the appointment or purported appointment of the enduring guardian until the Tribunal has revoked or confirmed the appointment.<sup>725</sup>

#### *Tasmania*

23.170 In Tasmania, section 33 of the *Powers of Attorney Act 2000* (Tas) gives the Guardianship Board wide powers to make orders on the review of an enduring power of attorney (the equivalent of an enduring power of attorney for financial matters). These include the power to suspend the operation of an enduring power of attorney if the Board considers it proper to do so by reason of urgency.<sup>726</sup>

#### *Victoria*

23.171 In Victoria, the Victorian Civil and Administrative Tribunal has the power, in specified circumstances, to suspend:

- an enduring power of attorney (the equivalent of an enduring power of attorney for financial matters), either generally or in respect of a specific matter;<sup>727</sup>
- an enduring power of attorney (medical treatment);<sup>728</sup> and
- the authority of an enduring guardian (the equivalent of an attorney under an enduring power of attorney for personal matters).<sup>729</sup>

### **Discussion Paper**

23.172 In the Discussion Paper, the Commission referred to the Adult Guardian's function of investigating complaints and allegations about the actions of attorneys, and suggested that the power to suspend all or some of an attorney's power might be seen as part of the Adult Guardian's investigative function. It also observed

<sup>724</sup> *Guardianship Act 1987* (NSW) s 6J(1).

<sup>725</sup> *Guardianship Act 1987* (NSW) s 6J(3).

<sup>726</sup> *Powers of Attorney Act 2000* (Tas) s 33(4)(a).

<sup>727</sup> *Instruments Act 1958* (Vic) s 125Z(c).

<sup>728</sup> *Medical Treatment Act 1988* (Vic) s 5C(1)(a).

<sup>729</sup> *Guardianship and Administration Act 1986* (Vic) s 35E(2)(c).

that, if it is necessary to suspend an attorney's power quickly in order to protect the adult's interests, suspension by the Adult Guardian avoids the need for a Tribunal hearing and the time that would be involved in convening the hearing.<sup>730</sup>

23.173 On the other hand, the Commission suggested that the conferral of this power on the Tribunal would be consistent with the Tribunal's power under section 155 of the *Guardianship and Administration Act 2000* (Qld) to suspend the power of a guardian or an administrator.<sup>731</sup>

23.174 The Commission therefore sought submissions on the following questions:<sup>732</sup>

- Should the Adult Guardian have 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 power of attorney or an advance health directive?
- If not, should the *Guardianship and Administration Act 2000* (Qld) be amended:
  - to repeal section 195; and
  - to provide that the Tribunal may, by order, suspend the operation of all or some of an attorney's power under an enduring power of attorney or an advance health directive?

### **Submissions**

23.175 The Adult Guardian stated in her submission that the number of enduring powers of attorney suspended over the last three years was 17 in 2006–07, 26 in 2007–08 and 21 in 2008–09. She also explained that, most frequently, suspensions occur as a result of financial issues, for example, following notification of large unpaid debts, very often to nursing homes. The Adult Guardian considered that the current approach was very efficient, and that the Adult Guardian should retain the power to suspend an attorney's power under an enduring document.<sup>733</sup>

The Adult Guardian has worked diligently over the last three years to streamline the investigation process. Currently 80% of matters are completed within 6 months.

Any interested person can bring an application to the tribunal at any time concerning the decisions being taken by an attorney. The role of the Adult Guardian in this context is to investigate those matters where the suspicion of

<sup>730</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.103].

<sup>731</sup> Ibid [18.104].

<sup>732</sup> Ibid 156.

<sup>733</sup> Submission 164.

inappropriate decision-making is not sufficiently apparent for an application to be heard by the tribunal without an investigation.

Overwhelmingly complaints within this office relate to guardianship and in particular accommodation and contact decisions. Over the last three years there have been very few complaints about investigations and those that are received relate predominantly to the failure of the Adult Guardian to suspend because we have been unable to rebut the presumption of capacity or, less frequently, to substantiate the allegations. The current suspension process is a very efficient way to manage inappropriate conduct by an attorney. Given the lack of criticism of the process and the relatively high uptake of EPAs across the community, and high estimates from the Elder Abuse Prevention Unit about the levels of elder abuse in particular, the Adult Guardian submits that the power to suspend is a relatively effective and efficient response and should remain with the Adult Guardian.

23.176 The Endeavour Foundation was also of the view that the Adult Guardian should retain the power to suspend the power of an attorney under an enduring power of attorney.<sup>734</sup>

23.177 However, Pave the Way and another respondent considered that the Adult Guardian should not have the power to suspend an attorney's power under an enduring document.<sup>735</sup> Pave the Way commented that this power should be vested in the Tribunal only, which could act quickly, if necessary.<sup>736</sup>

23.178 The Guardianship and Administration Reform Drivers ('GARD') similarly suggested that the Adult Guardian should not have the power to suspend an enduring power of attorney.<sup>737</sup> In GARD's view, it is more appropriate for that power to be exercised by the Tribunal:<sup>738</sup>

In many circumstances an enduring power of attorney is one of the clearest indications of the adult's intentions and should be treated as such. There needs to be stronger evidence [for suspension] combined with the use of clear procedures and criteria, before such a forceful power is invoked. It does not seem to be an appropriate power to be exercised by a body such as the Adult Guardian. The exercise of such a forceful power, which not only has vast ramifications on the lives of the adult and his/her family, but also goes against the express wishes of the adult, should be reserved for an entity such as a Court or the Tribunal. Given the nature of this power and the impact that such a decision could have, it is more appropriate that it be the subject of consideration by an independent body such as the Tribunal. These should be the only entities capable of suspension of such an important entitlement, that is, the entitlement of a capable person to expressly stipulate their wishes as to who will make decisions on their behalf in the event of them becoming incapacitated.

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734 Submission 163.

735 Submissions 941, 135.

736 Submission 135.

737 GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents for People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network.

738 Submission C24.

23.179 GARD also observed that no other Australian jurisdiction confers on its equivalent of the Adult Guardian the power to suspend an enduring power of attorney.

23.180 The former Acting Public Advocate did not express a view about whether the power to suspend the power of an attorney should remain with the Adult Guardian or be conferred on the Tribunal. However, he commented that, if the power were conferred on the Tribunal, it would be necessary for such an application to be heard urgently to avoid the occurrence of financial abuse.<sup>739</sup>

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

23.181 Because the power to suspend the power of an attorney under an enduring document is a quasi-judicial power, the Commission considered whether it would be more appropriate for that power to be exercised by the Tribunal, rather than by the Adult Guardian. This approach would be consistent with the approach taken in the other Australian jurisdictions, where the Public Advocate or Public Guardian, as the case may be, does not have any power to suspend an attorney's power.

23.182 However, in favour of the retention of this power by the Adult Guardian is its consistency with the Adult Guardian's function of protecting adults from neglect, exploitation and abuse,<sup>740</sup> and the efficiency that it promotes in enabling an adult's interests to be safeguarded. In addition, the Commission understands that the practice of the Adult Guardian in relation to suspensions is to apply immediately for the appointment of a guardian or an administrator, as the case may be, for the adult. Although the suspension may be for up to three months, that allows the Tribunal sufficient time to schedule a hearing for the appointment application. If the Adult Guardian did not have the power to suspend, or had only a limited power, instead of applying for the appointment of a guardian or an administrator, the Adult Guardian would instead be applying for an interim order appointing a guardian or an administrator.

23.183 On balance, although there are arguments supporting both approaches, the Commission has decided that promoting and safeguarding the interests of the adult favours the retention of this power by the Adult Guardian.

23.184 However, the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, if the Adult Guardian has suspended the power of an attorney, the suspension may not be extended by a further exercise of the Adult Guardian's power to suspend.<sup>741</sup> If a longer period is required, the Adult Guardian should apply to the Tribunal for the appointment of a guardian or an administrator.

23.185 In view of this recommendation, it is not necessary to consider the issues raised in the Discussion Paper about the procedure that would apply if the power to

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<sup>739</sup> Submission 160.

<sup>740</sup> See *Guardianship and Administration Act 2000* (Qld) s 174(2)(a).

<sup>741</sup> In contrast s 129 of the *Guardianship and Administration Act 2000* (Qld) enables the Tribunal to renew an interim order in exceptional circumstances.

suspend an attorney's power were removed from the Adult Guardian and transferred to the Tribunal.<sup>742</sup>

## The test for suspension

### *The law in Queensland*

23.186 The test for suspension of an enduring power of attorney under section 195(1) of the *Guardianship and Administration Act 2000* (Qld) is that the Adult Guardian 'suspects, on reasonable grounds, that the attorney is not competent'.

23.187 Section 195(2) provides that an attorney is not competent if, for example:

- a relevant interest of the adult has not been, or is not being, adequately protected;
- the attorney has neglected the attorney's duties or abused the attorney's powers; or
- the attorney has otherwise contravened the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

23.188 The test in section 195(1) of the *Guardianship and Administration Act 2000* (Qld) is consistent with the test in section 155(1) for the suspension by the Tribunal of all or some of the power of a guardian or an administrator.<sup>743</sup>

### *Discussion Paper*

23.189 In the Discussion Paper, the Commission suggested that the suspension of an attorney's power, even for a short period, is likely to disrupt the arrangements put in place to meet the adult's personal and financial decision-making needs. However, it noted that the disruption of these arrangements needed to be balanced against the importance of protecting the adult, and his or her property, from neglect, exploitation or abuse.<sup>744</sup>

23.190 The Commission referred to two preliminary submissions that had been made about the test for suspension.<sup>745</sup>

23.191 It noted that GARD had suggested that enduring powers of attorney should not be too readily suspended:<sup>746</sup>

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<sup>742</sup> See Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 158.

<sup>743</sup> *Guardianship and Administration Act 2000* (Qld) s 155 is set out at [23.162] above.

<sup>744</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.116].

<sup>745</sup> Ibid [18.114]–[18.115].

<sup>746</sup> Submission C24.

It is imperative that a decision-maker who is granted such a significant power ensures that the power is exercised properly, with due care and based upon proper evidence. GARD believes that in order to ensure this occurs, statutory based criteria and procedures should be provided for in the Queensland Act which include the requirement that there be strong evidence in support of any such decision.

23.192 It also noted that Queensland Health had suggested that the *Guardianship and Administration Act 2000* (Qld) should be amended to allow an enduring power of attorney to be suspended if the threat to the adult's property is immediate.<sup>747</sup>

Some clinicians present the argument that the Adult Guardian's suspension powers are not immediate enough to protect people with impaired capacity from financial abuse or exploitation. Clinicians suggest that upon receipt of concerns about alleged financial abuse, the Adult Guardian should be able to respond within 24 hours and immediately suspend the attorney's powers until the matter has been investigated.

Queensland Health considers that natural justice is an essential component in investigation matters. However, where there may be imminent risk to the adult's finances or property, the principles of natural justice should yield to the protection of the adult.

... An additional provision in the [*Guardianship and Administration Act 2000* (Qld)] that authorises the Adult Guardian to immediately suspend an attorney, in circumstances where the threat to the adult's property is immediate and is necessary for the continued protection of the adult's person or property.

23.193 In the Discussion Paper, the Commission sought submissions on whether the test under section 195 of the *Guardianship and Administration Act 2000* (Qld) for the suspension of an attorney's power (that is, that the Adult Guardian 'suspects, on reasonable grounds, that the attorney is not competent') is appropriate.<sup>748</sup>

### **Submissions**

23.194 The Adult Guardian, Pave the Way and the Endeavour Foundation considered that the current test in section 195 of the *Guardianship and Administration Act 2000* (Qld) is appropriate.<sup>749</sup>

23.195 The Adult Guardian referred, in her submission, to the issue raised by Queensland Health at [23.192] above, and acknowledged the frustration that clinicians experience at times. She explained, however, that the Adult Guardian sometimes lacks jurisdiction to conduct an investigation because it cannot be established that the adult has impaired capacity.<sup>750</sup>

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747 Submission C87B.

748 Ibid 160.

749 Submissions 135, 163, 164.

750 Submission 164.



Almost half of all referrals are made by family members. Currently about half of the investigations initiated by the office of the Adult Guardian are substantiated. Most frequently the matter is concluded when the investigator is unable to rebut the presumption of capacity.

23.196 However, the former Acting Public Advocate considered that the Adult Guardian has a very broad discretion under section 195 of the *Guardianship and Administration Act 2000* (Qld), and that the test ‘needs to be clarified and potentially narrowed’.<sup>751</sup>

While the current test for suspension offers immediate protection to an adult in circumstances where there is an imminent danger or risk to their property, finances or health, safety or wellbeing, it may also result in an attorney’s powers being suspended too readily. Consideration could be given to clarifying the definition of ‘reasonable grounds’ in the GAA to provide greater guidance as to the circumstances in which it is appropriate for suspension of an attorney to occur. In particular, there should be strong evidence of the abuse, neglect or exploitation of the adult, and/or the attorney’s incompetence to continue to act.

23.197 Another respondent commented that she disagreed with the current test for suspension, but did not explain why.<sup>752</sup>

### ***The Commission’s view***

23.198 The Commission considers that both aspects of the test in section 195(1) of the *Guardianship and Administration Act 2000* (Qld) for the suspension of an attorney’s power are appropriate. The requirement to suspect the relevant matter, *on reasonable grounds*, ensures that the power cannot be exercised without proper cause. The Commission also considers it appropriate that the suspicion is required to be held about the incompetence of the attorney, which is defined in section 195(2) to include various matters that are relevant to whether the adult is likely to be the subject of neglect, exploitation or abuse.

## **EXTERNAL REVIEW OF THE ADULT GUARDIAN’S DECISIONS**

### **Background**

23.199 During the course of this review, a number of submissions have raised concerns about the decision-making function and operations of the Adult Guardian. Concerns have been raised about a variety of matters, including:

- decisions by the Adult Guardian to restrict contact between family members and the adult;<sup>753</sup>

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751 Submission 160.

752 Submission 94I.

753 Submissions C17, 11, 132.

- decisions by the Adult Guardian about the adult's accommodation;<sup>754</sup>
- decisions by the Adult Guardian to remove and relocate the adult;<sup>755</sup>
- a failure to protect the adult from abuse and exploitation;<sup>756</sup>
- lack of consultation with family members;<sup>757</sup>
- insufficient information given to family members (including about matters such as the discharge of the adult from hospital or the relocation of the adult to new accommodation);<sup>758</sup>
- high turnover of delegated guardians or case workers for the adult,<sup>759</sup> which can lead to frustration in dealing with the Office of the Adult Guardian<sup>760</sup> and make it difficult for family members to establish any rapport with the relevant case worker;<sup>761</sup>
- appointing services providers who are considered by the adult's family to be unsuitable, leading to conflict with the family;<sup>762</sup>
- taking the side of service providers;<sup>763</sup> and
- a lack of oversight of the Adult Guardian's activities<sup>764</sup> and a lack of accountability and scrutiny.<sup>765</sup>

23.200 Queensland Parents for People with a Disability Inc commented that many of the issues raised by parents in that organisation highlight a lack of transparency in decision-making in the Office of the Adult Guardian. It suggested that transparency in all decision-making is urgently required.<sup>766</sup>

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754 Submissions C16B, C17, C91, C110, C124, 2, 18, 31, 89.

755 Submissions C17, C100, 89.

756 Submissions C6, C33, 4, 19, 47, 119, 120.

757 Submissions C3, C58, C115, C142, 2, 110, 132.

758 Submissions C16, C110, C142, 11, 18.

759 Submissions C19, C115, C142, C147, 110, 167. Two respondents referred to separate instances where the adult had six case workers in a two year period: C147, 110.

760 Submission C78.

761 Submission C142.

762 Submission 132.

763 Submission C3.

764 Submission C4.

765 Submission 31.

766 Submission 167.

23.201 The Cerebral Palsy League expressed a similar view:<sup>767</sup>

Clients, advocates and families are wary of the AG [Adult Guardian] system because there is no openness, transparency and accountability. ... [O]pportunities for scrutiny about failures and ways to improve the system are lost and squandered.

23.202 Queensland Advocacy Incorporated also commented on the need for greater transparency in decision-making by the Adult Guardian. It suggested that the Adult Guardian should be required to give reasons for decisions.<sup>768</sup>

Policies and procedures for decision making by staff of the Office of the Adult Guardian should be established, congruent with the General Principles of the Act. These should be available to relevant bodies and to interested parties in the interests of accountability and transparency. The Office of the Adult Guardian will provide a statement of reasons in relation to major or life defining decisions if requested by detailing:

- the consultation with relevant parties;
- the reasons for the decision;
- why the decision is in the best interest of the adult;
- the impact of the decision on the person, the family or others; and
- how the Adult Guardian's policies have been met.

23.203 It should be noted that the Commission has also received positive feedback about the Adult Guardian. One respondent said that he had a good relationship with the Adult Guardian and that he was grateful for what the Adult Guardian did as his mother's guardian.<sup>769</sup> Another respondent commented that the Adult Guardian had acted efficiently and quickly to secure accommodation for her father.<sup>770</sup> Yet another commented that she was able to have significant input into the decisions made by the Adult Guardian as her mother's guardian.<sup>771</sup>

23.204 Generally, however, it would be fair to say that the views expressed by respondents have revealed dissatisfaction with a number of the decisions made by the Adult Guardian and, in many cases, frustration and distress about their dealings with the Adult Guardian. It is probably inevitable that a review of this kind will attract negative feedback, and it cannot be assumed that this is necessarily representative of the wider community's perception of the Adult Guardian's guardianship services.

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767 Submission C86.

768 Submission 162.

769 Submission 20.

770 Submission C114.

771 Submission C147.

23.205 Further, it should be noted that this Commission's review is not an operational review of the Adult Guardian or the Office of the Adult Guardian. Accordingly, it has not been part of this review to investigate the substance of the concerns that have been raised; rather, the Commission's focus is on ensuring that the guardianship legislation provides a strong and effective means of ensuring transparency in relation to decision-making and of promoting accountability in decision-making.

23.206 It is in this context that the Commission has examined the current mechanisms for reviewing the personal decisions made for an adult by the Adult Guardian, as well as the comprehensive regime provided under the QCAT Act for reviewing 'reviewable decisions'.

### The law in Queensland

23.207 If a person is dissatisfied with a decision made by the Adult Guardian, there are currently several mechanisms by which the person may seek to have the decision changed.

#### ***Mechanisms under the guardianship legislation***

23.208 If the Adult Guardian is a guardian or an attorney, the adult concerned or an interested person may apply to the Tribunal under section 115 of the *Guardianship and Administration Act 2000* (Qld) for an order directing the Adult Guardian to make a decision about the matter in a particular way. The Tribunal's power to give advice or directions is found in section 138 of the Act.<sup>772</sup>

23.209 In *Re WFM*,<sup>773</sup> the Tribunal held that 'its power to give directions extends to how a decision maker should exercise its powers, and to how a matter for which a decision maker has been appointed should be decided'.<sup>774</sup>

23.210 Further, a person who is dissatisfied with a decision of the Adult Guardian may seek (although indirectly) to have a different decision made about a matter by applying for the removal of the Adult Guardian as the adult's guardian or attorney. If the Adult Guardian is a guardian, application may be made to the Tribunal under section 29 of the *Guardianship and Administration Act 2000* (Qld) for a review of the appointment of the Adult Guardian. On such a review, the Tribunal may remove the appointed guardian (in this case, the Adult Guardian) and make a new appointment.<sup>775</sup> If the Adult Guardian is an attorney, application may be made to the Tribunal or the Supreme Court to remove the Adult Guardian and appoint a new

<sup>772</sup> *Guardianship and Administration Act 2000* (Qld) s 138 is set out at [20.31] above.

<sup>773</sup> [2006] QGAAT 54. That decision and the Tribunal's power to give directions are considered in Chapter 20 of this Report.

<sup>774</sup> *Re WFM* [2006] QGAAT 54, [33].

<sup>775</sup> *Guardianship and Administration Act 2000* (Qld) s 31(3)(b)(ii)–(iii).

attorney or to remove a power from the Adult Guardian and to give the removed power to another attorney or to a new attorney.<sup>776</sup>

23.211 Because the Adult Guardian may be appointed only if there is no other appropriate person available for appointment,<sup>777</sup> once the Adult Guardian has been appointed as an adult's guardian, it might not be feasible for the Adult Guardian to be removed. The Tribunal has observed that 'the removal of a decision maker of last resort is not in reality an effective option for the Tribunal'.<sup>778</sup> Moreover, the fact that the Tribunal might, if it were the decision-maker, make a different decision, does not of itself mean that the Adult Guardian is generally inappropriate to be the adult's guardian.

### ***Internal review within the Office of the Adult Guardian***

23.212 In addition to these mechanisms discussed above, there are also some options for internal review of the Adult Guardian's decisions within the Office of the Adult Guardian.

23.213 If a person considers that a decision was made on incorrect or incomplete information, he or she may seek an internal review of the decision. An internal review may occur if the information that the person provides is not already known to the officer who made the decision or if the officer's manager considers that there are grounds for a review.<sup>779</sup>

### ***Investigation by the Ombudsman***

23.214 A person who is still dissatisfied following an internal review by the Office of the Adult Guardian may make a complaint to the Ombudsman.

23.215 Although the Ombudsman does not have the power to change the decision of an agency,<sup>780</sup> the Ombudsman does have other powers if the Ombudsman considers that the administrative action to which his or her investigation relates:<sup>781</sup>

- (a) was taken contrary to law; or
- (b) was unreasonable, unjust, oppressive, or improperly discriminatory; or
- (c) was in accordance with a rule of law or a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory in the particular circumstances; or

<sup>776</sup> *Powers of Attorney Act 1998* (Qld) ss 110, 116(a)–(b).

<sup>777</sup> *Guardianship and Administration Act 2000* (Qld) s 14(2).

<sup>778</sup> *Re WFM* [2006] QGAAT 54. It is possible, however, that an appropriate person who was not available when the Adult Guardian was appointed has since become available.

<sup>779</sup> Department of Justice and Attorney-General, Guardianship <<http://www.justice.qld.gov.au/justice-services/guardianship/adult-guardian/reason-for-decisions>> at 1 September 2010.

<sup>780</sup> See *Ombudsman Act 2001* (Qld) s 12.

<sup>781</sup> *Ombudsman Act 2001* (Qld) s 49(2).

- (d) was taken—
  - (i) for an improper purpose; or
  - (ii) on irrelevant grounds; or
  - (iii) having regard to irrelevant considerations; or
- (e) was an action for which reasons should have been given, but were not given; or
- (f) was based wholly or partly on a mistake of law or fact; or
- (g) was wrong.

23.216 In those circumstances, the Ombudsman can give a report to the principal officer of an agency (such as the Adult Guardian) stating the action that the Ombudsman considers should be taken and the reasons the action should be taken, and making the recommendations that the Ombudsman considers appropriate.<sup>782</sup> Where such a report has been given, the Ombudsman may ask the agency's principal officer to notify the Ombudsman within a stated time of the steps taken or proposed to be taken to give effect to the recommendations or, if no steps, or only some steps, have been or are proposed to be taken to give effect to the recommendations, the reasons for not taking all the steps necessary to give effect to the recommendations.<sup>783</sup>

23.217 If it appears to the Ombudsman that no steps that the Ombudsman considers appropriate have been taken within a reasonable time after giving the agency's principal officer the report and, within that time, the Ombudsman has considered any comments made by or for the principal officer and the Ombudsman considers it appropriate, the Ombudsman may give the Premier a copy of the report and a copy of any comments made by the agency's principal officer.<sup>784</sup>

## The law in other jurisdictions

### *New South Wales*

23.218 New South Wales is the only Australian jurisdiction that provides a formal external mechanism for reviewing the decisions of the New South Wales Public Guardian.<sup>785</sup> Section 80A of the *Guardianship Act 1987* (NSW) provides that prescribed decisions of the Public Guardian made in connection with the Public Guardian's functions under that Act as guardian are reviewable by the New South Wales Administrative Decisions Tribunal ('the ADT'). Section 80A provides:

<sup>782</sup> *Ombudsman Act 2001* (Qld) s 50(1).

<sup>783</sup> *Ombudsman Act 2001* (Qld) s 51(2).

<sup>784</sup> *Ombudsman Act 2001* (Qld) s 51(3).

<sup>785</sup> It also provides a formal external mechanism for reviewing decisions of the NSW Trustee and Guardian: see *NSW Trustee and Guardian Act 2009* (NSW) s 62.

**80A Review by ADT of guardianship decisions of Public Guardian**

- (1) An application may be made to the ADT for a review of a decision of the Public Guardian that:
- (a) is made in connection with the exercise of the Public Guardian's functions under this Act as a guardian, and
  - (b) is of a class of decision prescribed by the regulations for the purposes of this section.
- (2) An application under this section may be made by:
- (a) the person to whom the decision relates, or
  - (b) the spouse of the person, or
  - (c) the person who has the care of the person to whom the decision relates, or
  - (d) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

23.219 The *Guardianship Regulation 2005* (NSW) provides that all decisions made by the Public Guardian 'in connection with the exercise of the Public Guardian's functions under the Act as a guardian' are prescribed for the purposes of section 80A of the *Guardianship Act 1987* (NSW).<sup>786</sup>

23.220 Section 55 of the *Administrative Decisions Tribunal Act 1997* (NSW) provides when an application for a review of a decision may be made. It includes, as a requirement for applying for a review:<sup>787</sup>

- (b) where the person was entitled to seek an internal review of the decision—the person has duly applied for such a review and the review is taken to have been finalised under section 53(9).

23.221 The reference in section 55(1)(b) to the entitlement to seek an internal review of the decision is a reference to the internal review process provided by section 53 of the *Administrative Decisions Tribunal Act 1997* (NSW). Under section 53(6), a decision-maker (who is referred to in the Act as 'the administrator') must, within 21 days after the application for internal review is lodged (or such other period as the administrator and applicant agree on), notify the applicant in writing of the outcome of the internal review, the reasons for the decision in the internal review, and the right of the person to have the decision reviewed by the Tribunal.

23.222 Section 53(9) provides that an internal review is taken to be finalised if:

<sup>786</sup> *Guardianship Regulation 2005* (NSW) reg 17.

<sup>787</sup> *Administrative Decisions Tribunal Act 1997* (NSW) s 55(1)(b).

- (a) the applicant is notified of the outcome of the review under subsection (6), or
- (b) the applicant is not notified of the outcome of the review within 21 days after the application for the review is lodged (or such other period as the administrator and person agree on).

23.223 The requirement for an internal review to have been finalised before a person may apply to the ADT for the review of a decision by the Public Guardian ensures that only those matters that are not capable of being resolved within the Office of the Public Guardian can proceed to a review before the ADT.

### **Background to the New South Wales amendments**

23.224 Section 80A of the *Guardianship Act 1987* (NSW) was inserted by the *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW) in response to a recommendation in a report by the Public Bodies Review Committee of the New South Wales Parliament (the 'Committee') that the decisions of the Public Guardian and Protective Commissioner should be reviewable.<sup>788</sup> The Committee noted a range of concerns that had been raised about the Public Guardian, including:<sup>789</sup>

- a perceived lack of information provided and explained to parties about guardianship;
- concern about Public Guardian staff being unaware of client circumstances; and
- a concern expressed in general terms by a number of respondents that:

rhetoric about maintenance of family relationships in the Act and in the Public Guardian's literature is eroded in practical terms by a perceived organisational philosophy that applies stereotypes, fails to adequately take into account the view of family members, or judges these to be of less value than people providing services to a person under guardianship ...

23.225 The Committee noted that there had been improvements in the Public Guardian's complaint handling systems.<sup>790</sup> However, it also noted that:<sup>791</sup>

<sup>788</sup> Parliament of New South Wales, Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner*, Report (2001). The report is available at <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8db02477d7af85c7ca256cf500146a97/\\$FILE/Committee%20Report%2001%20October%202001%20-%20Inquiry%20into%20General%20Matters.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8db02477d7af85c7ca256cf500146a97/$FILE/Committee%20Report%2001%20October%202001%20-%20Inquiry%20into%20General%20Matters.pdf)> at 1 September 2010.

<sup>789</sup> Ibid 47.

<sup>790</sup> Ibid 50.

<sup>791</sup> Ibid 53.



Submissions to the Committee indicate significant public concern in respect to people's inability to take their complaints to an outside organisation. This inability has led to frustration and continued disaffection, irrespective of the many accomplishments of [the office].

23.226 The Committee considered that, even if a complaint is unresolved by external review, 'at least the process by which an external body can be involved may often significantly reduce levels of tension or ill-will'.<sup>792</sup> It therefore recommended that the Administrative Decisions Tribunal of New South Wales (the 'ADT') should be the first point of external appeal from decisions of the Public Guardian.<sup>793</sup> It noted in this regard that the ADT was established 'to provide a central, cost effective and convenient way for people to obtain a review of administrative decisions'.<sup>794</sup>

23.227 The Committee also considered that there was a need for an external agency to monitor the complaints handling processes and to identify and assist in the resolution of any systemic deficiencies.<sup>795</sup> It noted that, although the New South Wales Ombudsman cannot reverse a decision or substitute a new decision, the Ombudsman has an important role in reviewing the decision-making processes of agencies and reporting on any deficiencies observed, and of working with agencies to resolve those issues.<sup>796</sup> It therefore recommended that the *Ombudsman Act 1974* (NSW) should be amended to make the Office of the Public Guardian subject to the scrutiny of the New South Wales Ombudsman.<sup>797</sup>

### The Tribunal's review jurisdiction under the QCAT Act

23.228 One of the objects of the QCAT Act is 'to enhance the openness and accountability of public administration'.<sup>798</sup> The Tribunal has, in addition to its original and appeals jurisdiction, a review jurisdiction that enables it to review decisions made by certain entities.<sup>799</sup>

23.229 Although the decisions of the Adult Guardian are not reviewable decisions for the purposes of the QCAT Act, the extension of that jurisdiction to decisions (or to certain decisions) of the Adult Guardian was considered in the Discussion Paper, being a similar jurisdiction to that exercised by the Administrative Decisions

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792 Ibid 54.

793 Ibid 56, Recommendation 17.

794 Ibid 54.

795 Ibid 55.

796 Ibid.

797 Ibid 56, Recommendation 18.

798 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(e).

799 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 9(2). As explained in Chapter 22 of this Report, the Tribunal's jurisdiction includes the jurisdiction under ch 3, pt 3, div 2 of the *Guardianship and Administration Act 2000* (Qld) to review the appointment of guardians and administrators. The jurisdiction under ch 3, pt 3, div 2 forms part of the Tribunal's original jurisdiction, rather than its review jurisdiction: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 10(2).

Tribunal in New South Wales in relation to decision of the Public Guardian in that State.<sup>800</sup>

### ***The nature of the Tribunal's review jurisdiction***

23.230 Section 17 of the QCAT Act provides:

#### **17 Generally**

- (1) The tribunal's review jurisdiction is the jurisdiction conferred on the tribunal by an enabling Act to review a decision made or taken to have been made by another entity under that Act.
- (2) For this Act, a decision mentioned in subsection (1) is a **reviewable decision** and the entity that made or is taken to have made the decision is the **decision-maker** for the reviewable decision.

23.231 Accordingly, for the Tribunal to have jurisdiction to review a decision made by a particular entity, it is necessary for another Act (referred to in the QCAT Act as an 'enabling Act') to confer jurisdiction on the Tribunal to review the decisions of that entity.

23.232 To make the Adult Guardian's decisions reviewable by the Tribunal, it would therefore be necessary to amend the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) to provide that the Adult Guardian's decisions are reviewable decisions for the purposes of the QCAT Act. In that context, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) would be enabling Acts.

23.233 The Tribunal's review jurisdiction may be exercised if a person applies to the Tribunal under the QCAT Act to exercise its review jurisdiction for a reviewable decision.<sup>801</sup> A person may apply to the Tribunal to exercise its review jurisdiction for a reviewable decision, and the Tribunal may deal with the application, even if the decision is also the subject of a complaint, preliminary inquiry or investigation under the *Ombudsman Act 2001* (Qld).<sup>802</sup>

23.234 In exercising its review jurisdiction, the Tribunal:<sup>803</sup>

- must decide the review in accordance with the QCAT Act and the enabling Act under which the reviewable decision was made;
- may perform the functions conferred on the Tribunal by the QCAT Act or the relevant enabling Act; and
- has all the functions of the decision-maker for the reviewable decision.

<sup>800</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.138]–[18.151].

<sup>801</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 18(1).

<sup>802</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 18(2).

<sup>803</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 19.

23.235 The purpose of the review of a reviewable decision 'is to produce the correct and preferable decision'.<sup>804</sup> The Tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.<sup>805</sup>

### ***Decision-maker's obligations on a review***

23.236 Section 21 of the QCAT Act provides that the decision-maker for a reviewable decision must use his or her best endeavours to assist the Tribunal so that it can make its decision on the review. The section sets out the nature of the assistance that must be provided, including the provision to the Tribunal of a written statement of the reasons for the decision and any document or thing in the decision-maker's possession or control that may be relevant to the Tribunal's review of the decision:

#### **21 Decision-maker must help tribunal**

- (1) In a proceeding for the review of a reviewable decision, the decision-maker for the reviewable decision must use his or her best endeavours to help the tribunal so that it can make its decision on the review.
- (2) Without limiting subsection (1), the decision-maker must provide the following to the tribunal within a reasonable period of not more than 28 days after the decision-maker is given a copy of the application for the review under section 37—
  - (a) a written statement of the reasons for the decision;
  - (b) any document or thing in the decision-maker's possession or control that may be relevant to the tribunal's review of the decision.
- (3) If the tribunal considers there are additional documents or things in the decision-maker's possession or control that may be relevant to the tribunal's review of the reviewable decision, the tribunal may, by written notice, require the decision-maker to provide the documents or things.
- (4) If the tribunal considers the statement of reasons given under subsection (2)(a) is not adequate, the tribunal may, by written notice, require the decision-maker to give the tribunal an additional statement containing stated further particulars.
- (5) The decision-maker must comply with a notice given under subsection (3) or (4) within the period stated in the notice.
- (6) A requirement under this section that the decision-maker give the tribunal information or a document or other thing applies despite any provision in an Act prohibiting or restricting the disclosure of the information or the information contained in the document or thing.

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804 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(1).

805 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(2).

*Notes—*

- 1 Under section 66, the tribunal may make an order prohibiting the publication of the information, or the information contained in the document or thing, other than in the way and to the persons stated in the order.
- 2 Under section 90(2), the tribunal may direct a hearing, or a part of a hearing, in which the information, or information contained in the document or thing, is disclosed to be held in private.

***When a decision is stayed***

23.237 Generally, the commencement of a proceeding for the review of a reviewable decision under the QCAT Act does not affect the operation of the decision or prevent the implementation of the decision<sup>806</sup> — that is, it does not operate as a stay of the decision. The operation of the decision will be affected only if the relevant enabling Act provides for that to be the case or if the Tribunal makes an order staying the operation of the reviewable decision under section 22 of the QCAT Act and the order is still in effect.<sup>807</sup>

23.238 The Tribunal may, on the application of ‘a party’ or on its own initiative, make an order staying the operation of a reviewable decision if a proceeding for the review of the decision has been commenced under the QCAT Act.<sup>808</sup> However, it may make such an order only if it considers that the order is desirable after having regard to:<sup>809</sup>

- the interests of any person whose interests may be affected by the making of the order or the order not being made;
- any submission made to the Tribunal by the decision-maker for the reviewable decision; and
- the public interest.

***The Tribunal’s powers***

23.239 At any stage of a proceeding for the review of a reviewable decision, the Tribunal may invite the decision-maker for the decision to reconsider the decision.<sup>810</sup>

23.240 In a proceeding for a review of a reviewable decision, the Tribunal may:<sup>811</sup>

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806 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(1).

807 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(2).

808 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(3).

809 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 22(4).

810 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 23(1). If such an invitation is made, the decision-maker has 28 days to reconsider the decision, and may confirm the decision, amend the decision, or set aside the decision and substitute a new decision: s 23(2).

811 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(1).

- confirm or amend the decision;
- set aside the decision and substitute its own decision; or
- set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions that the Tribunal considers appropriate.

23.241 The Tribunal's decision to confirm or amend a decision or to set aside a decision and substitute its own decision:<sup>812</sup>

- is taken to be the decision of the decision-maker for the reviewable decision except for the purpose of the Tribunal's review jurisdiction or an appeal under part 8 of the QCAT Act; and
- subject to any contrary order of the Tribunal, has effect from when the reviewable decision takes, or took, effect.

23.242 The QCAT Act provides that the Tribunal may make written recommendations to the chief executive of the entity in which the reviewable decision was made 'about the policies, practices and procedures applying to reviewable decisions of the same kind'.<sup>813</sup> If the Tribunal makes written recommendations and the chief executive is not the decision-maker for the reviewable decision, the Tribunal must give a copy of the recommendations to the decision-maker.<sup>814</sup> This means that the Tribunal is not restricted simply to confirming or amending the decision, or substituting another decision for the decision under review, but has a wider power to comment on matters affecting the quality of the entity's decision-making functions.

23.243 As mentioned earlier in this chapter, the Tribunal has the power to make an order directing how a substitute decision-maker for an adult (which would include the Adult Guardian when he or she is acting in that capacity) should exercise power for a matter. In some respects, the effect of such a direction is similar, in outcome, to a review by the Tribunal that results in the amendment of a reviewable decision or in the setting aside of the decision and the substitution of the Tribunal's own decision. However, the fact that the Tribunal's review jurisdiction enables it to make recommendations to the chief executive of the entity that made the reviewable decision is a significant difference. That power is especially relevant to the stated object of the QCAT Act 'to enhance the quality and consistency of decisions made by decision-makers'.<sup>815</sup>

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812 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(2).

813 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

814 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(4).

815 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(d).

### **Requirement for decision-maker to give reasons for a reviewable decision**

23.244 The QCAT Act provides that the decision-maker for a reviewable decision must give written notice of the decision to each person who may apply to the Tribunal for a review of the decision.<sup>816</sup> The notice must state:<sup>817</sup>

- the decision;
- the reasons for the decision;
- that the person has a right to have the decision reviewed by the Tribunal;
- how, and the period within which, the person may apply for the review; and
- any right that the person has to have the operation of the decision stayed under section 22 of the QCAT Act.

23.245 A failure to comply with these requirements does not affect the validity of the reviewable decision.<sup>818</sup>

23.246 If a person who may apply to the Tribunal for a review of a reviewable decision has not been given a written statement of the reasons for the decision, the person may ask the decision-maker for the reviewable decision to give the person a written statement for the decision.<sup>819</sup> The decision-maker must give the person the statement within a reasonable period of not more than 28 days after the request is made.<sup>820</sup> The person is entitled to receive a written statement of reasons for the reviewable decision whether or not the provision of the enabling Act under which the decision is made requires that the person must be given a written statement of reasons for the decision.<sup>821</sup>

23.247 If a person asks the decision-maker for a reviewable decision for a written statement of the reasons for the decision and the decision-maker has not given the person the statement, the person may apply to the Tribunal for an order that the decision-maker give the person the statement.<sup>822</sup> If the Tribunal is satisfied that the person is entitled to receive the statement, it may make an order requiring the

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816 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 157(1).

817 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 157(2).

818 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 157(4).

819 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158(1)–(2). The request must be made in accordance with the requirements of s 158(3).

820 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158(4).

821 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158(5).

822 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 159(1)–(2). Written notice of the application must be given to the decision-maker: s 159(3).

decision-maker to give the person the statement within the period of not more than 28 days stated in the order.<sup>823</sup>

23.248 If the decision-maker for a reviewable decision gives a written statement of reasons for the decision to the person, the person may apply to the Tribunal for further and better particulars about stated matters.<sup>824</sup> If the Tribunal considers that the statement does not contain adequate particulars of the reasons for the decision, the Tribunal may make an order requiring the decision-maker to give to the person, within a stated period, an additional statement containing further and better particulars about stated matters.<sup>825</sup>

***The time within which application may be made for the review of a reviewable decision***

23.249 An application for the review of a reviewable decision must be made within 28 days after the 'relevant day'.<sup>826</sup> The relevant day for an application for the review of a reviewable decision means:

- (a) the day the applicant is notified of the decision; or
- (b) if the applicant has applied to the decision-maker for a written statement of reasons for the decision under section 158—the earlier of the following days—
  - (i) the day the written statement is given to the applicant;
  - (ii) the day by which the written statement is required to be given to the applicant under that section; or
- (c) if the applicant has applied to the tribunal for an order under section 159—
  - (i) if the tribunal makes the order—the earlier of the following days—
    - (A) the day the written statement of reasons the subject of the order is given to the applicant;
    - (B) the day by which the written statement of reasons the subject of the order is required to be given to the applicant under the order; or
  - (ii) if the tribunal does not make the order—the day the applicant is notified of the tribunal's decision to not make the order.

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823 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 159(4).

824 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 160(1)–(2).

825 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 160(3).

826 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 33(3).

### ***Parties to an application for review in QCAT's review jurisdiction***

23.250 Section 40 of the QCAT Act sets out who is a party to a proceeding in the Tribunal's review jurisdiction. It provides:

#### **40 Parties to review jurisdiction**

- (1) A person is a party to a proceeding in the tribunal's review jurisdiction if the person is—
  - (a) the applicant; or
  - (b) the decision-maker for the reviewable decision the subject matter of the proceeding; or
  - (c) intervening in the proceeding under section 41; or
  - (d) joined as a party to the proceeding under section 42; or
  - (e) someone else an enabling Act states is a party to the proceeding.
- (2) In a proceeding in the tribunal's review jurisdiction, so far as is practicable, the official description of the decision-maker must be used as the party's name instead of the decision-maker's name.

23.251 Section 42 provides for the joinder of parties:

#### **42 Joining parties**

- (1) The tribunal may make an order joining a person as a party to a proceeding if the tribunal considers that—
  - (a) the person should be bound by or have the benefit of a decision of the tribunal in the proceeding; or
  - (b) the person's interests may be affected by the proceeding; or
  - (c) for another reason, it is desirable that the person be joined as a party to the proceeding.
- (2) The tribunal may make an order under subsection (1) on the application of a person or on its own initiative.

### **Discussion Paper**

23.252 In the Discussion Paper, the Commission sought submissions on whether decisions of the Adult Guardian should be able to be reviewed by the Tribunal under the QCAT Act.<sup>827</sup>

<sup>827</sup>

Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 170.



## Submissions

23.253 A number of respondents, including the Adult Guardian, the former Acting Public Advocate, Pave the Way, Queensland Aged and Disability Advocacy Inc and the Council on the Ageing Queensland, were of the view that decisions of the Adult Guardian should be subject to the Tribunal's review jurisdiction.<sup>828</sup>

23.254 The former Acting Public Advocate commented on what he considered to be the advantages of such a change:<sup>829</sup>

The introduction of review mechanisms would provide an additional safeguard for adults with [impaired decision-making capacity] by ensuring greater transparency and accountability in decision-making by the Adult Guardian, and providing an avenue for interested parties, who may have better knowledge of the adult and their needs, views and wishes to challenge decision-making which, for example, is not perceived to be in the adult's interests, or was made in the absence of information which may result in a different decision being made. The ability for a review to be sought by interested parties is considered particularly significant to the protection of the adult's rights and interests in circumstances where a vulnerable adult does not have the capacity to challenge a decision for themselves.

Review of the Adult Guardian's decisions by QCAT could also potentially have systemic implications. QCAT's powers to comment on and make recommendations to the chief executive of an entity could enable recognition of and reporting on deficiencies in policy and procedure which may facilitate positive systems change in relation to decision-making for all adults.

23.255 There was also a high degree of support for this option at the Commission's community forums.<sup>830</sup> In discussing the existing mechanisms for seeking to have a decision of the Adult Guardian changed, a person at a forum commented that, although the Tribunal has the power to make directions, it was rare for the Tribunal to instruct an appointed guardian or administrator about what decision to make.<sup>831</sup>

## The Commission's view

23.256 Given the important role that the Adult Guardian performs as a guardian of last resort, and the significance of the decisions that may be made by the Adult Guardian, it is important, in fostering public confidence in the guardianship system, to ensure that the mechanisms for reviewing the decisions of the Adult Guardian are as effective and transparent as possible.

23.257 Although the Tribunal currently has the power to make a direction that a guardian (or an administrator) make a decision in a particular way,<sup>832</sup> that power

<sup>828</sup> Submissions 94I, 112, 124, 125, 126, 127, 128, 129, 135, 138, 140, 142, 148, 159, 160, 164.

<sup>829</sup> Submission 160.

<sup>830</sup> Forums 9, 10, 11, 12, 13, 14, 15.

<sup>831</sup> Forum 9. This power is considered at [23.208]–[23.209] above.

<sup>832</sup> See [20.98]–[20.104] above.

does not appear to be well understood by the families and carers of adults with impaired capacity. It may also be difficult for a person who wishes to seek such a direction to know the basis on which the disputed decision was made. In contrast, the QCAT Act has provisions to enable a person who may apply for the review of a reviewable decision to obtain from the decision-maker a written statement of the reasons for the decision.<sup>833</sup>

23.258 While the Tribunal is the appropriate body to review the Adult Guardian's decisions about personal matters, the Commission considers that a more comprehensive approach is required. In its view, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to provide that decisions of the Adult Guardian about personal matters for an adult are reviewable decisions for the purposes of the QCAT Act.<sup>834</sup>

23.259 This change has two main advantages.

23.260 Because of the requirements that the QCAT Act imposes on decision-makers of reviewable decisions, it will create greater transparency in relation to the Adult Guardian's decision-making processes. For example, section 21(2) of the QCAT Act requires a decision-maker to give the Tribunal a written statement of the reasons for the decision that is being reviewed and any document or thing in the decision-maker's possession or control that may be relevant to the Tribunal's review of the decision.

23.261 Further, in addition to enabling the Tribunal to confirm or amend the subject decision, or set it aside and substitute its own decision, the QCAT Act provides that the Tribunal may make written recommendations to the chief executive of the entity in which the reviewable decision was made 'about the policies, practices and procedures applying to reviewable decisions of the same kind'.<sup>835</sup> This power, which is similar to the Ombudsman's power to make recommendations to an agency,<sup>836</sup> has the potential to enhance the quality of the Adult Guardian's decision-making in a systemic way, which is not necessarily possible when the Tribunal's power is limited to making directions about an individual decision made by the Adult Guardian in a particular matter.

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833 Although the Commission has recommended that s 157 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) should not apply to the Adult Guardian (see Recommendation 23-14 below), a person who was entitled to apply to QCAT for the review of a decision made by the Adult Guardian could still seek a statement of reasons from the Adult Guardian under s 158 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

834 The particular decisions that are to be reviewable are considered further beginning at [23.262] below.

835 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

836 See [23.216] above.

## THE DECISIONS THAT SHOULD BE REVIEWABLE

### Discussion Paper

23.262 In the Discussion Paper, the Commission stated that two issues arise for consideration in relation to the decisions of the Adult Guardian that should be reviewable decisions for the purposes of the QCAT Act.<sup>837</sup>

23.263 The first issue is whether all, or only some, of the decisions made by the Adult Guardian in his or her capacity as a substitute decision-maker under the Queensland guardianship legislation (that is, as a guardian, attorney or statutory health attorney) should be reviewable. The Commission noted that, in New South Wales, all decisions made by the Public Guardian in connection with the exercise of the Public Guardian's functions under the *Guardianship Act 1987* (NSW) as a guardian are reviewable by the Administrative Decisions Tribunal.<sup>838</sup>

23.264 The Commission suggested that another option would be to make particular classes of decisions that appear to be contentious reviewable decisions, rather than all decisions. From the submissions that had been received to date, it suggested that these could include:<sup>839</sup>

- accommodation decisions;<sup>840</sup>
- decisions about visitation or contact (for example, where the Adult Guardian decides that a certain person is or is not to be permitted to visit the adult);<sup>841</sup>
- decisions delegating day-to-day decision-making about personal matters,<sup>842</sup> and
- decisions about restrictive practices.

23.265 The second issue raised by the Commission was whether external review should apply to decisions made by the Adult Guardian in relation to a matter for an adult, even though the Adult Guardian is not acting as the adult's guardian, attorney or statutory health attorney in making the decision. The Commission noted, for example, that sections 42 and 43 of the *Guardianship and Administration Act 2000* (Qld) provide, in effect, that in the relevant circumstances, the Adult Guardian may

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837 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.153].

838 Ibid [18.154] referring to *Guardianship Act 1987* (NSW) s 80A; *Guardianship Regulation 2005* (NSW) reg 17.

839 Ibid [18.155].

840 Submissions C16, C17, C91, C110, C124, 2, 18, 31, 89.

841 Submissions C17, C47, 11.

842 See [23.77] above.

make a decision about a health matter for an adult, even though the Adult Guardian is not the adult's guardian, attorney or statutory health attorney.<sup>843</sup>

23.266 The Commission commented that, as a matter of principle, if a particular type of decision was to be subject to external review — for example, a decision in relation to the withholding or withdrawal of a life-sustaining measure for an adult — it was difficult to distinguish between a decision made by the Adult Guardian as the adult's guardian and a decision made by the Adult Guardian under the power conferred by section 42 or 43 of the *Guardianship and Administration Act 2000* (Qld).<sup>844</sup>

23.267 The Commission noted that, although in New South Wales, external review is available in relation to decisions made by the Public Guardian in connection with the exercise of the Public Guardian's functions 'as a guardian', the *Guardianship Act 1987* (NSW) differs from the Queensland legislation in that it does not confer on the Public Guardian the additional decision-making powers that are conferred by the *Guardianship and Administration Act 2000* (Qld).<sup>845</sup>

23.268 The Commission sought submissions on the following questions:<sup>846</sup>

- If the *Guardianship and Administration Act 2000* (Qld) is amended to provide that decisions of the Adult Guardian should be reviewable, which decisions should be reviewable:
  - all of the Adult Guardian's decisions made as a guardian, attorney, or statutory health attorney for an adult with impaired capacity; or
  - specific classes of decisions made by the Adult Guardian as a guardian, attorney or statutory health attorney for an adult with impaired capacity, for example:
    - (i) accommodation decisions;
    - (ii) visitation or contact decisions;
    - (iii) delegation of the power to make day-to-day decisions;
    - (iv) health care decisions generally;
    - (v) decisions about the withholding or withdrawal of a life-sustaining measure in particular;
    - (vi) decisions about the use of restrictive practices?

843 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.156] referring to *Guardianship and Administration Act 2000* (Qld) ss 42–43.

844 Ibid [18.157].

845 Ibid [18.158].

846 Ibid 171–2.

- Should decisions made by the Adult Guardian for an adult, but not in the capacity of the adult's guardian, attorney or statutory health attorney, be reviewable, for example, making a decision about a health matter under sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld)?

## Submissions

### *Types of decisions that are reviewable*

23.269 The Adult Guardian commented that all of the Adult Guardian's decisions made as an adult's guardian, attorney or statutory health attorney should be reviewable, as should decisions about health matters made under sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld).<sup>847</sup>

23.270 A long-term Tribunal member was of the view that, if the decisions made by the Adult Guardian as guardian, attorney or statutory health attorney were to be reviewable for the purposes of the QCAT, then the legislation should provide for all categories of decisions to be reviewable.<sup>848</sup>

23.271 The former Acting Public Advocate was of the view that all decisions made by the Adult Guardian as guardian, attorney or statutory health attorney should be reviewable:<sup>849</sup>

It is considered preferable for a right of review of all decisions made by the Adult Guardian to be introduced to ensure enhanced transparency, accountability and scrutiny of decision-making for an adult, and to ensure the protection of the adults' rights and interests to the greatest possible extent.

23.272 Several other respondents, including Pave the Way, were also of the view that all of the Adult Guardian's decisions as guardian, attorney or statutory health attorney should be reviewable.<sup>850</sup>

23.273 In addition, Pave the Way considered that the following decisions should also be reviewable:

- a decision made under section 42 or 43 of the *Guardianship and Administration Act 2000* (Qld);
- a decision to supervise an attorney;<sup>851</sup> and
- a decision to carry out an investigation.

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847 Submission 164.

848 Submission 179.

849 Submission 160.

850 Submissions 941, 126, 135, 140.

851 See *Guardianship and Administration Act 2000* (Qld) s 179(1)(b), which is discussed at [23.62]–[23.64] above.

23.274 As mentioned above, the former Acting Public Advocate favoured making all decisions reviewable. However, he suggested that, if certain types of decisions only were to be reviewable, the following classes of decisions should be reviewable:<sup>852</sup>

- decisions about service provision for an adult, for example, the provision of paid care and other support;
- cultural or religious decision-making;
- decisions made in relation to education, training and employment for an adult; and
- decisions in relation to any other matters that affect the health, safety, welfare or quality of life of the adult to prevent the omission of review rights for decisions which fall outside the other categories specified above, but which may have a significant impact on the health, welfare or rights or interests of an adult.

23.275 At the Commission's community forums, there was general support for the view that, if only certain categories of decisions were to be reviewable, the following decisions should be reviewable:

- accommodation decisions;<sup>853</sup>
- visitation or contact decisions;<sup>854</sup>
- delegations by the Adult Guardian of day-to-day decision-making;<sup>855</sup>
- decisions about the withholding or withdrawal of life-sustaining measures;<sup>856</sup>
- all health care decisions (not just decisions about the withholding or withdrawal of life-sustaining measures);<sup>857</sup>
- decisions about the use of restrictive practices,<sup>858</sup> and
- decisions to appoint a particular service provider.<sup>859</sup>

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852 Submission 160.

853 Forums 9, 13, 14, 15.

854 Forums 9, 10, 13, 14, 15.

855 Forums 9, 10, 13, 14, 15.

856 Forums 9, 10, 14, 15.

857 Forums 12, 13.

858 Forum 12.

859 Forum 15.

*The requirement for the decision to have been the subject of an internal review by the Adult Guardian*

23.276 The former Acting Public Advocate considered that a legislative internal review process should be available and invoked before an application may be made to the Tribunal for the review of a decision of the Adult Guardian:<sup>860</sup>

prior to seeking review from QCAT, internal review should be available through the Office of the Adult Guardian. It is understood at present that there are limited review options available through the OAG, which are based on internal policy and procedures. Consideration should be given to the introduction of legislative provisions to govern internal review to enable the reconsideration of reviewable decisions. The Adult Guardian could be given power to confirm, revoke or amend the decision, with a right of review of a reviewable decision which has been confirmed or amended available to the QCAT. This would prevent the QCAT expending resources unnecessarily on decisions which could be appropriately dealt with on internal review.

## **The Commission's view**

### ***Types of decisions that are reviewable***

23.277 Given the nature of the decisions that may be made by the Adult Guardian as a guardian under the *Guardianship and Administration Act 2000* (Qld) or as an attorney or a statutory health attorney under the *Powers of Attorney Act 1998* (Qld), the Commission is of the view that a decision made by the Adult Guardian for an adult under either of those Acts or under an enduring document, regardless of the type of decision, should be a reviewable decision for the purposes of the QCAT Act. The Commission considered whether this could be limited to particular types of decisions. However, the Commission was not satisfied that there was any type of decision that could properly be excluded from this type of review, given the significance of the various types of decisions that may be made by the Adult Guardian.

23.278 The Commission is also of the view that a decision of the Adult Guardian made under section 42 or 43 of the *Guardianship and Administration Act 2000* (Qld), being a decision about a health matter for an adult, should also be a reviewable decision for the purposes of the QCAT Act.

23.279 Further, to avoid uncertainty about whether a decision of the Adult Guardian to delegate the power to make day-to-day decisions about a personal matter for an adult is itself a personal decision, the *Guardianship and Administration Act 2000* (Qld) should also provide that such a decision is a reviewable decision for the purposes of the QCAT Act.

23.280 However, the Commission does not consider it necessary to provide, as suggested by Pave the Way, that a decision by the Adult Guardian to subject an attorney (or a guardian or an administrator) to the Adult Guardian's supervision should be a reviewable decision. Section 179(3) of the *Guardianship and*

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Submission 160.

*Administration Act 2000* (Qld) already provides that an attorney, guardian or administrator who receives a notice subjecting him or her to the Adult Guardian's supervision may apply to the Tribunal about the notice and that the Tribunal may make the order it considers appropriate.

***The requirement for the decision to have been the subject of an internal review by the Adult Guardian***

23.281 The Commission has considered whether it should be a requirement that, before a person may apply to QCAT for the review of a reviewable decision of the Adult Guardian, the person must first have had the decision reviewed internally by the Adult Guardian.

23.282 Although the imposition of such a requirement would operate as a filter on the matters that would proceed to external review by QCAT, ultimately, the Commission has decided against recommending such a requirement.

23.283 As explained earlier in this chapter, an interested person may currently apply to the Tribunal for an order under section 138 of the *Guardianship and Administration Act 2000* (Qld) directing the Adult Guardian to make a decision about a matter in a particular way.<sup>861</sup> An interested person is not required, before applying for such a direction, to have the Adult Guardian's decision reviewed internally. Given that one of the main purposes of the Commission's recommendations in relation to external review is to provide a more comprehensive approach for reviewing decisions than that which can be achieved by an application for directions,<sup>862</sup> the Commission considers that an application to the Tribunal for the review of a reviewable decision should not be subject to restrictions that do not apply to an application for directions.

23.284 Further, if a mandatory requirement for internal review were imposed, it would be necessary to create an exception where the relevant decision of the Adult Guardian was a decision to withhold or withdraw a life-sustaining measure. In that situation, it would obviously be important for the matter to be resolved as soon as possible. Although disputes about other decisions of the Adult Guardian might not need to be resolved with quite the same degree of urgency, the more protracted process that would result from a requirement for internal review would not be in the adult's interests.

23.285 The Commission also considers that, in light of the nature of the decisions made by the Adult Guardian, a requirement for internal review could create practical difficulties. Take, for instance, the following scenario. The Adult Guardian decides that the adult is to live with A rather than with B. On an internal review sought by B, the Adult Guardian changes the decision so that the adult is now to live with B. A disagrees with that decision. It would be impracticable to require A to

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<sup>861</sup> See [23.208] above. In Chapter 20, the Commission has recommended that s 138 of the *Guardianship and Administration Act 2000* (Qld) 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: see Recommendation 20-1 of this Report.

<sup>862</sup> See [23.257]–[23.258] above.



have the Adult Guardian's decision reviewed internally before being able to apply to QCAT a review of the further decision.

23.286 The Commission considers that its approach in relation to the issue of internal review is consistent with the approach that the QCAT Act takes in relation to the availability of review by the Ombudsman. The fact that a decision is also the subject of a complaint, preliminary inquiry or investigation by the Ombudsman does not limit a person's right to apply to QCAT for a review of the decision. In fact, section 18(2) of the QCAT Act expressly preserves that right:

**18 When review jurisdiction exercised**

...

- (2) A person may apply to the tribunal to exercise its review jurisdiction for a reviewable decision, and the tribunal may deal with the application, even if the decision is also the subject of a complaint, preliminary inquiry or investigation under the *Ombudsman Act 2001*.

23.287 Although it will not be a requirement to have a reviewable decision of the Adult Guardian reviewed internally before applying to the Tribunal for a review of the decision, that will not, of course, prevent a person who wishes to do so from seeking internal review by the Adult Guardian. Despite the availability of an external review process, some people may be content with internal review by the Adult Guardian or may not wish to make an application to the Tribunal. The Commission's recommendations in this chapter do not affect the circumstances in which a person may currently seek an internal review by the Adult Guardian.

## **PERSONS WHO MAY APPLY FOR THE REVIEW OF A REVIEWABLE DECISION OF THE ADULT GUARDIAN**

### **Discussion Paper**

23.288 In the Discussion Paper, the Commission stated that, if decisions, or certain classes of decisions, made by the Adult Guardian were to be reviewable decisions for the purposes of the QCAT Act, a further issue arose in relation to which persons should be able to seek the review of a relevant decision.<sup>863</sup>

23.289 The Commission noted that the QCAT Jurisdiction Amendment Act amended a number of Acts to provide that decisions made under those Acts are reviewable decisions under the QCAT Act.<sup>864</sup> For example, it amended the *Introduction Agents Act 2001* (Qld) to provide that:<sup>865</sup>

<sup>863</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.159].

<sup>864</sup> *Ibid* [18.160].

<sup>865</sup> *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 602.

- an applicant for a licence to carry on the business of an introduction agent may apply to QCAT for a review of a decision of the chief executive to grant a licence subject to conditions or to refuse the grant of a licence;
- a licensee may apply to QCAT for a review of a decision of the chief executive to suspend his or her licence or to refuse to replace a lost, stolen or destroyed licence.

23.290 The Commission considered that, in the context of a legislative scheme such as the *Introduction Agents Act 2001* (Qld), the applicant for external review can properly be restricted to the person who is directly aggrieved by the particular decision.<sup>866</sup>

23.291 However, the Commission suggested that decision-making in the context of the guardianship system, where the adult's interests are the primary focus, is quite different. It suggested that the person who is directly affected by a decision of the Adult Guardian will usually be an adult with impaired capacity, who in all likelihood will lack the capacity to seek the review of a decision personally. However, it considered that it is more likely to be members of the adult's family and support network who were concerned about the decision that had been made in relation to the adult and who would wish to seek an external review of the decision. It noted that the *Guardianship and Administration Act 2000* (Qld) uses the term 'interested person', which is defined to mean 'a person who has a sufficient and continuing interest in the other person',<sup>867</sup> and suggested that a reference to an 'interested person' might be an appropriate way to capture the nature of the interest of the concerned members of the adult's family and support network.<sup>868</sup>

23.292 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>869</sup>

18-15 Who, if any, of the following people should be able to apply to QCAT for a review of a reviewable decision made by the Adult Guardian:

- the adult who is the subject of the decision;
- an interested person?

18-16 Should anyone else be able to apply to QCAT for the review of a reviewable decision made by the Adult Guardian?

<sup>866</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.161].

<sup>867</sup> *Guardianship and Administration Act 2000* (Qld) sch 4.

<sup>868</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [18.162].

<sup>869</sup> *Ibid* 173.

## Submissions

23.293 The Adult Guardian commented that an application for the review of a reviewable decision of the Adult Guardian should be able to be made by the adult and anyone who has a sufficient interest in the ongoing welfare of the adult, but not by an interested person:<sup>870</sup>

The adult and anyone who has a sufficient interest in the ongoing welfare of the adult ought to be able to request a review of a reviewable decision. Opening reviews to interested persons could simply create platforms for applications which aren't founded in a concern about the welfare of the adult.

23.294 The Adult Guardian considered, however, that 'anyone who has a sufficient interest in the matter ought to be able to apply to review a reviewable decision':

That may vary upon the circumstances of the decision. In some cases it will be family members, in other cases medical practitioners.

23.295 A number of respondents, including the former Acting Public Advocate, Pave the Way, the Endeavour Foundation and a long-term Tribunal member, were of the view that it should be possible for the following persons to apply for the review of a reviewable decision:<sup>871</sup>

- the adult who is the subject of the decision; and
- an interested person.

23.296 The former Acting Public Advocate commented, in relation to the reference to an 'interested person':<sup>872</sup>

This would sufficiently capture the adult's family, support network and other community members who interact with and have an ongoing interest in the adult, such as teachers, paid carers, social workers, medical professionals or other third parties. In this way the adult's interests would be appropriately protected.

23.297 Pave the Way was also of the view that the legislation should provide that an 'aggrieved person' may apply for the review of a decision. It suggested that this would enable someone who was the subject of a decision to seek a review.<sup>873</sup>

## The Commission's view

23.298 In the Commission's view, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to

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870 Submission 164.

871 Submissions 94I, 135, 160, 163, 179.

872 Submission 160.

873 Submission 135.

provide that the adult and an interested person may apply, as provided under the QCAT Act, to the Tribunal to have a reviewable decision of the Adult Guardian reviewed.

23.299 Although, in a sense, a person might be aggrieved by a particular decision, for example, a person who is refused contact with the adult, it is nevertheless appropriate that the person should be an 'interested person' in order to invoke the Tribunal's review jurisdiction.

## **PERSONS WHO SHOULD BE ADVISED THAT THEY MAY APPLY FOR THE REVIEW OF A REVIEWABLE DECISION**

### **The law in Queensland**

23.300 Section 157 of the QCAT Act requires a decision-maker for a reviewable decision to give written notice of the decision to 'each person who may apply to the tribunal for a review of the decision':

#### **157 Information notice to be given**

- (1) The decision-maker for a reviewable decision must give written notice of the decision to each person who may apply to the tribunal for a review of the decision.
- (2) The notice must state the following—
  - (a) the decision;
  - (b) the reasons for the decision;

*Note—*

See the *Acts Interpretation Act 1954*, section 27B (Content of statement of reasons for decision).

  - (c) the person has a right to have the decision reviewed by the tribunal;
  - (d) how, and the period within which, the person may apply for the review;
  - (e) any right the person has to have the operation of the decision stayed under section 22.
- (3) It is sufficient compliance with this section for the decision-maker to give the person, as required under the enabling Act, a written notice stating the matters mentioned in subsection (2)(a) to (e).
- (4) A failure to comply with this section does not affect the validity of the reviewable decision.

## The Commission's view

23.301 The Commission recognises that there are differences between the decisions that are currently reviewable under the QCAT Act and those that are made by the Adult Guardian. Even if the Adult Guardian does not have a plenary appointment, but is appointed to make decisions about a specific matter, such as accommodation, the Adult Guardian has an ongoing decision-making role in relation to that matter for the duration of the appointment. In contrast, many of the decision-makers whose decisions are currently reviewable under the Tribunal's review jurisdiction tend to be making one-off decisions.

23.302 For that reason, the Commission considers that it would be impracticable to require the Adult Guardian to comply with the requirement in section 157 of the QCAT to give written notice of each decision that the Adult Guardian makes to each person who may apply for a review of the decision.

23.303 In the first place, the Adult Guardian might be making numerous decisions for an adult, and none of the decisions might even be in dispute. Further, because the Commission has recommended that an 'interested person' should be able to apply for the review of a decision, the flexible nature of the term 'interested person' would make it difficult for the Adult Guardian to identify all of the people who should be given notice.

23.304 Accordingly, although it would be best practice for the Adult Guardian to inform relevant people of their right to apply to QCAT for a review of a reviewable decision of the Adult Guardian, the Commission considers that 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

### The law in Queensland

23.305 The QCAT Act provides for notice to be given of both an application and a hearing. Section 37(2) of the Act requires an applicant for an application to give a copy of the application to:

- (a) each party to the proceeding; and
- (b) each other person to whom notice of the proceeding must be given under an enabling Act or the rules; and
- (c) any person the tribunal directs to be given notice of the proceeding.

23.306 Section 92 of the QCAT Act further requires the principal registrar to give notice, as stated in the rules, of the time and place for the hearing of a proceeding to:

- (a) each party to the proceeding; and

- (b) each other person to whom notice of the hearing must be given under an enabling Act or the rules; and
- (c) any person the tribunal directs to be given notice of the hearing.

23.307 If an applicant, instead of seeking a review of the Adult Guardian's decision, sought a direction by the Tribunal that the Adult Guardian make a decision in a particular way, different notification requirements would apply. The principal registrar would be required to give notice of the application in accordance with rule 21(3) of the QCAT Rules, and the Tribunal would be required to give notice of the hearing of the application in accordance with section 118 of the *Guardianship and Administration Act 2000* (Qld).<sup>874</sup>

23.308 This raises the issue of what notification requirements should apply when a person applies to QCAT for the review of a reviewable decision made by the Adult Guardian. It also raises the issue of how, if the duty to notify is conferred on the Tribunal, the Tribunal would know who to notify of an application.

23.309 The *Child Protection Act 1999* (Qld) includes provisions to address these issues. It requires the Tribunal to give notice of a review application received in relation to a reviewable decision made under that Act to the decision-maker concerned. The decision-maker is then required to provide specified information to the Tribunal in response to that notice. Section 99E provides:

**99E Registrar to give notice of review application**

- (1) The registrar must give notice of a review application to the decision-maker.
- (2) Within 7 days after receiving the notice, the decision-maker must give the registrar notice of the names and addresses of all persons, apart from the applicant—
  - (a) who are entitled to apply for a review of the reviewable decision concerned; and
  - (b) of whom the decision-maker is aware.
- (3) The tribunal may shorten the period for giving the decision-maker's notice to the registrar.
- (4) The tribunal may act under subsection (3) only if satisfied that not to do so will result in a child's interests being adversely affected or another party to the review suffering hardship.
- (5) For subsection (2), a person's entitlement to apply for a review is taken to be unaffected by the ending of the period of 28 days mentioned in the QCAT Act, section 33(3).
- (6) Immediately on receipt of the decision-maker's notice, the registrar must give an information notice to each person named in the decision-maker's notice.

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These provisions are considered in Chapter 21 of this Report.

- (7) The information notice must state—
- (a) details of the review application; and
  - (b) that the person may elect to become a party to the review and the period within which the notice of election must be filed under section 99ZB; and
  - (c) how the person may elect to become a party to the review.

### The Commission's view

23.310 Because of the special nature of the guardianship system, the Commission considers that it is more appropriate for the notice requirements for guardianship proceedings to apply to an application for review, even though an application for review is made under the QCAT Act.

23.311 Accordingly, if an application is made to the Tribunal for the review of a reviewable decision of the Adult Guardian, the Tribunal should have the same requirements to give notice of the application and of the hearing as would apply if the application were a proceeding under the *Guardianship and Administration Act 2000* (Qld). The *Guardianship and Administration Act 2000* (Qld) should be amended to that effect.

23.312 Further, to ensure that the Tribunal is aware, so far as possible, of all the persons who should be given notice of the application and the hearing, the *Guardianship and Administration Act 2000* (Qld) should include a provision, modelled on section 99E of the *Child Protection Act 1999* (Qld), requiring:

- the principal registrar to give notice of the review application to the Adult Guardian; and
- 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).

## APPLICATION OF CONFIDENTIALITY AND RELATED PROVISIONS

### The law in Queensland

23.313 As explained above, section 21(2) of the QCAT Act provides that the Tribunal may, in the exercise of its review jurisdiction, require a decision-maker to file a written statement of the reasons for the decision and any document or thing in the decision-maker's possession or control that may be relevant to the Tribunal's review of the decision.<sup>875</sup> Section 21 includes a note, which refers to the following

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*Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21 is set out at [23.236] above.

provisions of the QCAT Act:

- section 66, which enables the Tribunal to make an order prohibiting the publication of information; and
- section 90(2), which enables the Tribunal to direct that a hearing, or a part of a hearing, is to be held in private.

23.314 Sections 66 and 90 of the QCAT Act do not apply to proceedings under Chapter 7 of the *Guardianship and Administration Act 2000* (Qld).<sup>876</sup> Instead, the *Guardianship and Administration Act 2000* (Qld) has its own provisions that deal with the Tribunal's power to order that:

- information about a Tribunal proceeding not be published (section 108: Non publication order) or that part of a document or information be withheld from an active party or other person (section 109: Confidentiality order); and
- a hearing or a part of a hearing be closed to all or some of the public or that a particular person be excluded (section 107: Closure order).

23.315 In addition, the *Guardianship and Administration Act 2000* (Qld) makes provision for the Tribunal to make adult evidence orders (section 106), and regulates the information that may be published about a guardianship proceeding (section 114A).<sup>877</sup> The Act also has a specific provision (section 103) that deals with access by active parties and non-parties to documents and information in guardianship proceedings.<sup>878</sup>

23.316 This raises an issue about which confidentiality and related provisions should apply in relation to the Tribunal's hearing of a review application and to any documents filed with the Tribunal when the Tribunal is reviewing, under the provisions recommended above, a decision by the Adult Guardian.

<sup>876</sup> *Guardianship and Administration Act 2000* (Qld) s 101(a)–(b).

<sup>877</sup> The *Guardianship and Administration Act 2000* (Qld) sch 4 includes the following definition of 'guardianship proceeding':

**guardianship proceeding—**

- (a) means—
- (i) a proceeding under this Act before the tribunal; or
  - (ii) a hearing, conference or interlocutory matter before the tribunal taken in connection with or incidental to a proceeding before the tribunal; or
  - (iii) a proceeding in which the court is exercising concurrent jurisdiction with the tribunal; but
- (b) does not include a proceeding in which the court is exercising the powers of the tribunal under section 245.

This definition would not include a proceeding in which a decision of the Adult Guardian was reviewed by the Tribunal as part of its review jurisdiction under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

<sup>878</sup> The relationship between s 103 of the *Guardianship and Administration Act 2000* (Qld) and s 230 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) is considered in Chapter 21 of this Report.



### The Commission's view

23.317 Although the Tribunal's review jurisdiction is exercised under the QCAT Act, rather than under the *Guardianship and Administration Act 2000* (Qld), the nature of the guardianship system makes it more appropriate that the provisions that have been specifically developed for the Tribunal's guardianship jurisdiction should apply for a review under the QCAT Act that relates to a reviewable decision of the Adult Guardian.

23.318 Accordingly, 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)<sup>879</sup> 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.

## RECOMMENDATIONS

### *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*.

879

See Recommendations 21-12 to 21-14 of this Report.

***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

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### INTRODUCTION

#### The Webbe-Weller Review

24.1 Since the commencement of the *Guardianship and Administration Act 2000* (Qld), the function of systemic advocacy has been undertaken by the Public Advocate, an independent statutory officer established by the *Guardianship and Administration Act 2000* (Qld).<sup>880</sup>

24.2 However, in 2008, the Government initiated a review of 457 Queensland Government boards, committees and statutory authorities (the ‘Webbe-Weller Review’) to identify which bodies were ‘working efficiently and which should be abolished’.<sup>881</sup> Although the Public Advocate is not a board, committee or statutory

<sup>880</sup> *Guardianship and Administration Act 2000* (Qld) ss 208–209.

<sup>881</sup> S Webbe and P Weller AO, *A Public Interest Map: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, Part A Report (2008) 3.

authority,<sup>882</sup> the Public Advocate was nevertheless included in the review. The final report of the Webbe-Weller Review, which was completed in March 2009, refers to a submission made by the Department of Justice and Attorney-General to the effect that the Public Advocate should be abolished and that the functions of the Public Advocate should be transferred to the Adult Guardian:<sup>883</sup>

The Department of Justice and Attorney-General contended that the Public Advocate position should be abolished with the systems advocacy function transferred to the Office of the Adult Guardian because, by being separated from the experiences of the Adult Guardian, the Public Advocate does not have sufficient access to information to amass a systemic assessment based on objective data and meet its original objectives.

24.3 Although the reviewers acknowledged the submissions that strongly recommended the Public Advocate's continuing contribution,<sup>884</sup> they accepted the contention of the Department of Justice and Attorney-General that the Public Advocate does not have access to the information that is essential to meet the functions of that office, and should therefore be abolished:<sup>885</sup>

The Reviewers consider that stakeholder support and clear focus on objectives is important but *the ability to perform its critical role of systems advocacy is more important*. If by reason of its separate structure the Public Advocate has not been able to access data and experience the necessary body of evidence to enable it to undertake its role effectively, then government and stakeholder ambitions for the role have been undersold by an organisational form ultimately that is not fit for purpose. (emphasis in original)

24.4 The report included the following recommendation about the abolition of the Public Advocate:<sup>886</sup>

Pending analysis of a different finding (in favour) of the structural capability of the Public Advocate to perform its essential role in the current guardianship laws review by the Queensland Law Reform Commission due by 31 December 2009, the Public Advocate should be abolished and its function transferred to the Adult Guardian.

882 Note, s 221 of the *Guardianship and Administration Act 2000* (Qld) provides that the Public Advocate is not a statutory body for the *Statutory Bodies Financial Arrangements Act* (Qld) or the *Financial Administration and Audit Act 1977* (Qld).

883 S Webbe and P Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, Part B Report (2009) ('the Webbe-Weller Report') 142 <<http://www.premiers.qld.gov.au/government/assets/part-b-report-brokering-balance.pdf>> at 30 September 2010.

884 For a discussion of those submissions, see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.18]–[20.20].

885 S Webbe and P Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, Part B Report (2009) 142–3 <<http://www.premiers.qld.gov.au/government/assets/part-b-report-brokering-balance.pdf>> at 30 September 2010.

886 Ibid 143.

## Government response to the Webbe-Weller Report

24.5 Following the release of the Webbe-Weller Report, the Government published its response to the recommendations made in that review.<sup>887</sup> The Government expressly supported the recommendation in relation to the Public Advocate. The Government response states:<sup>888</sup>

The government acknowledges that the Review's recommendation is consistent with how the role of the Public Advocate operates in some of the other Australian jurisdictions. The functions will continue, but will be carried out by the Adult Guardian.

## Discussion Paper

24.6 Because the recommendation in the Webbe-Weller Report was expressed to be made pending a different finding by the Commission in this review, the Commission's Discussion Paper examined, and sought submissions on, whether the Public Advocate should continue to remain separate from the Adult Guardian or whether the Public Advocate's functions should be transferred to the Adult Guardian.<sup>889</sup> The Commission's preliminary view in the Discussion Paper was that the function of systemic advocacy can most effectively be performed by a separate systems advocate whose function is supported by a wide range of investigative powers.<sup>890</sup>

## Amendment of the Commission's terms of reference<sup>891</sup>

24.7 On 16 November 2009, the Attorney-General and Minister for Industrial Relations amended the Commission's terms of reference to:

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

24.8 On 20 January 2010, the Attorney-General and Minister for Industrial relations further amended the terms of reference to require the Commission to review:

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887 See *Government Response to the Report, Brokering Balance: A Public Interest Map for Queensland Government Bodies — An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* <<http://www.premiers.qld.gov.au/government/assets/government-response-to-part-b-report.pdf>> at 30 September 2010.

888 Ibid.

889 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.11]–[20.27].

890 Ibid [20.43].

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

the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework; **but not including consideration of who should exercise the systemic advocacy function and powers contained in Chapter 9 of the *Guardianship and Administration Act 2000*, these being matters already dealt with in the Government Response to recommendation 133 of the Part B Report of the Queensland Government Boards, Committees and Statutory Authorities tabled in the Legislative Assembly on 22 April 2009.** (emphasis in original)

### The approach in this Report

24.9 Because the terms of reference were amended after the release of the Discussion Paper, the Commission has received a number of submissions that addressed the question of whether the Public Advocate should remain separate from the Adult Guardian or whether the Public Advocate's functions should be transferred to the Adult Guardian. However, in light of the amendment of the terms of reference in November 2009 and January 2010, this Report does not make any recommendation about that issue.

24.10 Instead, this chapter examines the new issue of how an independent systemic advocacy role can be maintained when the Public Advocate's powers are transferred to the Adult Guardian, as well as the sufficiency and appropriateness of the powers that are to be transferred to the Adult Guardian. Because the powers of the Public Advocate have not yet been transferred to the Adult Guardian,<sup>892</sup> this chapter still refers to the current powers of the Public Advocate.

## THE LAW IN QUEENSLAND

### The current functions of systemic advocacy

24.11 Section 209 of the *Guardianship and Administration Act 2000* (Qld) sets out the Public Advocate's functions in relation to systemic advocacy. That section provides:

**209 Functions—systemic advocacy**

The public advocate has the following functions—

- (a) promoting and protecting the rights of adults with impaired capacity for a matter;
- (b) promoting the protection of the adults from neglect, exploitation or abuse;
- (c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;

<sup>892</sup>

The transfer of these powers will require the *Guardianship and Administration Act 2000* (Qld) to be amended.



- (d) promoting the provision of services and facilities for the adults;
- (e) monitoring and reviewing the delivery of services and facilities to the adults.

24.12 The functions of the Public Advocate are concerned with systemic advocacy. In contrast, the primary functions of the Adult Guardian are currently to act as a guardian and to investigate allegations of abuse, neglect and exploitation in relation to specific adults with impaired capacity.<sup>893</sup>

24.13 The Public Advocate's Annual Report for 2008–09 outlines a broad range of advocacy work undertaken in the following areas: the disability system, the guardianship system, the housing system, the mental health system, the health system, the criminal justice and corrective services systems, the legal system, the advocacy system, the aged care system and workforce systems.<sup>894</sup> This has involved monitoring the outcome of legislative and policy reform in these areas, making submissions in response to various inquiries, papers or exposure drafts, and participating in reference or advisory committees.

24.14 The main differences that have been identified between systemic advocacy and individual advocacy are that systemic advocacy:<sup>895</sup>

- provides outcomes for groups or classes of individuals rather than for a single person or small group of people;
- provides enduring, long-term outcomes and tends to be slow, as distinct from the short-term immediate outcomes of individual advocacy;
- is proactive rather than reactive;
- concerns collective rights and interests and interests of general importance to the population or at least a large group of people rather than the interests and needs of a single person;
- aims to address systems and structures that have an ongoing impact, whereas individual advocacy aims to redress specific instances of abuse, neglect and discrimination; and

893 The role of the Adult Guardian is considered in Chapter 23 of this Report.

894 See Office of the Public Advocate (Qld), *Annual Report 2008–2009* (2009).

895 See eg J Graffman, 'Systemic and individual advocacy: two complementary approaches' (2002) February/March *Access* 14, 15–16; R Huber et al, *Elder Advocacy: Essential Knowledge and Skills Across Settings* (2008) 45–6, 178–9; R Banks and R Kayess, 'Disability advocacy: too much talk and not enough action' in M Hauritz, C Sampford and S Blencowe (eds), *Justice for People with Disabilities: Legal and Institutional Issues* (1998) 153, 166; S Seymour and D Peter, 'Disability Advocacy in Australia' in Goodbody Economic Consultants, *Developing an Advocacy Service for People with Disabilities: International Research Papers*, vol 2 (February 2004) 1, 12. See also Australian Government Department of Families, Community Services and Indigenous Affairs and Disability Services Queensland, *Strategic Reporting Framework for Advocacy* (2007) 3; and Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (ARTD Consultants), *The National Disability Advocacy Program (NDAP) Quality Assurance Consultations Report* (July 2008) 7.

- includes lobbying, community education and research, whereas individual advocacy includes both representation of the person and the provision of information and advice to the person.

24.15 There is a relationship between the two types of advocacy, in that systemic advocacy can be informed by individual cases, and can assist individual advocacy efforts. Likewise, individual advocacy can sometimes illustrate systemic issues and can prompt systemic change:<sup>896</sup>

Systemic and individual advocacy are interdependent in some very important ways. Individual advocacy provides precedents for systemic changes, in that individual cases provide the leverage with which to drive system change. At the same time, systemic advocacy provides the platform or basis (through legislation, policy, service models, etc) for individual advocacy. Through critical mass (a number of individual advocacy cases) individual advocacy provides 'grass roots' credibility to support a systemic approach. Likewise, systemic advocacy provides the infrastructure (community development and education, legislative change, resource development, industry training, etc) to support successful individual advocacy.

### The current powers for systemic advocacy

24.16 The current powers for systemic advocacy are set out in section 210 of the *Guardianship and Administration Act 2000* (Qld), which provides:

#### 210 Powers

- (1) The public advocate may do all things necessary or convenient to be done to perform the public advocate's functions.
- (2) The public advocate may intervene in a proceeding before a court or tribunal, or in an official inquiry, involving protection of the rights or interests of adults with impaired capacity for a matter.
- (3) However, intervention requires the leave of the court, tribunal or person in charge of the inquiry and is subject to the terms imposed by the court, tribunal or person in charge of the inquiry.<sup>897</sup> (note added)

### THE LAW IN OTHER JURISDICTIONS

24.17 The guardianship legislation in all other Australian jurisdictions establishes a body with similar functions and powers to the Queensland Adult Guardian.<sup>898</sup> In

<sup>896</sup> J Graffman, 'Systemic and individual advocacy: two complementary approaches' (2002) February/March Access 14, 16.

<sup>897</sup> For a discussion of proceedings in which the Public Advocate has recently intervened, see Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.8].

<sup>898</sup> In the ACT, South Australia, Victoria and Western Australia, the relevant body is the Public Advocate: *Public Advocate Act 2005* (ACT) s 6(1); *Guardianship and Administration Act 1993* (SA) s 18; *Guardianship and Administration Act 1986* (Vic) s 14(1); *Guardianship and Administration Act 1990* (WA) s 91(1). In New South Wales, the Northern Territory and Tasmania, the relevant body is the Public Guardian: *Guardianship Act 1987* (NSW) s 77(1); *Adult Guardianship Act* (NT) s 5(1); *Guardianship and Administration Act 1995* (Tas) s 14.

addition, the functions of the Public Advocate in the ACT, South Australia, Victoria and Western Australia, and the Public Guardian in Tasmania, include several functions relating to systemic advocacy.<sup>899</sup>

24.18 No other Australian jurisdiction includes, as part of its guardianship system, a body with the sole function of systemic advocacy.<sup>900</sup>

## MAINTAINING AN INDEPENDENT FUNCTION OF SYSTEMIC ADVOCACY

24.19 As mentioned earlier in this chapter, the Commission's terms of reference were amended in January 2010 to add the requirement to report on:<sup>901</sup>

issues to be taken into account to ensure that an independent systemic advocacy role will be maintained when the functions of the Public Advocate are transferred to the Adult Guardian.

24.20 The Public Advocate is an independent statutory officer. Section 211 of the *Guardianship and Administration Act 2000* (Qld) provides that the Public Advocate, in performing his or her functions and in exercising his or her powers, is not under the control or direction of the Minister.

24.21 The Adult Guardian is also an independent statutory officer. Section 176 of the *Guardianship and Administration Act 2000* (Qld) provides, in similar terms to section 211, that, in performing the Adult Guardian's functions and exercising the Adult Guardian's powers, the Adult Guardian is not under the control or direction of the Minister.

24.22 At present, section 213(4) of the *Guardianship and Administration Act 2000* (Qld) provides that a person may not hold office as Public Advocate while the person holds office as Adult Guardian or Public Trustee.<sup>902</sup> That provision has ensured that there is no conflict of interest for the Public Advocate in performing systemic advocacy functions in relation to services provided by either the Adult Guardian or the Public Trustee. However, section 213 will presumably be repealed when legislation is introduced to transfer the function of systemic advocacy to the Adult Guardian.

24.23 The *Guardianship and Administration Act 2000* (Qld) requires both the Public Advocate and the Adult Guardian to prepare an Annual Report, which must

<sup>899</sup> *Public Advocate Act 2005* (ACT) s 10(a); *Guardianship and Administration Act 1993* (SA) s 21(1)(a)–(c), (e); *Guardianship and Administration Act 1995* (Tas) s 15(1)(a)–(c); *Guardianship and Administration Act 1986* (Vic) s 15(a)–(b); *Guardianship and Administration Act 1990* (WA) s 97(1)(g)–(h).

<sup>900</sup> The background to the creation in Queensland of the separate office of the Public Advocate is considered in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.12]–[20.16].

<sup>901</sup> See [24.7] above.

<sup>902</sup> *Guardianship and Administration Act 2000* (Qld) s 213(4).

be given to the Minister. The Minister is required to table the Annual Report in Parliament within 14 sitting days of its receipt.<sup>903</sup>

## Discussion Paper

24.24 In the Discussion Paper, the Commission referred to the suggestion of the former Public Advocate that consideration be given to amending the *Guardianship and Administration Act 2000* (Qld) to give the systems advocate the power to tender a report regarding one or more systems issue/s to the Attorney-General at any time during the year, and to require the Attorney-General to table the report in Parliament within, say, five sitting days.<sup>904</sup> The former Public Advocate considered that 14 days was too long given that reports might sometimes detail serious deficiencies that may warrant immediate action.

24.25 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>905</sup>

- If the function of systemic advocacy is to be performed by the Adult Guardian, is it possible for the Adult Guardian to avoid a conflict of interest in relation to systemic issues about the services and systems for which the Adult Guardian is responsible? If so, how?
- Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that:
  - the Public Advocate may give a report about a systems issue to the Attorney-General at any time during the year; and
  - the Attorney-General must table the report in Parliament within five sitting days?

24.26 Subsequently, as a result of the amendment to the terms of reference, the Commission sought submissions on the issues that should be taken into account to ensure that an independent systemic advocacy role will be maintained when the functions of the Public Advocate are transferred to the Adult Guardian.<sup>906</sup>

## Submissions

24.27 The Adult Guardian suggested the following ways of strengthening the systemic advocacy function once it is transferred to the Adult Guardian:<sup>907</sup>

<sup>903</sup> *Guardianship and Administration Act 2000* (Qld) ss 206, 220.

<sup>904</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.36].

<sup>905</sup> *Ibid* 199, 203.

<sup>906</sup> This question was asked in Answer Sheets posted on the Commission's website at <<http://www qlrc qld gov au/publications.htm#2>> at 30 September 2010.

<sup>907</sup> Submission 164.

- The Manager of the systemic advocacy group should report directly to the Adult Guardian.
- The annual report should include a separate reporting function for both the systemic and community visitor roles.
- An external reference group for systemic advocacy for the purpose of assisting to determine the systemic priorities and to review and provide feedback about internal policies.
- The annual report should include provision for reporting about the number of complaints received, what they concerned and how they have been managed.
- The annual report should separately report on the amount of funding provided to both the systemic advocacy and the community visitor roles.

24.28 The Adult Guardian considered that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that:

- the systems advocate may give a report about a systems issue to the Attorney-General at any time during the year; and
- the Attorney-General must tender the report in Parliament within five sitting days.

24.29 The former Acting Public Advocate and another respondent also supported an amendment to enable the systems advocate to prepare a report to the Attorney-General at any time of the year, and to require the Attorney-General to table the report within five sitting days.<sup>908</sup> The former Acting Public Advocate commented:<sup>909</sup>

There would also be some advantages for the Systems Advocate being entitled to provide a report to the Attorney-General at any time for tabling in Parliament, not just an annual report. This procedure is available to the Public Advocate, South Australia. This would provide an expeditious mechanism to apprise Government promptly of issues considered by the Systems Advocate to warrant immediate action. (note omitted)

24.30 The former Acting Public Advocate also made a number of other suggestions in relation to the maintenance of an independent systemic advocacy function. In particular, he suggested that another agency should monitor the guardianship services provided by the Adult Guardian:

issues regarding the guardianship services provided by the Adult Guardian have been the subject of advocacy by this Office. For example, this year the Public Advocate has raised with the Office of the Adult Guardian a number of issues relevant to service provision. Inevitably, the Adult Guardian cannot monitor its own activities and the Systems Advocate must be able to do this

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908 Submissions 941, 160.

909 Submission 160.

independently. Alternatively, in any combined structure, the Systems Advocate must be given the power to monitor and review all services other than those provided by the Adult Guardian. Another agency would need to be tasked with this role.

24.31 The former Acting Public Advocate also suggested that the systems advocate should be empowered to perform the systems advocacy role independently, and that governance arrangements should provide for the systems advocacy program and the guardianship services to operate independently within the Office of the Adult Guardian. He considered, however, that this suggestion:

will be ineffectual to provide an adequate information barrier if all functions reside in the one individual, namely the Adult Guardian, who will have responsibility to direct the work of all program areas within the Office of the Adult Guardian, including the systems advocacy program.

24.32 He also suggested that a separate Annual Report should be prepared in relations to the systemic advocacy function:

In a merged structure, there is potential for the focus on the reporting of systems advocacy work to be lost if it is to be one part of the annual report of the Adult Guardian. Accordingly the Systems Advocate should be entitled to report to Parliament independently of the Adult Guardian.

24.33 In addition, he suggested that the budget and staff of the Office of the Public Advocate should be quarantined when the Public Advocate's function is transferred to the Adult Guardian.

24.34 Finally, the former Acting Public Advocate suggested that the name of the merged entity should be the Public Advocate, rather than the Adult Guardian:

A variety of arrangements are in place in other Australian jurisdictions. However, in the majority of jurisdictions where a systems advocacy function exists, it is the role of the Public Advocate. This is the case in Victoria, Western Australia, the Australian Capital Territory, and South Australia. In Tasmania, the Public Guardian has some systems advocacy functions, although they are arguably more limited.

Although the Public Advocates noted above also have the function of statutory guardian, the distinction is arguably an important one. The name assists to shape the organisation's own conception of its role and the significance which it may attach to its role as systems advocate. Accordingly, if the functions are to be combined, it is suggested that the functions of the Adult Guardian should be transferred to the Public Advocate, and the independent statutory appointee be named the Public Advocate.

***Recommendation 1: The position abolished should be the Adult Guardian and any combined statutory functions as systems advocate and guardianship service provider should reside in the Public Advocate.***  
(emphasis in original)

24.35 Caxton Legal Centre Inc suggested two ways in which the independence of the systemic advocacy function might be maintained once that function is transferred to the Adult Guardian.

24.36 First, it suggested that a parliamentary committee could be established to receive the systems advocate's annual report and to consider its operational aspects.<sup>910</sup>

Parliament provides a forum for staunch advocacy in a way that government department bureaucrats cannot. It is also well-placed to remain attuned to public confidence, which is also likely to be adversely affected by the amalgamation of the Public Advocate and Adult Guardian.

24.37 Caxton Legal Centre Inc commented that the establishment of a Parliamentary Committee should be undertaken with a view to a two-yearly review of the new combined functions to consider whether it would be more appropriate to move the Office of the Adult Guardian outside the Department of Justice and Attorney-General and, if so, how that should be achieved. Caxton Legal Centre Inc explained the reason for raising the possible relocation of the Office of the Adult Guardian:

in taking on the new role of systems advocate, the [Office of the Adult Guardian] needs to be able to separate itself from its past and from the [Department of Justice and Attorney-General] accountability stream if it is to be an effective advocate, especially around issues arising out of the operation of brother agencies reporting to the same Director-General. If the systems advocacy function is not done, because the people who are clients are not consumers in the sense of being able to choose and complain, there will clearly be further instances of systemic abuse in Queensland.

24.38 The second suggestion of Caxton Legal Centre Inc was that separate financial accountability needed to be established to ensure that the funds presently expended on systemic advocacy by the Public Advocate are transferred to the Adult Guardian for the continued performance of systemic advocacy:

Were these functions expected to be fulfilled by the Adult Guardian without transfer of funds from the Public Advocate, public confidence and the capacity of the Adult Guardian to do the work will meet at or near zero. Hence, this submission assumes adequate funding will accompany the functions transfer. And in which case, it is submitted these funds should be separately accounted for. The real risk is, as a service delivery agency, there will be pressure on staff to delay or leave the systems advocacy in deference to the urgency of pressing and immediate individual cases. This must be fortified against, or there will be inadequate systemic advocacy.

24.39 Queensland Advocacy Incorporated was strongly opposed to the decision to transfer the Public Advocate's functions to the Adult Guardian. It suggested, however, that, if this function were transferred to the Adult Guardian, it 'should be delegated to an independent multidisciplinary committee that sits within the Office of the Adult Guardian'.<sup>911</sup> Queensland Advocacy Incorporated further suggested that this committee could be modelled on the Child Death Case Review Committee (the 'CDCRC') established under the *Commission for Children and Young People*

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910 Submission 174.

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

and *Child Guardian Act 2000* (Qld). The CDCRC's functions include reviewing all reviews carried out under Chapter 7A of the *Child Protection Act 1999* (Qld)<sup>912</sup> and, in relation to matters arising out of those reviews, making recommendations to the Director-General for Child Safety about certain matters, including:<sup>913</sup>

- (i) improving the child safety department's policies relating to the delivery of services to children and families; and
- (ii) improving the relationships between the child safety department and other entities whose functions include having involvement with children and families.

24.40 Membership of the CDCRC consists of the Commissioner for Children and Young People and Child Guardian, the Assistant Commissioner for Children and Young People and Child Guardian and between five and seven members appointed by the Minister.<sup>914</sup> Although the Commissioner is the chairperson of the CDCRC,<sup>915</sup> the CDCRC in performing its functions must act independently and is not under the control or direction or any other entity, including the Minister or the Commissioner.<sup>916</sup>

24.41 Queensland Advocacy Incorporated suggested that a 'similar model may help to ensure the independence and prevent the relegation of systemic advocacy when that function is transferred to the Adult Guardian':

Instead of being an individual, the Public Advocate could be a multi-disciplinary committee whose membership is largely independent of the Adult Guardian. Decisions to take up a matter for review would be decided by majority vote. The Adult Guardian should be a member of the committee and act as chairperson with a casting vote in matters not related to the operations of the Adult Guardian. If such a matter arose for consideration, the Adult Guardian should, for that matter, revert to the status of an ordinary member. Another member should be elected to chair the committee for that matter and would, for that matter, have the casting vote in the event of a deadlock. However, the Assistant Adult Guardian should not be a member of the committee at all. The committee would sit within the Office of the Adult Guardian, but would act entirely independently, taking direction neither from the Adult Guardian nor from the Minister. The committee would set its own direction within its remit prescribed in the Act.

The committee would not be responsible for the day-to-day management of the matters it adopted. The committee would act as a decision-maker, supervisor and final editor of committee publications. Day-to-day management of matters the committee adopted would devolve to a cohort of staff including managerial,

912 *Child Protection Act 1999* (Qld) ch 7A deals with child deaths.

913 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 117(b)(i)–(ii).

914 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 120(1). A person is eligible for appointment as an appointed member only if the Minister is satisfied that the person has expertise in the field of paediatrics and child health, forensic pathology, mental health, investigations or child protection or is otherwise, because of the person's qualifications, experience or membership of an entity, likely to make a valuable contribution to the CDCRC: s 120(2)(a).

915 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 127(1).

916 *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 118.



legal, research, investigative and administrative personnel within the Office of the Adult Guardian, which was nevertheless quarantined from operational activities within that office and subject only to the direction of the committee. The committee and its staff would have the powers necessary to perform its functions effectively. These would include investigative powers similar to those the Adult Guardian possesses, the power to compel relevant entities to release to it the information it requires to perform its functions, and the power to enter and inspect without notice the premises of service providers. The committee should develop a report with recommendations for change for each matter it investigates. If the matter falls within the purview of a particular department, the report should be presented to the Director-General of that department. If the Director-General does not implement that report within a reasonable time, the report should be presented to the Attorney-General and the Minister of the relevant department. The committee should produce an annual report and should publish in that report the extent to which its recommendations have been followed. The committee and its staff should also have the responsibility of establishing and maintaining the restrictive practices database previously described.

24.42 The Department of Communities commented that it is imperative that the role of systemic advocacy remain a discrete function within the Office of the Adult Guardian to ensure that the high quality, critical advice role of the Public Advocate is continued.<sup>917</sup>

24.43 Pave the Way was strongly opposed to the transfer of the Public Advocate's systemic advocacy function to the Adult Guardian. It specifically commented that it could not, therefore, offer any advice or suggestions about what issues should be taken into account to ensure that an independent systemic advocacy role will be maintained once that function is transferred to the Adult Guardian.<sup>918</sup>

## **The Commission's view**

### ***Reporting on systemic advocacy***

24.44 When the function of systemic advocacy is transferred from the Public Advocate to the Adult Guardian, the Adult Guardian will be both a provider of guardianship services, as well as the systems advocate in relation to a range of services provided to adults with impaired capacity, including guardianship services. This creates a potential for a conflict of interest, although several recommendations in this Report will generally provide for a greater scrutiny of the Adult Guardian's role as a guardian.

24.45 In Chapter 23, the Commission has recommended that decisions of the Adult Guardian about personal matters for an adult with impaired capacity should be reviewable decisions for the purposes of the QCAT Act.<sup>919</sup>

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917 Submission 169.

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

919 See Recommendations 23-11, 23-12 of this Report.

24.46 Further, in Chapter 26, the Commission has recommended that section 237 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the department's annual report must also include information about:<sup>920</sup>

- 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;
- the basis of the referral; and
- the outcome of the referral.

24.47 The Commission has also recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to include a new provision that applies if a matter involving the Adult Guardian's appointment as guardian is referred by a community visitor to the Adult Guardian. In that situation, the Act should require the chief executive to give the Tribunal a copy of the community visitor's referral to the Adult Guardian and the Adult Guardian's response.<sup>921</sup>

24.48 It is also important to ensure that the function of systemic advocacy maintains a clear focus and is not diminished by a reallocation of personnel or resources once the function of systemic advocacy is transferred to the Adult Guardian. To guard against that possibility, the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Adult Guardian's Annual Report must include information about:

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

24.49 This will help to ensure public accountability in terms of the systems advocacy that is undertaken within Office of the Adult Guardian.

24.50 In addition to the requirement for the Adult Guardian to prepare an Annual Report that addresses these issues, the Commission considers that the *Guardianship and Administration Act 2000* (Qld) should also be amended to enable the Adult Guardian, as systems advocate, to prepare a report to the Minister at any time on a systemic issue. The Act should also require the Minister to table a copy of the report in the Legislative Assembly within five sitting days of receiving the report. Although it is not expected that the power to prepare such a report would be used very often, the amendment provides a way for the Adult Guardian to bring to the attention of the government and the public a systemic issue about which the Adult Guardian has significant concerns. It is for that reason that the Commission

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920 See Recommendation 26-10 of this Report.

921 See Recommendation 26-11 of this Report.

has recommended a tabling requirement of five sitting days, rather than the more usual legislative requirement of 14 sitting days.

### ***Oversight of systemic advocacy***

24.51 Several of the submissions made suggestions about committee structures that might be put in place to oversee the Adult Guardian's systemic advocacy function.

24.52 The Commission does not consider that it is necessary for the Adult Guardian to be overseen by a parliamentary committee as suggested by Caxton Legal Centre Inc.<sup>922</sup> The Commission also doubts that such a mechanism would be the most effective way for the Adult Guardian to receive input into matters concerning systemic advocacy.

24.53 However, the Commission considers that there may be merit in establishing an external reference group, as suggested by the Adult Guardian,<sup>923</sup> or a committee structure, as suggested by Queensland Advocacy Incorporated,<sup>924</sup> to provide input and assistance in determining the Adult Guardian's priorities for systemic advocacy. The committee structure recommended by Queensland Advocacy Incorporated would be quite a formal structure having a legislative basis and members appointed by the Minister. However, the external reference group suggested by the Adult Guardian would not need a legislative basis.

24.54 On balance, the Commission considers that the flexibility afforded by a less formal structure will maximise the Adult Guardian's opportunity to receive input from persons and organisations representing a diverse range of interests. Accordingly, the Commission does not make any recommendation for legislative reform in relation to this issue.

### ***The name of the merged entity***

24.55 As mentioned above, the former Acting Public Advocate raised the issue of the name of the merged entity, and suggested that it should be called the Public Advocate rather than the Adult Guardian. Such a change would emphasise the new functions that are to be transferred to the Adult Guardian. However, a disadvantage of such a change is the potential for confusion in terms of the Adult Guardian's existing functions and powers. The role of the Adult Guardian has been in existence now for over 12 years. During that time, health providers have become familiar with the Adult Guardian's role as statutory health attorney and with the Adult Guardian's powers under sections 42 and 43 of the *Guardianship and Administration Act 2000* (Qld). There is also a level of awareness within the general community of the Adult Guardian's role as a guardian for adults with impaired capacity.

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922 See [24.36]–[24.37] above.

923 See [24.27] above.

924 See [24.39]–[24.41] above.

24.56 The Commission considers that the name of the merged entity is a matter for the government to decide when it passes legislation to give effect to its decision to transfer the Public Advocate's functions to the Adult Guardian. Accordingly, the Commission does not make any recommendation about this issue. However, the Commission makes the observation that any change to the name of the Adult Guardian would need to be accompanied by a public awareness campaign.

### **Review by the Minister**

24.57 Finally, there is the issue of whether the transfer of the systemic advocacy function to the Adult Guardian will ultimately realise the benefits envisaged by the Webbe-Weller Review, namely, a more effective systems advocate.<sup>925</sup> To ensure that this objective is considered, the *Guardianship and Administration Act 2000* (Qld) should be amended to require the Minister, within five years of the commencement of the provisions transferring the Public Advocate's functions and powers to the Adult Guardian, to review the systemic advocacy function of the Adult Guardian to ascertain whether an independent systemic advocacy role has been maintained. 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.

## **ADEQUACY OF THE CURRENT POWERS IN RELATION TO SYSTEMIC ADVOCACY**

### **Introduction**

24.58 The Public Advocate's powers in relation to systemic advocacy are set out in section 210 of the *Guardianship and Administration Act 2000* (Qld).<sup>926</sup> Those powers include a power to intervene in legal proceedings. However, section 210 does not give the Public Advocate any power to compel the provision of information.

24.59 In the Discussion Paper, the Commission referred to the submission of the Guardianship and Administration Reform Drivers ('GARD').<sup>927</sup> GARD observed that the Public Advocate lacks the power to compel the production of information, and suggested that this detracts from the independence of the Public Advocate.

24.60 The Commission considered that, because the information required for the systemic advocacy function comes from a range of sources, and not just from the Adult Guardian, it raises the issue of whether it would be appropriate for the Adult Guardian, once the function of systemic advocacy has been transferred, to have

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925 See [24.3] above.

926 *Guardianship and Administration Act 2000* (Qld) s 210 is set out at [24.16] above.

927 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.29]. GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents for People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network.

the power to compel the provision of information from individuals, organisations or agencies to further the function of systemic advocacy.<sup>928</sup> The Commission therefore proceeded to consider a number of specific powers that could be relevant to the function of systemic advocacy.

24.61 These issues are considered further below.

### Intervening in legal proceedings

24.62 Section 210 of the *Guardianship and Administration Act 2000* (Qld) currently provides that the Public Advocate may, with leave, intervene in a proceeding before a court or tribunal, or in an official inquiry, involving protection of the rights or interests of adults with impaired capacity for a matter.<sup>929</sup>

24.63 The Public Advocate has intervened in Tribunal proceedings that raised issues about:

- whether the Guardianship and Administration Tribunal had the power to give directions to a guardian or an administrator about how the appointee should exercise a power conferred on the appointee and how a matter for which the appointee had been appointed should be decided;<sup>930</sup>
- the remuneration of a trustee company that is appointed as the administrator of an adult under the *Guardianship and Administration Act 2000* (Qld);<sup>931</sup> and
- whether the administration of an antilipidinal drug to an adult with impaired capacity constitutes a health matter, a personal matter, or a restrictive practice matter under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).<sup>932</sup>

24.64 The Public Advocate has also intervened in Supreme Court proceedings that raised issues about the circumstances in which the Tribunal is required to apply the presumption of capacity.<sup>933</sup>

24.65 The significance of the Public Advocate's power to intervene can be seen in the first of the proceedings mentioned above. In that proceeding, the applicant (the adult's daughter) sought an order that the Adult Guardian (who was the adult's

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928 Ibid [20.31].

929 *Guardianship and Administration Act 2000* (Qld) s 210(2)–(3).

930 *Re WFM* [2006] QGAAT 54. This decision is discussed in Chapter 20 of this Report.

931 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323. This decision is discussed in Chapter 29 of this Report.

932 *Re AAG* [2009] QGAAT 43. This decision is discussed in Chapter 19 of this Report.

933 *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] 2 Qd R 402. This decision is discussed in Chapter 7 of this Report.

guardian) be directed to make certain decisions, including a decision to give the applicant access to her mother on specified days.

24.66 Counsel for the Adult Guardian submitted that the *Guardianship and Administration Act 2000* (Qld) did not give the Tribunal such a power, arguing that it would trespass on the functions of guardians and administrators.<sup>934</sup> In contrast, Counsel for the Public Advocate made submissions supporting the applicant's submission that the Tribunal's power to give directions included the power to give directions of the kind sought. The Tribunal declared that it had the power to give directions to a guardian or an administrator about how the appointee exercises a power conferred on the appointee and how a matter for which the appointee has been appointed should be decided.<sup>935</sup>

24.67 The Public Advocate's power to intervene in proceedings has meant that, for significant decisions, the Tribunal or the court has had the benefit of the submissions made by a disinterested person who nevertheless has substantial expertise and experience in relation to guardianship issues.

### **Submissions**

24.68 The former Acting Public Advocate commented that, in any combined structure, it is imperative that the systems advocate be able to intervene in proceedings separate of the Adult Guardian in order to protect the rights and interests of adults with impaired decision-making capacity. He suggested that appropriate mechanisms must be implemented to avoid conflicts of interest and to enable the systems advocate to carry out interventions independently.<sup>936</sup>

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

24.69 Under the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian is always an active party for a proceeding in relation to an adult.<sup>937</sup> Accordingly, it is inevitable that, in relation to guardianship proceedings, the power to intervene will no longer serve its current purpose once the Public Advocate's functions are transferred to the Adult Guardian.

24.70 The Commission considers, however, that section 210(2)–(3) of the *Guardianship and Administration Act 2000* (Qld) should be retained, as it will enable the Adult Guardian to intervene in other proceedings, for example, a coronial inquiry.

24.71 For guardianship proceedings, the Adult Guardian would never need to exercise the power to intervene. However, another person who wished to intervene

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934 *Re WFM* [2006] QGAAT 54, [20].

935 *Ibid* [1].

936 Submission 160.

937 *Guardianship and Administration Act 2000* (Qld) s 119(e).

in a guardianship proceeding could apply to the Tribunal for leave to intervene under section 41(2) of the QCAT Act, which is a provision of general application.<sup>938</sup>

24.72 In view of the fact that section 41(2) of the QCAT Act is the sole source of the power for an independent person to apply to intervene in a guardianship proceeding, it is desirable that section 41(2) should be mentioned in the *Guardianship and Administration Act 2000* (Qld) to draw attention to the existence of that provision. The Commission is therefore of the view that 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

### *Discussion Paper*

24.73 In the Discussion Paper, the Commission referred to comments by the former Public Advocate that, while the ability to influence change relies to a significant degree on the ongoing establishment of respectful and constructive relationships with stakeholders, there may be a need at times for a power to compel the provision of information required for systemic advocacy, regardless of which body within the guardianship system performs that function.<sup>939</sup>

This Office works with a broad range of stakeholders. As Public Advocate, I have consistently sought to engage constructively in discussions about identified systems issues with a view to working collaboratively with agencies to improve systems for the benefit of the vulnerable adults for whom OPA advocates. ... A more confrontative approach would only be considered in the event of persistent non-cooperation and/or significant concerns about the protection of the rights and interests of adults with impaired capacity or possible abuse, neglect or exploitation.

However, access to information which could potentially inform the work of this Office can currently easily be limited or entirely blocked. The Public Advocate has no power to require the provision of information and, where an agency or party doesn't provide information, there is nothing the Public Advocate can do to access the information.

This suggests that in reconsidering the issue of how systems advocacy should be done in the guardianship regime, it would be useful to consider the issue of the powers that may be required to ensure that agencies can be compelled to provide information and engage around issues, wherever the systems advocacy resides. Penalties in the event of non-compliance would also need to be considered.

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*Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 41 provides:

**41 Intervention**

- (1) The Attorney-General may, for the State, intervene in a proceeding at any time.
- (2) The tribunal may, at any time, give leave for a person to intervene in a proceeding, subject to the conditions the tribunal considers appropriate.

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Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.32].

24.74 The Commission also referred to the former Public Advocate's suggestion that, to assist in the performance of the function of systemic advocacy, consideration should be given to providing the systems advocate with:<sup>940</sup>

- Power to require that information reasonably within the knowledge and/or control of the person/agency regarding a system under consideration by the systems advocate be provided within a reasonable time frame ... ; and
- Power to compel written answers to specific questions within a reasonable time frame (again, penalty for non-compliance is suggested).

24.75 The Commission also referred to concerns raised by the former Public Advocate that the *Information Privacy Act 2009* (Qld) could impede the provision of personal information to the systems advocate by government agencies.<sup>941</sup>

24.76 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>942</sup>

- Should the *Guardianship and Administration Act 2000* (Qld) be amended to confer any or all of the following powers on the Public Advocate:
  - the power to require a person who has the custody or control of information or documents relating to a system under consideration by the Public Advocate to give the information or access to the documents (including copies) to the Public Advocate;
  - the power to require a person who has the custody or control of information or documents to give the Public Advocate information or access to documents (including copies) relating to:
    - (i) the arrangements for individuals or a class or individuals; or
    - (ii) policies and procedures that apply within a service, agency or facility;
  - the power to require a person (including a person who is responsible for a service or facility) to give the Public Advocate written answers to specific questions;
- Alternatively, or in addition, should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that agencies must disclose personal

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940 Ibid [20.36].

941 Ibid [20.34].

942 Ibid 202–3.



information about an adult that the Public Advocate reasonably considers to be necessary for the performance of his or her functions?<sup>943</sup>

### **Submissions**

24.77 The Adult Guardian considered that the *Guardianship and Administration Act 2000* (Qld) should be amended to confer on the systems advocate the power to require that certain information or documents be given to the systems advocate in two situations.

24.78 First, the Adult Guardian stated that the systems advocate should have the power to require a person who has the custody or control of information or documents relating to a system under consideration by the systems advocate to give information or access to the documents (including copies) to the systems advocate.<sup>944</sup>

24.79 Secondly, she considered that the systems advocate should have the power to require a person who has the custody or control of information or documents to give the systems advocate information or access to documents (including copies) relating to:

- the arrangements for a class of individuals; or
- policies and procedures that apply within a service, agency or facility.

24.80 However, the Adult Guardian stated that it would be inappropriate for the systems advocate to be able to seek documents in relation to an individual.

24.81 The Adult Guardian considered that the *Guardianship and Administration Act 2000* (Qld) should not be amended to confer on the systems advocate the power to require a person (including a person who is responsible for a service or facility) to give the systems advocate written answers to specific questions. She doubted that this is the role of systemic advocacy, and observed that this power is not replicated in the other Australian jurisdictions.

24.82 The Adult Guardian was also of the view that the *Guardianship and Administration Act 2000* (Qld) should not be amended to provide that agencies must disclose personal information about an adult that the systems advocate reasonably considers to be necessary for the performance of his or her functions.

24.83 The former Acting Public Advocate commented that, at present, the Public Advocate does not have powers to compel the reasonable provision of information to enable it to monitor and review the provision of services and facilities:<sup>945</sup>

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943 Ibid 203.

944 Submission 164.

945 Submission 160.

Generally, respectful relationships are able to be developed and maintained by the Public Advocate with stakeholder agencies, and often information is provided. Many agencies respond positively when issues of concern are raised and engage constructively to pursue beneficial outcomes for vulnerable adults with [impaired decision-making capacity]. However, if an agency refuses to cooperate, there should be a power to require information in order to ensure that the rights and interests of vulnerable adults are able to be adequately protected.

24.84 The former Acting Public Advocate therefore considered that the systems advocate should have the power:

- to require from an agency or person the provision of documents and information (relating to the arrangements for individuals or a class or classes of individuals and/or other relevant policy and procedure documentation which applies within the service or agency or facility) reasonably within the power, custody, knowledge or control of the person; and
- to require a person who is responsible for a service or facility to give answers to specific questions.

24.85 Another respondent also favoured amending the legislation to enable the Adult Guardian to require information of this kind.<sup>946</sup> However, this respondent was of the view that the legislation should not be amended to enable the Adult Guardian to require an agency to disclose personal information of an adult.

24.86 Queensland Advocacy Incorporated was in favour of giving the Public Advocate the power to compel the provision of information required for systemic advocacy and investigative powers similar to those of the Adult Guardian, but was opposed to the transfer of the Public Advocate's functions to the Adult Guardian.<sup>947</sup>

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

24.87 In the Commission's view, systemic advocacy will ordinarily be undertaken by working collaboratively with agencies and organisations to improve the services and facilities provided for adults with impaired capacity. The Commission recognises, however, that the Adult Guardian, as systems advocate, may at times require information that agencies or organisations are reluctant to provide.

24.88 Accordingly, 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 system being monitored or reviewed by the Adult Guardian;
- arrangements for a class of individuals; and

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946 Submission 94I.

947 Submission 162.

- policies and procedures that apply within an agency, service or facility.

24.89 The provision giving effect to this recommendation should generally be modelled on section 183(1), (2)(a), (c), (3)–(5) of the *Guardianship and Administration Act 2000* (Qld). In doing so, the new provision will enable the Adult Guardian, for the purpose of systemic advocacy, to inspect documents and take copies of them. It will also require compliance with a notice given by the Adult Guardian unless the person has a reasonable excuse; preserve the privilege against self-incrimination; and override other restrictions against disclosure.

24.90 While the Commission’s recommendation will enable the Adult Guardian to require information, or access to documents, relating to a class of individuals, in some circumstances, it may not be possible for an agency to comply with that requirement without disclosing personal information about an adult.<sup>948</sup> This might be the case where a small number of adults live in a facility and the nature of the information sought is relevant to only one of the adults, with the result that the identity of that adult can reasonably be ascertained from the information. This raises the issue of whether the requirement to comply with the *Information Privacy Act 2009* (Qld) could prevent an agency from complying with the Adult Guardian’s notice requiring information or the production of documents.

24.91 As explained in Chapter 23 of this Report, the *Information Privacy Act 2009* (Qld) requires an agency, other than the Health Department, to comply with the Information Privacy Principles (‘IPPs’) set out in the Act. It also requires the Health Department to comply with the National Privacy Principles (‘NPPs’) set out in the Act.<sup>949</sup> IPP 11 and NPP 2 place limits on the disclosure, or on the use and disclosure, by an agency of personal information about an individual except for certain specified purposes. However, IPP 11(1)(d) does not prohibit disclosure if ‘the disclosure is authorised or required under a law’.<sup>950</sup> Similarly, NPP 2(1)(f) does not prohibit use or disclosure if ‘the use or disclosure is authorised or required by or under a law’.<sup>951</sup> There is therefore no impediment to the disclosure of personal information by an agency if the personal information is required under a law.

24.92 To avoid the possibility that compliance with the IPPs and the NPPs might prevent an agency from complying with a notice given by the Adult Guardian requiring information or access to documents, the provision giving effect to the recommendation at [24.88] above, should specifically provide that the Adult Guardian’s power to require information or access to documents includes the

948 *Information Privacy Act 2009* (Qld) s 12 defines personal information:

**12 Meaning of personal information**

Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. (emphasis added)

949 *Information Privacy Act 2009* (Qld) ss 27, 31.

950 *Information Privacy Act 2009* (Qld) sch 3, IPP 11(1)(d).

951 *Information Privacy Act 2009* (Qld) sch 4, NPP 2(1)(f).

power to require personal information about an adult if the provision of that information is necessary to comply with the Adult Guardian's notice.

## **Power to require the collection and provision of statistical information**

### ***Discussion Paper***

24.93 In the Discussion Paper, the Commission referred to the former Public Advocate's suggestion that consideration be given to a legislative requirement that agencies performing functions under the guardianship system:<sup>952</sup>

be required to collect and provide to the systems advocate statistical information regarding the performance of their functions which might be expected to be useful and to provide some systemic trend information. It is desirable that the guardianship system understand the demographics and characteristics of its clientele very well (to aid systems work and also plan for future needs) and so detailed information will always be appropriately collected. Priorities for the systems advocate may make access to particular categories of data desirable from time to time. Better data systems, which allow differential interrogation of the data according to targeted priorities would also be useful.

24.94 The Commission therefore sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended to confer on the Public Advocate the power to require agencies performing a function within the guardianship system to collect and provide statistical information about the performance of their functions.<sup>953</sup>

### ***Submissions***

24.95 The Adult Guardian considered that the systems advocate should be able to access relevant statistical data that is already in existence and, to that end, should be able to recommend that different types or groups of statistical information or data be maintained by an agency.<sup>954</sup>

24.96 The Adult Guardian also made the more general comment about data gathering and the role that it plays in systemic advocacy:

Although there is much merit in the suggestions concerning data gathering, the role would need to be significantly resourced in a way that it currently is not, both to keep and to analyse the material. Without sufficient resources for this purpose, expectations about the functions of the office may be created which are unachievable.

Historically the role within Queensland has not relied upon data collection. The risk with this change in focus is that the role may come to be seen as either a 'data depository' or 'centre of analysis' when what is really needed to undertake the role is perhaps intelligence and insight.

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952 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.38].

953 Ibid 202–3.

954 Submission 164.

24.97 However, the former Acting Public Advocate considered that it would be desirable for the legislation to provide that the systems advocate may require trend data to be provided by the Adult Guardian and the Community Visitors Program, although he noted that additional resources might be required to provide for better data systems.<sup>955</sup>

Detailed and accurate statistical information about the interaction of adults with [impaired decision-making capacity] within the guardianship system would not only facilitate systems advocacy but would also allow Government to plan for the future. Consideration should be given to a legislative requirement that agencies performing functions under the guardianship regime be required to collect and provide to the Systems Advocate certain accurate statistical information which might indicate systemic trends, and which is anticipated as useful to inform the performance of the systems advocacy functions. Such a legislative requirement should be introduced regardless of whether the current functions of the Adult Guardian, Community Visitors and Public Advocate reside within the one entity, as the situation may likely remain unchanged. Resources for better data systems, which allow differential interrogation of the data according to targeted priorities, may also be useful as it appears that they do not currently exist.

...

***There should be a statutory requirement for entities performing functions within the guardianship system (including Adult Guardian and the Community Visitor Program) to collect data relevant to identification of systemic trends and provide it at regular intervals to the Systems Advocate.*** (emphasis in original)

24.98 Another respondent also favoured amending the legislation to give the Adult Guardian the power to require agencies performing a function within the guardianship system to collect and provide statistical information about the performance of their functions.<sup>956</sup>

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

24.99 The Commission considers that it could be unduly onerous for the agencies concerned if the Adult Guardian had a statutory power to require an agency that performs a function within the guardianship system, or any other agency, to collect and provide particular statistical information about the performance of their functions. If the agencies did not reasonably have the capacity or resources to collect information in the way required by the Adult Guardian, compliance with such a requirement could have the effect of diverting resources away from the services provided by the agency.

24.100 However, if an agency or a person has statistical information that is relevant to a system being monitored or reviewed by the Adult Guardian, arrangements for a class of individuals, or policies and procedures that apply within an agency, service or facility, the Commission considers that the Adult Guardian's

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955 Submission 160.

956 Submission 94I.

power to require the provision of information or access to documents, recommended earlier in this chapter, should extend to that statistical information.

24.101 The Adult Guardian, as systems advocate, may well wish to make recommendations about the types of statistical information that it would be useful for agencies to collect. The making of such a recommendation does not require a legislative power.

### **Power to enter premises to monitor service delivery**

24.102 The Public Advocate's functions under section 209 of the *Guardianship and Administration Act 2000* (Qld) include:<sup>957</sup>

- promoting the provision of services and facilities for adults with impaired capacity; and
- monitoring and reviewing the delivery of services and facilities for adults with impaired capacity.

24.103 This is separate from the more specific functions of community visitors to inquire into, and report to the chief executive on:<sup>958</sup>

- the adequacy of services for the assessment, treatment and support of consumers at visitable sites; and
- the appropriateness and standard of services for the accommodation, health and well-being of consumers at visitable sites; and
- the extent to which consumers at visitable sites receive services in the way least restrictive of their rights.

### **Discussion Paper**

24.104 In the Discussion Paper, the Commission referred to comments by the former Public Advocate that the powers supporting the systemic advocacy function do not include the power to enter the premises of a service provider.<sup>959</sup>

at the moment, if the public advocate wishes to visit the premises of a service provider, it can only be done with the agreement of the service provider, as there is no power to compel entry. This means that a sanitised version of the service delivered or facility can be presented to the public advocate.

24.105 The Commission also referred to the former Public Advocate's suggestion that consideration should be given to providing the systems advocate with the

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<sup>957</sup> *Guardianship and Administration Act 2000* (Qld) s 209(d)–(e).

<sup>958</sup> *Guardianship and Administration Act 2000* (Qld) s 224(2)(a)–(c). These functions are considered in Chapter 26 of this Report.

<sup>959</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.33].

following powers to support the function of monitoring and reviewing the delivery of services and facilities:<sup>960</sup>

- Power to require from a person the provision of documents and information (relating to the arrangements for individuals or a class or classes of individuals and/or other relevant policy and procedure documentation which applies within the service/agency/facility) reasonably within the power, custody, knowledge or control of the person (penalty for non-compliance is suggested to discourage non-compliance);
- Power to require a person who is responsible for a service or facility to give answers to specific questions (again, a penalty for non-compliance is suggested);
- Power to conduct visits to premises without notice (again, penalty provisions for non-compliance).

24.106 In view of these comments, the Commission sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended so that Public Advocate has the power to enter the premises of a service provider, without notice, to monitor the delivery of services at those premises.<sup>961</sup>

### **Submissions**

24.107 The Adult Guardian considered that the *Guardianship and Administration Act 2000* (Qld) should not be amended to confer on the systems advocate the power to enter the premises of a service provider, without notice, to monitor the delivery of services at those premises. The Adult Guardian considered that the investigation role of the Adult Guardian should allow for this power. She also doubted that this was part of the role of systemic advocacy, and observed that this power is not replicated in the other Australian jurisdictions.<sup>962</sup>

24.108 However, the former Acting Public Advocate and another respondent favoured amending the legislation to give the systems advocate the power to enter the premises of a service provider, without notice, to monitor the delivery of services at those premises.<sup>963</sup>

24.109 Queensland Advocacy Incorporated was in favour of giving the Public Advocate the power to enter and inspect the premises of service providers unannounced, but was opposed to the transfer of the Public Advocate's functions to the Adult Guardian.<sup>964</sup>

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960 Ibid [20.37].

961 Ibid 202–3.

962 Submission 164.

963 Submissions 941, 160.

964 Submission 162.

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

24.110 The *Guardianship and Administration Act 2000* (Qld) already makes provision for certain persons to enter premises on certain conditions. The Commission's recommendations in this Report have extended some of these powers.

24.111 As explained in Chapter 26 of this Report, section 227 of the *Guardianship and Administration Act 2000* (Qld) gives community visitors the power to enter visitable sites without notice during normal hours (that is, between 8am and 6pm) and, with the chief executive's authorisation, outside normal hours. It also gives community visitors the power to require persons at visitable sites to answer questions and to produce visitable site documents.

24.112 In Chapter 26 of this Report, the Commission has recommended that section 226(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that the Adult Guardian, as well as certain other specified persons, may ask the chief executive to arrange for a community visitor to visit a visitable site.<sup>965</sup> The Commission has also recommended that the range of visitable sites that community visitors may visit be widened to include all residential services that are registered under the *Residential Services (Accreditation) Act 2002* (Qld), regardless of the level of accreditation of the service.<sup>966</sup> These recommendations enable the Adult Guardian to request that community visitors visit a wide range of facilities.

24.113 Further, in Chapter 20 of this Report, the Commission has recommended that the Tribunal's powers be amended to confer the power to issue a new type of warrant — an entry and assessment warrant — to authorise the Adult Guardian to enter premises to obtain information relevant to an assessment of an adult's circumstances.<sup>967</sup>

24.114 In view of the existing and recommended powers for community visitors and the Adult Guardian to enter premises, the Commission considers it unnecessary for the Adult Guardian, as the systems advocate, also to have a specific power to enter premises to monitor the provision of services and facilities for adults with impaired capacity.

### **Sanctions**

24.115 As explained in Chapter 23 of this Report, the Adult Guardian has a number of investigative powers under the *Guardianship and Administration Act 2000* (Qld) that enable the Adult Guardian to require that certain information or documents be provided to the Adult Guardian when conducting an investigation

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965 See Recommendation 26-4(c) of this Report.

966 See Recommendation 26-2 of this Report.

967 See Recommendations 20-6 to 20-12 of this Report. The Commission has recommended that the Tribunal may, in issuing an entry and assessment warrant, authorise a police officer to assist the Adult Guardian in enforcing the warrant, or authorise 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: see Recommendation 20-7(b) of this Report.



into an allegation or a complaint in relation to an adult. Those provisions also provide for a maximum penalty of 100 penalty units (that is, \$10 000) for a breach.<sup>968</sup>

### **Discussion Paper**

24.116 In the Discussion Paper, the Commission referred to comments by the former Public Advocate that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide for a penalty for non-compliance with the additional powers that had been suggested for the systems advocate.<sup>969</sup>

24.117 The Commission sought submissions on whether, if the *Guardianship and Administration Act 2000* (Qld) were amended to confer additional powers on the systems advocate, the Act should also impose sanctions for non-compliance.<sup>970</sup>

### **Submissions**

24.118 The Adult Guardian considered that the *Guardianship and Administration Act 2000* (Qld) should not be amended to impose sanctions for non-compliance with any powers that might be conferred on the systems advocate.<sup>971</sup>

24.119 However, the former Acting Public Advocate and another respondent supported the imposition of sanctions for non-compliance with a power conferred on the Adult Guardian for systemic advocacy.<sup>972</sup>

24.120 As mentioned earlier, Queensland Advocacy Incorporated favoured the retention of the Public Advocate and the augmentation of the Public Advocate's powers in relation to systemic advocacy.<sup>973</sup> In that regard, it considered that a failure to comply with a lawful direction from the Public Advocate based on any of those increased powers should attract a statutory penalty.<sup>974</sup>

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

24.121 As explained above, each of sections 182 to 185 of the *Guardianship and Administration Act 2000* (Qld) provides for a penalty of up to 100 penalty units (that

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968 *Guardianship and Administration Act 2000* (Qld) ss 182 (Records and audits), 183 (Right to information), 184 (Information by statutory declaration), 185 (Witnesses). See *Penalties and Sentences Act 1992* (Qld) s 5 (meaning of 'penalty unit').

969 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.36]–[20.38].

970 *Ibid* 203.

971 Submission 164.

972 Submissions 94I, 160.

973 See [24.86] above.

974 Submission 162.

is, \$10 000)<sup>975</sup> for non-compliance with a notice given by the Adult Guardian under the relevant provision.

24.122 The Commission considers that, if the powers recommended in this chapter are to be effective, the *Guardianship and Administration Act 2000* (Qld) should similarly provide for a penalty for non-compliance with a notice given by the Adult Guardian exercising his or her powers as systems advocate. The penalty should be consistent with the penalties provided for in sections 182 to 185 of the Act — that is, 100 penalty units.

## A specific power to investigate

### *Discussion Paper*

24.123 In the Discussion Paper, the Commission referred to the suggestion by GARD that the Public Advocate should be provided with specific investigative powers.<sup>976</sup> While GARD acknowledged that the Public Advocate does not have a function of individual advocacy, it suggested that investigative powers were still important in relation to systemic advocacy:<sup>977</sup>

the Public Advocate does not have any individual advocacy or complaints functions and it therefore does not deal with individual cases like the Adult Guardian, but instead it looks at widespread deficiencies in institutions and systems that affect a large number of people with impaired capacity. It could be argued that even though the function relates to the investigation of issues affecting large numbers of people, the function requires much the same type of information gathering processes as the investigation of individual matters.

24.124 GARD therefore recommended that, in order to fully perform its functions under the *Guardianship and Administration Act 2000* (Qld), ‘the Public Advocate should be granted similar investigative powers to those of the Adult Guardian’. As explained in Chapter 23 of this Report, the Adult Guardian’s investigative powers include:

- a right to all information necessary to investigate a complaint or allegation or to carry out an audit (section 183);
- if a person is required to give information to the Adult Guardian — the power to require the person to give the information by statutory declaration (section 184); and

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<sup>975</sup> See *Penalties and Sentences Act 1992* (Qld) s 5(1)(c) (Meaning of penalty unit).

<sup>976</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.40].

<sup>977</sup> *Ibid.*

- the power to require a person, by written notice, to attend before the Adult Guardian to give information and answer questions, or produce stated documents or things (section 185).<sup>978</sup>

24.125 The Commission also noted that the former Public Advocate had suggested that consideration be given to conferring a range of specific powers on the systems advocate.<sup>979</sup>

24.126 In the Discussion Paper, the Commission sought submissions on whether:<sup>980</sup>

- the *Guardianship and Administration Act 2000* (Qld) should be amended to confer any specific investigative powers on the Public Advocate in addition to the powers discussed earlier in the chapter; and
- if additional powers were to be conferred, what those powers should be.

24.127 Subsequently, as a result of the amendment to the terms of reference, the Commission sought submissions on these questions as if a reference to the Public Advocate were a reference to the Adult Guardian.<sup>981</sup>

### **Submissions**

24.128 The Adult Guardian commented that, apart from her earlier suggestions to confer limited additions powers on the systems advocate,<sup>982</sup> she did not have any suggestions regarding any further powers.<sup>983</sup>

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

24.129 In this chapter, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to confer on the Adult Guardian, as systems advocate, the power to give a notice requiring the provision of certain information or access to documents. In the Commission's view, that power should be sufficient to enable the Adult Guardian to perform the systemic advocacy function that is to be transferred to the Adult Guardian. Accordingly, the Commission does not recommend that any additional powers be conferred on the Adult Guardian.

<sup>978</sup> Section 185(2) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must comply with the notice unless the person has a reasonable excuse. However, s 188 provides that it is not a reasonable excuse for a person to fail to comply with a notice under s 185(1) that compliance with the notice or answering the question might tend to incriminate the person.

<sup>979</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [20.42].

<sup>980</sup> Ibid 204–5.

<sup>981</sup> This question was asked in Answer Sheets posted on the Commission's website at <<http://www qlrc qld gov au/publications.htm#2>> at 30 September 2010.

<sup>982</sup> See [24.77]–[24.79] above.

<sup>983</sup> Submission 164.

## RECOMMENDATIONS

### *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

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## INTRODUCTION

25.1 The Commission's terms of reference require it to review the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:<sup>984</sup>

the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.

25.2 The terms of reference also require the Commission, in undertaking the review, to have regard to a number of specified matters, including:

the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts.

25.3 Because the Public Trustee of Queensland (the 'Public Trustee') is eligible for appointment as an administrator and an attorney, and is appointed as administrator for the majority of adults who have an administrator,<sup>985</sup> the Public Trustee is generally regarded as one of the agencies forming part of the guardianship system, even though the Public Trustee is established under the *Public Trustee Act 1978* (Qld),<sup>986</sup> rather than under the *Guardianship and Administration Act 2000* (Qld).<sup>987</sup>

25.4 This chapter outlines the role of the Public Trustee under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). It also examines the avenues currently available for reviewing financial decisions made for an adult by the Public Trustee under those Acts.

## THE ROLE OF THE PUBLIC TRUSTEE<sup>988</sup>

### ***Guardianship and Administration Act 2000* (Qld)**

#### ***Appointment as an administrator***

25.5 The *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Public Trustee as an administrator to make decisions about financial matters for an adult.<sup>989</sup> When so appointed, the Public Trustee has

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

985 See [23.6] below.

986 *Public Trustee Act 1978* (Qld) s 7(1).

987 In contrast, the Adult Guardian is established by the *Guardianship and Administration Act 2000* (Qld): see Chapter 23 of this Report.

988 The Public Trustee's role as a litigation guardian is considered in Chapter 28 of this Report.

989 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii). However, the Public Trustee is not eligible to be appointed as a guardian to make personal decisions for an adult: s 14(1)(a).



the same powers as any other administrator.<sup>990</sup> The only difference is that the requirement for the Tribunal to review the appointment of a guardian or an administrator at least every five years does not apply to an appointment of the Public Trustee (or a trustee company).<sup>991</sup>

25.6 Although the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Adult Guardian as a guardian for a matter only if there is no other appropriate person available for the matter,<sup>992</sup> the Act does not include a similar limitation on the appointment of the Public Trustee as an administrator. In Chapter 14 of this Report, however, the Commission has recommended that section 14 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal may appoint the Public Trustee as administrator for a matter only if there is no person mentioned in section 14(1)(b)(i) who is appropriate and available for appointment as administrator for the matter.<sup>993</sup>

25.7 At 30 June 2009, the Public Trustee was the appointed administrator for 7142 adults with impaired capacity, an increase of 5.3 per cent from 30 June 2008.<sup>994</sup> This represents a significant proportion of all administrators appointed by the Tribunal, as indicated by Table 25.1 below.

Financial year	Adults for whom an administrator was appointed <sup>995</sup>	Adults for whom the Public Trustee was appointed as the sole administrator	Percentage of appointments of the Public Trustee
2008–09 <sup>996</sup>	2166	1675	78.2%
2007–08 <sup>997</sup>	2196	1857	84.6%
2006–07 <sup>998</sup>	1917	1645	85.8%
2005–06 <sup>999</sup>	1740	1463	84%

990 The powers and duties of guardians and administrators are considered in Chapter 15 of this Report.

991 *Guardianship and Administration Act 2000* (Qld) s 28(1). However, in Chapter 22 of this Report, the Commission has recommended that s 28(1) of the *Guardianship and Administration Act 2000* (Qld) be amended so that the Public Trustee and trustee companies are subject to the same requirements for periodic review as other administrators: see Recommendation 22-5 of this Report.

992 *Guardianship and Administration Act 2000* (Qld) s 14(2).

993 See Recommendation 14-13 of this Report. *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i) refers to 'a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwth) or a similar law of a foreign jurisdiction'.

994 Public Trustee of Queensland, *Annual Report 2008–2009* (2009) 29.

995 The figures in Table 25.1 include original appointments and appointments on review.

996 Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 42.

997 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 41.

998 Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 41.

999 Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 38.

2004–05 <sup>1000</sup>	1471	1250	85%
2003–04 <sup>1001</sup>	1688	1262	74.8%

Table 25.1

### **Acting as an administrator in limited circumstances**

25.8 In limited circumstances, the Public Trustee may also act as an adult's administrator even though no formal appointment has been made by the Tribunal:

- If the Tribunal suspects, on reasonable grounds, that an administrator is not competent, it may suspend the operation of all or some of the administrator's power for a period of up to three months.<sup>1002</sup> During the period of suspension, the Public Trustee is taken to be the adult's administrator for the exercise of the suspended power.<sup>1003</sup>
- If the Adult Guardian suspects, on reasonable grounds, that an attorney is not competent, the Adult Guardian may suspend the operation of all or some of an attorney's power for a period of up to three months.<sup>1004</sup> During the period of suspension, the Public Trustee is taken to be the adult's attorney for the exercise of the suspended power.<sup>1005</sup>

25.9 When making a decision as an administrator, or during the suspension of power of an administrator or attorney, the Public Trustee must apply the General Principles.<sup>1006</sup>

### **Powers of Attorney Act 1998 (Qld)**

#### **Appointment as an attorney under an enduring power of attorney**

25.10 The *Powers of Attorney Act 1998* (Qld) provides that an adult (the 'principal') may, by an enduring power of attorney, appoint one or more persons who are eligible attorneys to do in relation to one or more financial matters or personal matters anything that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised.<sup>1007</sup>

1000 Guardianship and Administration Tribunal, *Annual Report 2004–2005* (2005) 22.

1001 Guardianship and Administration Tribunal, *Annual Report 2003–2004* (2004) 22.

1002 *Guardianship and Administration Act 2000* (Qld) s 155(1), (4).

1003 *Guardianship and Administration Act 2000* (Qld) s 155(6).

1004 *Guardianship and Administration Act 2000* (Qld) s 195(1), (3).

1005 *Guardianship and Administration Act 2000* (Qld) s 196(3).

1006 *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(1); *Powers of Attorney Act 1998* (Qld) s 76.

1007 *Powers of Attorney Act 1998* (Qld) s 32(1)(a). Enduring powers of attorney are considered in Chapter 16 of this Report.

25.11 An eligible person for a matter under an enduring power of attorney includes the Public Trustee.<sup>1008</sup> The *Powers of Attorney Act 1998* (Qld) does not limit the matters for which the Public Trustee is an eligible attorney.<sup>1009</sup> Accordingly, the Public Trustee may be appointed to make decisions about both financial matters and personal matters (including health matters).<sup>1010</sup> In Chapter 16 of this Report, however, the Commission has recommended that section 29(1)(b) of the *Powers of Attorney Act 1998* (Qld) 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.<sup>1011</sup>

25.12 In exercising a power as an attorney under an enduring power of attorney for a financial matter, the Public Trustee must comply with the General Principles.<sup>1012</sup>

### **Acting as an attorney under an advance health directive**

25.13 The *Powers of Attorney Act 1998* (Qld) provides that an adult principal may, by an advance health directive, give directions about both health matters and special health matters for his or her future health care.<sup>1013</sup> The principal may also give information about those directions, and may appoint one or more persons who are eligible attorneys to exercise power for a health matter for the principal in the event that the directions prove inadequate.<sup>1014</sup> Subject to the terms of the advance health directive and the *Powers of Attorney Act 1998* (Qld), an attorney appointed under an advance health directive may also do anything in relation to a health matter for the principal that the principal could lawfully do if he or she had capacity for the matter.<sup>1015</sup>

25.14 An eligible person for a matter under an advance health directive includes the Public Trustee.<sup>1016</sup> In Chapter 9 of this Report, however, the Commission has recommended that section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) be

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<sup>1008</sup> *Powers of Attorney Act 1998* (Qld) s 29(1)(b).

<sup>1009</sup> See *Powers of Attorney Act 1998* (Qld) s 29. In contrast, the Adult Guardian is an eligible attorney only for personal matters: *Powers of Attorney Act 1998* (Qld) s 29(1)(d).

<sup>1010</sup> This is in contrast to the position under the *Guardianship and Administration Act 2000* (Qld). Although the Tribunal may appoint the Public Trustee as an administrator to make decisions about financial matters for an adult, it does not have the power to appoint the Public Trustee as a guardian to make personal decisions for an adult: see *Guardianship and Administration Act 2000* (Qld) s 14(1)(a), (b)(ii).

<sup>1011</sup> See Recommendation 16-2 of this Report.

<sup>1012</sup> *Powers of Attorney Act 1998* (Qld) s 76.

<sup>1013</sup> *Powers of Attorney Act 1998* (Qld) s 35(1)(a). Advance health directives are considered in Chapter 9 of this Report.

<sup>1014</sup> *Powers of Attorney Act 1998* (Qld) s 35(1)(b)–(c).

<sup>1015</sup> *Powers of Attorney Act 1998* (Qld) s 36(4)–(5).

<sup>1016</sup> *Powers of Attorney Act 1998* (Qld) s 29(2)(b).

omitted so that the Public Trustee is no longer an eligible attorney for a matter under an advance health directive.<sup>1017</sup>

### Duty to consult with other substitute decision-makers

25.15 The guardianship legislation imposes a duty on the guardians, administrators and attorneys of an adult to consult with each other. If there are two or more persons who are the guardian, administrator or attorney for an adult, 'the persons must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them'.<sup>1018</sup>

25.16 The Public Trustee is subject to this requirement when appointed as an adult's administrator or attorney.

### The law in other jurisdictions

25.17 In all other Australian jurisdictions, the Public Trustee (or equivalent)<sup>1019</sup> may be appointed as an administrator (or equivalent) to make financial decisions for an adult who has impaired capacity for those decisions.<sup>1020</sup>

25.18 In addition, the Public Trustee (or equivalent) may be appointed as an attorney under an enduring power of attorney to make financial decisions for a principal.<sup>1021</sup>

### Discussion Paper

25.19 In the Discussion Paper, the Commission noted that the powers of the Public Trustee when acting as an administrator or as an attorney under an enduring power of attorney are the same as the powers of any other administrator or attorney.<sup>1022</sup>

<sup>1017</sup> See Recommendation 9-2 of this Report.

<sup>1018</sup> *Guardianship and Administration Act 2000* (Qld) s 40(1); *Powers of Attorney Act 1998* (Qld) s 79(1).

<sup>1019</sup> In New South Wales, the equivalent of the Public Trustee is the NSW Trustee: see *NSW Trustee and Guardian Act 2009* (NSW). In Victoria, the equivalent of the Public Trustee is State Trustees Limited: see *State Trustees (State Owned Company) Act 1994* (Vic).

<sup>1020</sup> *Guardianship and Management of Property Act 1991* (ACT) ss 8, 9 (manager); *Guardianship Act 1987* (NSW) s 25E (manager); *Aged and Infirm Persons' Property Act* (NT) ss 11, 13(1)(a) (manager); *Guardianship and Administration Act 1993* (SA) s 35(1), (2)(b) (administrator); *Guardianship and Administration Act 1995* (Tas) ss 51, 54(1)(a) (administrator); *Guardianship and Administration Act 1986* (Vic) ss 46, 47(1), (4) (administrator); *Guardianship and Administration Act 1990* (WA) ss 3(1) (definition of 'corporate trustee'), 64, 68(1)(b)–(d) (administrator).

<sup>1021</sup> *Powers of Attorney Act 2006* (ACT) ss 13, 14(1)(a); *Powers of Attorney Act 2003* (NSW) s 19, *NSW Trustee and Guardian Act 2009* (NSW) s 11(1)(d); *Powers of Attorney Act* (NT) s 13, *Public Trustee Act* (NT) s 32(1)(j); *Powers of Attorney and Agency Act 1984* (SA) s 6, *Public Trustee Act 1995* (SA) s 5(2)(a); *Powers of Attorney Act 2000* (Tas) s 30, *Public Trustee Act 1930* (Tas) s 12(1); *Instruments Act 1958* (Vic) s 115, *State Trustees (State Owned Company) Act 1994* (Vic) s 1(b), *Trustee Companies Act 1984* (Vic) s 15(1); *Guardianship and Administration Act 1990* (WA) s 104C.

<sup>1022</sup> Those powers are considered in Chapters 15 and 16 of this Report.

25.20 Nevertheless, the Commission sought submissions on whether:<sup>1023</sup>

- the *Guardianship and Administration Act 2000* (Qld) should be amended to change the powers of the Public Trustee when acting as an administrator; or
- the *Powers of Attorney Act 1998* (Qld) should be amended to change the powers of the Public Trustee when acting as an attorney under an enduring document.

## Submissions

25.21 The Adult Guardian commented that she is not aware of any need to change the powers of the Public Trustee when acting as an administrator or attorney.<sup>1024</sup>

25.22 A submission from Pave the Way commented that the Public Trustee's powers as an administrator were appropriate, but that the Public Trustee's powers as an attorney should be limited to financial matters.<sup>1025</sup>

## The Commission's view

25.23 In the Commission's view, it is generally appropriate that the Public Trustee, when appointed as an administrator under the *Guardianship and Administration Act 2000* (Qld) or as an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld), has the same powers as any other administrator or attorney appointed under those Acts.

25.24 With the exception of the absence of a specific power to delegate, which is considered below, the Public Trustee's powers are appropriate for its role as administrator or attorney under an enduring power of attorney, and do not require amendment.

## THE PUBLIC TRUSTEE'S POWER TO DELEGATE

### The law in Queensland

25.25 Section 11A of the *Public Trustee Act 1978* (Qld) provides for the Public Trustee to delegate the Public Trustee's powers under that Act. However, the section does not extend to the delegation of the Public Trustee's powers that are exercisable by virtue of appointment as an administrator under the *Guardianship and Administration Act 2000* (Qld) or as an attorney under the *Powers of Attorney Act 1998* (Qld). Section 11A provides:

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<sup>1023</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 181.

<sup>1024</sup> Submission 164.

<sup>1025</sup> Submission 135. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

**11A Delegation by public trustee**

- (1) The public trustee may delegate the public trustee's powers under this Act to any person.
- (2) A power may be subdelegated if the delegation expressly allows the subdelegation of the power.
- (3) Without limiting subsections (1) and (2), the following powers may be delegated (and subdelegated)—
  - (a) making an affidavit or statutory declaration required or permitted to be made by the public trustee, signing a document to be filed in a court, verifying an account or personally attending a court instead of the public trustee;
  - (b) executing a transfer of property for the public trustee;
  - (c) giving or signing a notice, consent, certificate, instrument or other document the public trustee is required or permitted to give or sign.
- (4) If, when exercising a power under a delegation or subdelegation under this section, the delegatee signs a document, the delegatee may add after the delegatee's signature the following statement or a statement to the following effect—
 

‘Signed as delegate for the public trustee under section 11A of the *Public Trustee Act 1978*’.
- (5) A document purporting to be a document mentioned in subsection (4) is taken to have been properly signed by a delegatee of the public trustee under a delegation made under this section unless the contrary is proved.
- (6) Subsections (4) and (5) do not limit section 27A of the *Acts Interpretation Act 1954*. (emphasis added)

25.26 Neither the *Guardianship and Administration Act 2000* (Qld) nor the *Powers of Attorney Act 1998* (Qld) enables the Public Trustee to delegate any of the Public Trustee's powers when acting as an administrator or attorney appointed under those Acts.

25.27 In contrast, the *Guardianship and Administration Act 2000* (Qld) enables the Adult Guardian to delegate specified powers. As explained in Chapter 23, under section 177 of that Act, the Adult Guardian may:

- delegate the Adult Guardian's powers, other than the power to give notice under section 185(1) or 189 of the Act, to an appropriately qualified member of the Adult Guardian's staff;<sup>1026</sup> and

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*Guardianship and Administration Act 2000* (Qld) s 177(1).

- delegate the Adult Guardian's mediation and conciliation powers to an appropriately qualified person.<sup>1027</sup>

25.28 In addition, section 177 enables the Adult Guardian to delegate day-to-day decisions about personal matters. Subsections (4)–(6) provide:

- (4) Also, if the adult guardian has power for a personal matter for an adult, the adult guardian may delegate the power to make day-to-day decisions about the matter to 1 of the following—

- (a) an appropriately qualified carer of the adult;  
 (b) a health provider of the adult;

*Editor's note—*

This is despite an adult's paid carer or health provider not being eligible to be appointed as the adult's guardian or administrator (section 14(1) (Appointment of 1 or more eligible guardians and administrators)) or as the adult's attorney (*Powers of Attorney Act 1998*, section 29 (Meaning of eligible attorney)).

- (c) an attorney under an enduring document;  
 (d) 1 of the persons who could be eligible to be the adult's statutory health attorney.

- (5) In this section—

**appropriately qualified**, for a person to whom a power may be delegated, includes having the qualifications, experience or standing appropriate to exercise the power.

*Example of standing for a person working in a hospital or care facility—*

a person's level of authority in the hospital or care facility

**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.

*Example of day-to-day decision—*

a decision about podiatry, physiotherapy, non-surgical treatment of pressure sores and health care for colds and influenza

## The Commission's view

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

25.29 It is necessary for the Public Trustee to be able to delegate, within the Public Trust Office, the powers that are exercisable by the Public Trustee:

<sup>1027</sup>

*Guardianship and Administration Act 2000* (Qld) s 177(2).

- when appointed as an administrator under the *Guardianship and Administration Act 2000* (Qld) or when otherwise exercising the powers of an administrator under that Act; and
- when appointed as an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld) or when otherwise exercising the powers of an attorney under that Act.

25.30 As explained above, the Public Trustee's power of delegation under section 11A of the *Public Trustee Act 1978* (Qld) is limited to the delegation of powers under that Act.

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

25.32 Framing the provisions in this way will enable the Public Trustee to delegate not only the Public Trustee's power when appointed as an administrator or attorney, but also the power that the Public Trustee may exercise when the power of an adult's administrator or attorney is suspended, and the Public Trustee is taken to be the adult's administrator or attorney, as the case may be, during the period of suspension.<sup>1028</sup>

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

25.33 As explained above, section 177(4) of the *Guardianship and Administration Act 2000* (Qld) enables the Adult Guardian to delegate, to persons who have a specified connection with the adult, the power to make minor day-to-day decisions about personal matters.

25.34 In the Commission's view, both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended so that, if the Public Trustee's power in relation to financial matters for an adult extends to making day-to-day decisions,<sup>1029</sup> the Public Trustee has the flexibility to delegate the power to make day-to-day financial decisions of a minor and uncontroversial nature to a person who has a relevant relationship with the adult. The power to delegate such a power may expedite the making of low risk financial decisions, while also resulting in a cost saving to the adult.<sup>1030</sup>

<sup>1028</sup> See *Guardianship and Administration Act 2000* (Qld) ss 155(6), 196(3).

<sup>1029</sup> This might not always be the case. The Public Trustee's appointment might, for example, be limited to making complex financial decisions for the adult.

<sup>1030</sup> See the discussion in Chapter 29 of this Report in relation to the basis on which the Public Trustee charges fees for acting as an administrator or attorney.



25.35 Subject to the following changes, the persons to whom the Public Trustee should be able to delegate the power to make day-to-day financial decisions should be consistent with the persons to whom the Adult Guardian may, under section 177(4) of *Guardianship and Administration Act 2000* (Qld), delegate the power to make day-to-day decisions about personal matters. In the Commission's view, it would not be appropriate for the power to be delegated to the adult's health provider, who is listed in section 177(4)(b) in relation to personal matters. Further, the Public Trustee should be able to delegate the power to any other person the Public Trustee, in the Public Trustee's discretion, considers appropriate. Accordingly, the power to make day-to-day financial decisions should be able to be delegated to one of the following:

- an appropriately qualified carer of the adult;
- an attorney under an enduring document;
- one of the persons who could be eligible to be the adult's statutory health attorney (that is, a spouse with whom the adult is in a close and continuing relationship; a person who is 18 years or more who is an unpaid carer for the adult; and a person who is 18 years or more who is a close friend or relation of the adult and who is not a paid carer for the adult); or
- any other person the Public Trustee, in the Public Trustee's discretion, considers appropriate.

25.36 Given that the Adult Guardian's powers as a guardian or an attorney are limited to decisions about personal matters,<sup>1031</sup> it would not be appropriate for the Public Trustee to delegate to the Adult Guardian the power to make day-to-day decisions about financial matters. Accordingly, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should also provide that the Public Trustee's power to delegate decisions about day-to-day financial matters may not be exercised in favour of the Adult Guardian.

25.37 For the purpose of the recommended provisions allowing the Public Trustee to delegate its powers, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should also be amended to include definitions of:

- appropriately qualified, for a person to whom a power may be delegated; and
- day-to-day decision.

25.38 Those definitions should be based on the definitions of these terms in section 177(5) of the *Guardianship and Administration Act 2000* (Qld).<sup>1032</sup> The inclusion of similar terms in the provision that deals with delegation by the Public

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<sup>1031</sup> See *Guardianship and Administration Act 2000* (Qld) ss 33(1), 174(2)(d)(i), (e); *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

<sup>1032</sup> *Guardianship and Administration Act 2000* (Qld) s 177(5) is set out at [25.28] above.

Trustee will ensure that only low risk decisions of a minor and uncontroversial nature will be able to be delegated, and that any delegation must be made to a person with the qualifications, experience or standing appropriate to exercise the delegated power.

25.39 The Commission has not made a similar recommendation in this Report in relation to the delegation of power by a private trustee company or any other administrator or attorney. An administrator who is appointed by the Tribunal or an attorney who is appointed by the adult should ordinarily exercise that power personally. The Commission considers, however, that an exception can be made in the case of the Public Trustee. As a public entity, the Public Trustee is subject to greater oversight than other administrators and attorneys,<sup>1033</sup> including the recommendation made later in this chapter that a decision of the Public Trustee to delegate the power to make day-to-day decisions about financial matters is to be a reviewable decision for the purposes of the QCAT Act. Further, the argument in relation to cost savings that applies in relation to the Public Trustee will not ordinarily apply in relation to private trustee companies. As explained in Chapter 29 of this Report, private trustee companies tend to be appointed as administrators in circumstances where an adult receives a substantial award of damages or settlement in respect of a personal injuries claim. In those cases, the damages to which the adult is entitled include a component for the expense incurred in managing the award of damages.<sup>1034</sup>

### **Subdelegation**

25.40 Because the provisions that have been recommended above in relation to the power to delegate do not expressly authorise a delegate of the Public Trustee to subdelegate any of those powers, a person to whom the Public Trustee delegates a power will not be able to subdelegate the power.<sup>1035</sup>

## **EXTERNAL REVIEW OF THE PUBLIC TRUSTEE'S DECISIONS**

### **Background**

25.41 During the course of this review a number of submissions have raised concerns about the decision-making function and operations of the Public Trustee. Concerns have been raised about a variety of matters, including:

- lack of communication with the adult, including about how the adult's funds are being expended;<sup>1036</sup>

<sup>1033</sup> See [25.60]–[25.65] below.

<sup>1034</sup> See *Willett v Fletcher* (2005) 221 CLR 627, 643 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), which is discussed at [29.58]–[29.60] below.

<sup>1035</sup> See *Acts Interpretation Act 1954* (Qld) s 27A(12).

<sup>1036</sup> Submission C8.

- insufficiency of funds made available for the adult for living expenses;<sup>1037</sup>
- delays in making funds available for the adult's expenses;<sup>1038</sup>
- decisions by the Public Trustee not to expend funds on repairs and improvements to the adult's home;<sup>1039</sup>
- not paying the adult's bills on time;<sup>1040</sup>
- lack of consultation with the adult and the adult's guardians, family and support network;<sup>1041</sup>
- staff turnover;<sup>1042</sup>
- cost;<sup>1043</sup> and
- lack of an effective complaints mechanism.<sup>1044</sup>

25.42 Queensland Parents for People with a Disability Inc commented that many of the issues raised by parents in that organisation highlight a lack of transparency in decision-making in the Public Trust Office. It also suggested that many members of that organisation consider that the decisions made by the Public Trustee are impersonal and, as a result, are not in the adult's best interests.<sup>1045</sup>

25.43 Some respondents and people at the Commission's community forums have commented that the Public Trustee needs to be more flexible in taking account of the adult's lifestyle and day-to-day needs. For example, one person explained that, when the adult's kettle broke, she was required to obtain three quotes before buying a replacement kettle.<sup>1046</sup> Another respondent has commented that the Public Trustee, who is the administrator for her adult son who has an acquired brain injury, is reluctant to release funds for the purchase of clothing. She says that she wants him to 'fit in', but that she has been asked by a Public Trust officer, 'Why don't you buy his clothes at Vinnies?'<sup>1047</sup>

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1037 Submissions C8, C13, C35, C39, C147; Forum C11.

1038 Submissions C35A, 84.

1039 Submission C8.

1040 Submissions C13, C92.

1041 Submissions C35, C58, C142, 20, 61, 84.

1042 Submissions C35A, C92.

1043 Submissions C35, C39, C116, C130, C150, 142, 167.

1044 Submission C35A.

1045 Submission 143.

1046 Forum 13.

1047 Submission 39A.

25.44 It has also been suggested that some relatively small decisions take too long, for example, providing funds to buy winter clothes, with the result that the money is not available to meet the adult's needs at the particular time.<sup>1048</sup>

25.45 Another concern that has been expressed is that the Public Trustee focuses primarily on maintaining the adult's investments rather than on the adult's quality of life.<sup>1049</sup> Queensland Parents for People with a Disability Inc commented that financial issues should not be put above the chosen lifestyle of the individual concerned.<sup>1050</sup>

25.46 Some of these respondents revealed a high degree of anger, frustration and distress about their dealings with the Public Trustee.

25.47 The 2008–09 Annual Report of the Queensland Ombudsman records the 15 State agencies about which the most complaints were received. The Public Trustee appears as the sixth agency on that list.<sup>1051</sup> The Annual Report notes that complaints made to the Queensland Ombudsman about the Public Trustee increased from 133 in 2007–08 to 158 in 2009–10, an increase of 19 per cent.<sup>1052</sup>

25.48 It should be noted that the Commission has also received some positive feedback about the Public Trustee. One respondent commented:<sup>1053</sup>

We have found the Public Trustee very flexible and easy to work with. They have been extremely important in assisting people at risk of exploitation or who are incapable of managing their money.

25.49 The Public Trustee also commented in his submission that it is cognisant of concerns and criticisms of that office, and is committed to addressing them. He also made the following general observation about the concerns outlined in the Discussion Paper:<sup>1054</sup>

The Public Trustee as the Commission has observed is an administrator for a significant number of adults with impaired capacity. Indeed the most recent annual report of the Public Trustee ... reflects that the Public Trustee was as at 30 June 2009 an administrator for 7,142 adults.

... It is relevant ... to appreciate (without questioning the likely force and validity of the submissions received by the Commission) that the lot of a financial administrator — indeed an administrator who in respect of many matters is the administrator of last resort that there will be concerns raised as to

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1048 Forum 11.

1049 Submission C92; Forum 14.

1050 Submission 143.

1051 Queensland Ombudsman, *Fairness Matters: Annual Report 2008–2009* (2009) 29.

1052 *Ibid.*

1053 Submission 123.

1054 Submission 156A.

funds expended, their insufficiency and the decisions made in respect of deployment of those funds ...

Often adults with impaired capacity and of very limited means (usually in receipt of a Government pension) have difficulties appreciating the limitations on their funds and the need for an administrator to properly understand decisions being asked of it.

25.50 The Public Trustee's submission commented on the nature and outcome of the complaints made to the Ombudsman:<sup>1055</sup>

For the period 1 July 2009 to 30 September 2009 there were 36 complaints made to the Ombudsman in regards to the Public Trustee.

Seventeen of those complaints related to trusts and 'protective management' — that is administration under the [*Guardianship and Administration Act 2000* (Qld)]. No findings of maladministration were made during that period and the Ombudsman was not moved to investigate in respect of any of them.

For the nine month period ending 31 March 2009, 122 complaints were made in respect of the Public Trustee.

Sixty-five of those during that nine month period related to trusts and 'protective management'. Of those 65, 53 related to 'financial management', five to 'legal issues' and 7 to 'property management'.

Ninety-nine complaints were not investigated — largely (75) were referred for internal review by the Office.

It is relevant to appreciate that complaints made to the Queensland Ombudsman do not usually constitute improper decision-making by the Office.

Rather they are reflective of just that 'complaints'.

The Public Trustee it ought be appreciated has a large client base of nearing at least 40,000 client matters during the financial year 2008–2009.

...

The volume of matters attended to (some 40,000) means that the Office not only undertakes a significant volume of work but deals with and affects the interests of many tens of thousand Queenslanders.

The Public Trustee however strives to improve his Office and function but contends that the 127 complaints in the financial year ended 2007 and 133 in 2008 ... should in part be viewed in the context of this volume of work.

25.51 While it would be fair to say that the submissions have generally been critical of the Public Trustee's decisions and decision-making processes, as noted in Chapter 23 in relation to the submissions that have been received about the Adult Guardian, it is not surprising that a review of this kind will attract criticism of those Offices. Further, it should be noted that this Commission's review is not an operational review of the Public Trust Office. Accordingly, it has not been part of

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The Ombudsman's powers are considered at [23.215]–[25.65] below.

this review to investigate the substance of the concerns that have been raised; rather, the Commission's focus is on ensuring that the guardianship legislation provides a strong and effective means of ensuring transparency in relation to decision-making and of promoting accountability in decision-making.

25.52 It is in this context that the Commission has examined the current mechanisms for reviewing the financial decisions made by the Public Trustee, as well as the comprehensive regime provided under the QCAT Act for reviewing 'reviewable decisions'.

### **The law in Queensland**

25.53 If a person is dissatisfied with a decision made by the Public Trustee as an adult's administrator or attorney, there are several formal mechanisms under the guardianship legislation by which the person may seek to have the decision changed. These are similar to the mechanisms discussed in Chapter 23 in relation to decisions by the Adult Guardian.

#### ***Application for advice or directions***

25.54 If the Public Trustee is an administrator or attorney, the adult concerned or another interested person may apply to the Tribunal under section 115 of the *Guardianship and Administration Act 2000* (Qld) for an order directing the Public Trustee to make a decision about the matter in a particular way. The Tribunal's power to give advice or directions is found in section 138 of the Act.<sup>1056</sup>

25.55 In *Re WFM*,<sup>1057</sup> the Tribunal held that 'its power to give directions extends to how a decision maker should exercise its powers, and to how a matter for which a decision maker has been appointed should be decided'.<sup>1058</sup>

#### ***Application for a review of appointment or for removal***

25.56 If the Public Trustee is an administrator, it may be possible to seek to have a different decision made about a matter by applying under section 29 of the *Guardianship and Administration Act 2000* (Qld) for a review of the appointment of the Public Trustee as the adult's administrator. On such a review, the Tribunal may remove the appointed administrator (in this case, the Public Trustee) and make a new appointment, but only if the administrator is no longer competent or another person is more appropriate for appointment.<sup>1059</sup>

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<sup>1056</sup> *Guardianship and Administration Act 2000* (Qld) s 138 is set out at [20.31] above.

<sup>1057</sup> [2006] QGAAT 54. That decision and the Tribunal's power to give directions are considered in Chapter 20 of this Report.

<sup>1058</sup> [2006] QGAAT 54, [33].

<sup>1059</sup> *Guardianship and Administration Act 2000* (Qld) s 31(3)(b)(ii)–(iii). In Chapter 14, the Commission has recommended a change to the test in s 31(3): see Recommendations 14-14, 14-15 of this Report.

25.57 If a person is dissatisfied with a decision made by the Public Trustee as an adult's attorney under an enduring power of attorney, it may be possible for the person to apply to the Tribunal or the Supreme Court for an order to:<sup>1060</sup>

- remove the Public Trustee and appoint a new attorney;
- remove a power from the Public Trustee and give the removed power to another attorney or to a new attorney;
- change the terms of the enduring power of attorney; or
- revoke all or part of the enduring power of attorney.

25.58 However, the fact that the Tribunal or, in the case of an enduring power of attorney, the Supreme Court, might have made a different decision if it were the decision-maker does not of itself mean that the Public Trustee is inappropriate to be the adult's administrator or attorney.

25.59 These options are indirect means of challenging a particular decision and will not provide redress where there is no issue concerning the appropriateness of the Public Trustee's appointment.

#### ***Internal review within the Public Trust Office***

25.60 In addition to these formal mechanisms under the guardianship legislation, there are also some options for internal review of the Public Trustee's decisions. The Public Trustee has a Complaint Management Policy for resolving client complaints.<sup>1061</sup> Under that policy, the Managing Officer is to provide a response to the complainant outlining the result of the investigation of the complaint and advising of the remedial action (if any) to be taken.<sup>1062</sup>

25.61 A complainant who is dissatisfied with the outcome of his or her complaint may request a review of the complaint to be undertaken by the Public Trustee.<sup>1063</sup>

#### ***Investigation by the Ombudsman***

25.62 A person who is dissatisfied with the outcome of the Public Trustee's review of his or her complaint may lodge a complaint with the Ombudsman. Although the Ombudsman does not have the power to change the decision of an

<sup>1060</sup> *Powers of Attorney Act 1998* (Qld) ss 109A, 110, 116.

<sup>1061</sup> Public Trustee of Queensland, Complaint Management Policy, 26 June 2008, [18] <<http://www.pt.qld.gov.au/files/files/complaint-management-policy.pdf>> at 26 August 2010. This policy is made in compliance with Public Service Commission Directive No 13/06 <<http://www.psc.qld.gov.au/library/document/directive/2006/2006-13-complaints-management-systems.pdf>> at 26 August 2010. The Directive requires all agencies to implement and maintain a system or systems for complaints management, which must be supported by written policies and/or procedures. A directive 'binds the persons to whom it applies': *Public Service Act 2008* (Qld) s 47(3).

<sup>1062</sup> Public Trustee of Queensland, Complaint Management Policy, 26 June 2008, [19] <<http://www.pt.qld.gov.au/files/files/complaint-management-policy.pdf>> at 26 August 2010.

<sup>1063</sup> *Ibid.*

agency,<sup>1064</sup> the Ombudsman does have other powers if the Ombudsman considers that the administrative action to which his or her investigation relates:<sup>1065</sup>

- (a) was taken contrary to law; or
- (b) was unreasonable, unjust, oppressive, or improperly discriminatory; or
- (c) was in accordance with a rule of law or a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory in the particular circumstances; or
- (d) was taken—
  - (i) for an improper purpose; or
  - (ii) on irrelevant grounds; or
  - (iii) having regard to irrelevant considerations; or
- (e) was an action for which reasons should have been given, but were not given; or
- (f) was based wholly or partly on a mistake of law or fact; or
- (g) was wrong.

25.63 In those circumstances, the Ombudsman can give a report to the principal officer of an agency (such as the Public Trustee) stating the action that the Ombudsman considers should be taken and the reasons the action should be taken, and making the recommendations that the Ombudsman considers appropriate.<sup>1066</sup> Where such a report has been given, the Ombudsman may ask the agency's principal officer to notify the Ombudsman within a stated time of the steps taken or proposed to be taken to give effect to the recommendations or, if no steps, or only some steps, have been or are proposed to be taken to give effect to the recommendations, the reasons for not taking all the steps necessary to give effect to the recommendations.<sup>1067</sup>

25.64 If it appears to the Ombudsman that no steps that the Ombudsman considers appropriate have been taken within a reasonable time after giving the agency's principal officer the report and, within that time, the Ombudsman has considered any comments made by or for the principal officer and the Ombudsman considers it appropriate, the Ombudsman may give the Premier a copy of the report and a copy of any comments made by the agency's principal officer.<sup>1068</sup>

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<sup>1064</sup> See *Ombudsman Act 2001* (Qld) s 12.

<sup>1065</sup> *Ombudsman Act 2001* (Qld) s 49(2).

<sup>1066</sup> *Ombudsman Act 2001* (Qld) s 50(1).

<sup>1067</sup> *Ombudsman Act 2001* (Qld) s 51(2).

<sup>1068</sup> *Ombudsman Act 2001* (Qld) s 51(3).



25.65 The Public Trustee commented in its submission to the Commission that 'the Public Trustee has not in living memory failed to ever comply with a view or finding adopted by the Queensland Ombudsman'.<sup>1069</sup>

### The law in other jurisdictions

25.66 New South Wales is the only Australian jurisdiction that has a specific legislative mechanism for the external review of decisions made by that jurisdiction's equivalent of the Public Trustee.

25.67 Section 62 of the *NSW Trustee and Guardian Act 2009* (NSW) provides that prescribed decisions of the NSW Trustee<sup>1070</sup> made in connection with the NSW Trustee's functions in respect of the estates of managed persons are reviewable by the Administrative Decisions Tribunal (the 'ADT') in that State. Section 62 provides:

**62 Review by ADT of decisions by NSW Trustee under this Division**

- (1) An application may be made to the ADT for a review of a decision of the NSW Trustee that:
  - (a) is made in connection with the exercise of the NSW Trustee's functions under this Division, and
  - (b) is of a class of decision prescribed by the regulations for the purposes of this section.
- (2) Subsection (1) does not apply if the decision of the NSW Trustee was made in accordance with a direction given by the Supreme Court to the NSW Trustee.
- (3) An application under this section may be made by:
  - (a) a managed person in respect of whose estate the decision was made, or
  - (b) the spouse of a managed person in respect of whose estate the decision was made, or
  - (c) any other person whose interests are, in the opinion of the ADT, adversely affected by the decision.

25.68 Clause 43 of the *NSW Trustee and Guardian Regulation 2008* (NSW) provides:

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<sup>1069</sup> Submission 156A.

<sup>1070</sup> The NSW Trustee and Guardian is established by s 5 of the *NSW Trustee and Guardian Act 2009* (NSW) and is generally referred to in that Act as the NSW Trustee: s 3(1). The Act abolishes and dissolves the offices of the Public Trustee and the Protective Commissioner and provides that the NSW Trustee is taken, for all purposes, including the rules of private international law, to be a continuation of and the same legal entity as the former corporations: sch 1 cl 10–11.

### 43 Review by ADT of estate management decisions of NSW Trustee

All decisions made by the NSW Trustee in connection with the exercise of the NSW Trustee's functions under Division 1 of Part 4.5 of the Act are prescribed for the purposes of section 62 of the Act.

25.69 The reference in clause 43 to the NSW Trustee's functions under Division 1 of Part 4.5 of the *NSW Trustee and Guardian Act 2009* (NSW)<sup>1071</sup> includes the functions of the NSW Trustee when the NSW Guardianship Tribunal orders that the estate of a person be subject to management under the *NSW Trustee and Guardian Act 2009* (NSW).<sup>1072</sup> However, clause 43 does not appear to include decisions made by the NSW Trustee in the capacity of an attorney under an enduring power of attorney.<sup>1073</sup>

25.70 Section 62 of the *NSW Trustee and Guardian Act 2009* (NSW) replaced section 28A of the *Protected Estates Act 1983* (NSW) when the latter Act was repealed in 2009.<sup>1074</sup> Section 28A of the *Protected Estates Act 1983* (NSW) was inserted by the *Guardianship and Protected Estates Legislation Amendment Act 2002* (NSW) in response to a recommendation in a report by the Public Bodies Review Committee of the New South Wales Parliament ('the Committee') that the decisions of the Public Guardian and the Protective Commissioner (now the NSW Trustee)<sup>1075</sup> should be reviewable.<sup>1076</sup> The Committee noted a range of concerns that had been raised about the Protective Commissioner, including:<sup>1077</sup>

- concern about the length of time to get bills paid;
- perceived unfairness in fees charged;
- perception that staff are not consulting with, or working with, families; and

<sup>1071</sup> Div 1 of pt 4.5 of the *NSW Trustee and Guardian Act 2009* (NSW) applies 'in respect of the estate of a managed person that is committed to the management of the NSW Trustee': s 55 (emphasis added). Section 38 of the Act defines 'managed person' to mean 'a protected person, managed missing person or patient whose estate is subject to management under this Act'. It further defines 'protected person' to mean 'a person in respect of whom an order is in force under Part 4.2 or 4.3 or the *Guardianship Act 1987* that the whole or any part of the person's estate be subject to management under this Act'.

<sup>1072</sup> See *Guardianship Act 1987* (NSW) s 25E.

<sup>1073</sup> As explained at n 1071 above, div 1 of pt 4.5 of the *NSW Trustee and Guardian Act 2009* (NSW) applies 'in respect of the estate of a managed person that is committed to the management of the NSW Trustee': s 55. The definition of 'managed person' does not appear to include a person who appoints the NSW Trustee as an attorney under an enduring power of attorney.

<sup>1074</sup> The *Protected Estates Act 1983* (NSW) was repealed by s 4 of the *NSW Trustee and Guardian Act 2009* (NSW).

<sup>1075</sup> As explained at n 1070 above, the Protective Commissioner has recently been abolished and replaced by the NSW Trustee.

<sup>1076</sup> Parliament of New South Wales, Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner*, Report (2001). The report is available at <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8db02477d7af85c7ca256cf500146a97/\\$FILE/Committee%20Report%2001%20October%202001%20-%20Inquiry%20into%20General%20Matters.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/8db02477d7af85c7ca256cf500146a97/$FILE/Committee%20Report%2001%20October%202001%20-%20Inquiry%20into%20General%20Matters.pdf)> at 26 August 2010.

<sup>1077</sup> *Ibid* 48.

- insufficient client contact or knowledge.

25.71 The Committee considered that:<sup>1078</sup>

there is a strong need for an external review mechanism that provides for a review of individual decisions, and also provides a mechanism that may highlight deficiencies and improve their service delivery.

25.72 It therefore recommended that the New South Wales ADT be the first point of external appeal from decisions of the Protective Commissioner.<sup>1079</sup> It noted in this regard that the ADT was established ‘to provide a central, cost effective and convenient way for people to obtain a review of administrative decisions’.<sup>1080</sup>

25.73 The Committee also recommended that the *Ombudsman Act 1974* (NSW) be amended to make the Office of the Protective Commissioner subject to the scrutiny of the New South Wales Ombudsman.<sup>1081</sup>

### The Tribunal’s review jurisdiction

25.74 As explained in detail in Chapter 23, in addition to the Tribunal’s original and appeals jurisdiction, it also has a review jurisdiction that enables it to review decisions made by certain entities. Section 17 of the QCAT Act provides:

#### 17 Generally

- (1) The tribunal’s review jurisdiction is the jurisdiction conferred on the tribunal by an enabling Act to review a decision made or taken to have been made by another entity under that Act.
- (2) For this Act, a decision mentioned in subsection (1) is a **reviewable decision** and the entity that made or is taken to have made the decision is the **decision-maker** for the reviewable decision.

25.75 Accordingly, for the Tribunal to have jurisdiction to review a decision made by a particular entity, it is necessary for another Act (referred to in the QCAT Act as an ‘enabling Act’) to confer jurisdiction on the Tribunal to review the decisions of that entity.

25.76 The significant features of the Tribunal’s review jurisdiction are:

- The Tribunal has all the functions of the decision-maker for the reviewable decision.<sup>1082</sup>

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1078 Ibid 54.

1079 Ibid 56, Recommendation 17.

1080 Ibid 54.

1081 Ibid 56, Recommendation 18.

1082 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 19(c).

- The Tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.<sup>1083</sup>
- The decision-maker for the reviewable decision must give the Tribunal a written statement of the reasons for the decision and any document or thing in the decision-maker's possession that may be relevant to the Tribunal's review of the decision.<sup>1084</sup>
- If the Tribunal considers that there are additional documents or things in the decision-maker's possession or control that may be relevant to its review of the reviewable decision, the Tribunal may by written notice require the decision-maker to provide the document or things.<sup>1085</sup>
- If the Tribunal considers that the statement of reasons for the decision given by the decision-maker to the Tribunal is not adequate, it may by written notice require the decision-maker to give the Tribunal an additional statement containing stated further particulars.<sup>1086</sup>
- The Tribunal may, at any stage of a proceeding for the review of a reviewable decision, invite the decision-maker for the decision to reconsider the decision.<sup>1087</sup>
- The Tribunal may confirm or amend the decision, set aside the decision and substitute its own decision, or set aside the decision and return the matter for reconsideration to the decision-maker for the decision with such directions as the Tribunal considers appropriate.<sup>1088</sup>
- The Tribunal may make written recommendations to the chief executive of the entity in which the reviewable decision was made 'about the policies, practices and procedures applying to reviewable decisions of the same kind'.<sup>1089</sup> This means that the Tribunal is not restricted simply to confirming or amending the decision, or substituting another decision for the decision under review, but has a wider power to comment on matters affecting the quality of the entity's decision-making functions.

25.77 The last of these powers is particularly relevant to the stated object of the QCAT Act 'to enhance the quality and consistency of decisions made by decision-makers'.<sup>1090</sup>

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1083 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(2).

1084 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(2).

1085 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(3).

1086 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 21(4).

1087 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 23(1).

1088 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(1).

1089 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

1090 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(d).

25.78 The QCAT Act imposes requirements on the decision-maker for a reviewable decision to give written notice of the decision, which must include the reasons for the decision, to each person who may apply to the Tribunal for a review of the decision.<sup>1091</sup>

25.79 The Act also includes provisions to enable such a person to obtain a statement of reasons from the decision-maker if one has not been provided. If a person who may apply to the Tribunal for a review of a reviewable decision has not been given a written statement of the reasons for the decision, the person may ask the decision-maker for the reviewable decision to give the person a written statement for the decision.<sup>1092</sup> The decision-maker must give the person the statement within a reasonable period of not more than 28 days after the request is made.<sup>1093</sup> The person is entitled to receive a written statement of reasons for the reviewable decision whether or not the provision of the enabling Act under which the decision is made requires that the person must be given a written statement of reasons for the decision.<sup>1094</sup>

25.80 If a person asks the decision-maker for a reviewable decision for a written statement of the reasons for the decision and the decision-maker has not given the person the statement, the person may apply to the Tribunal for an order that the decision-maker give the person the statement.<sup>1095</sup> If the Tribunal is satisfied that the person is entitled to receive the statement, it may make an order requiring the decision-maker to give the person the statement within the period of not more than 28 days stated in the order.<sup>1096</sup>

25.81 If the decision-maker for a reviewable decision gives a written statement of reasons for the decision to the person, the person may apply to the Tribunal for further and better particulars about stated matters.<sup>1097</sup> If the Tribunal considers that the statement does not contain adequate particulars of the reasons for the decision, the Tribunal may make an order requiring the decision-maker to give to the person, within a stated period, an additional statement containing further and better particulars about stated matters.<sup>1098</sup>

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1091 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 157(1).

1092 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158(1)–(2). The request must be made in accordance with the requirements of s 158(3).

1093 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158(4).

1094 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158(5).

1095 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 159(1)–(2). Written notice of the application must be given to the decision-maker: s 159(3).

1096 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 159(4).

1097 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 160(1)–(2).

1098 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 160(3).

25.82 An application for the review of a reviewable decision must be made within 28 days of the 'relevant day'.<sup>1099</sup>

### Discussion Paper

25.83 In the Discussion Paper, the Commission referred to the Tribunal's review jurisdiction, and raised the possibility of making the Public Trustee's decisions as an administrator or attorney subject to that jurisdiction. The Commission noted that, for the Tribunal to have jurisdiction to review a decision made by a particular entity, it is necessary for another Act (referred to in the QCAT Act as an 'enabling Act') to confer jurisdiction on the Tribunal to review the decisions of that entity.<sup>1100</sup>

25.84 The Commission observed that, if the Public Trustee's decisions as an administrator were to be reviewable by the Tribunal, it would be necessary to amend the *Guardianship and Administration Act 2000* (Qld) to provide that those decisions are reviewable decisions for the purposes of the QCAT Act. Similarly, it observed that it would be necessary to amend the *Powers of Attorney Act 1998* (Qld) to provide that the Public Trustee's decisions as an attorney are reviewable decisions for the purposes of the QCAT Act. In that context, each of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) would be an enabling Act.<sup>1101</sup>

25.85 In the Discussion Paper, the Commission sought submissions on whether:<sup>1102</sup>

- the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Public Trustee's decisions as an administrator appointed under that Act may be reviewed by the Tribunal in accordance with the QCAT Act; and
- the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the Public Trustee's decisions as an attorney appointed under an enduring power of attorney may be reviewed by the Tribunal in accordance with the QCAT Act.

### Submissions

25.86 A considerable number of respondents, including the former Acting Public Advocate, the Adult Guardian, Pave the Way, the Council on the Ageing Queensland and the Endeavour Foundation, were of the view that the Public Trustee's decisions as an administrator or attorney should be made subject to the

<sup>1099</sup> 'Relevant day' is defined in s 33(4) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which is set out at [23.249] above.

<sup>1100</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [19.41]–[19.42], referring to *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 17.

<sup>1101</sup> Ibid [19.42].

<sup>1102</sup> Ibid 188.

Tribunal's review jurisdiction.<sup>1103</sup> There was also widespread support for this option at the Commission's community forums.<sup>1104</sup>

25.87 The former Acting Public Advocate commented that 'legislative provision for internal review prior to external review by QCAT should also be introduced'.<sup>1105</sup>

25.88 The Department of Communities commented generally that:<sup>1106</sup>

Appropriate weight should be given to the submissions made to the QLRC that raised concerns about the decision making functions of the Public Trustee. The concerns — which include a lack of communication and consultation with the adult, how the adult's funds were expended, insufficient funds being made available for the adult's living expenses, delays in making funds available, not paying bills on time, and costs — are serious matters which affect the most vulnerable in our society.

The nature and the extent of these concerns may be sufficient for consideration to be given to providing for the Public Trustee's decisions as an administrator being reviewable by QCAT.

25.89 The Public Trustee stated that he saw 'no particular difficulty with the amendments foreshadowed' in relation to the external review of decisions by the Tribunal.<sup>1107</sup> The Public Trustee was strongly of the view, however, that the Tribunal's review jurisdiction should apply to decisions made by all administrators and attorneys:

The Public Trustee contends that there is much less oversight and review of other fiduciaries in similar roles than is the case with respect to the Public Trustee.

...

the prudential oversight and particular review mechanisms currently existing in respect of the Public Trustee generally and particularly acting as administrator and attorney are significant.<sup>1108</sup> It is a question of balance ultimately for the Attorney-General as to whether the additional mechanisms proposed in chapter 19 of the discussion paper ought be introduced.

None of these mechanisms exist in respect of private trustee companies acting as administrator or attorney or indeed any other attorney or administrator.

This alone must ground sound reason for the amendments foreshadowed in chapter 19 to be applied to other administrators and attorneys. (note added)

1103 Submissions 20B, 94I, 112, 124, 126, 127, 128, 129, 135, 138, 140, 142, 148, 159, 160, 163, 164.

1104 Forums 9, 10, 11.

1105 Submission 160.

1106 Submission 169.

1107 Submission 156A.

1108 The Public Trustee also referred in its submission to the oversight provided by the Tribunal, the Public Trustee's Complaints Management Policy, the Ombudsman, the Crime and Misconduct Commission and the Queensland Audit Office.

25.90 The Public Trustee commented further:

In short there are many matters where individual attorneys and administrators and corporate private administrators have acted inappropriately.

Sometimes private trustee companies withdraw when there is an insufficiency of funds or when faced with difficult or challenging clients.

A broader enquiry into these types of matters is warranted by the Commission in accordance with the reference.

On the issue of the changes proposed in chapter 19 [of the Discussion Paper], power for the Tribunal to substitute [its own] decision and for decisions to be challenged should be welcomed should it apply to all administrators and attorneys.

### The Commission's view

25.91 As explained earlier in this chapter, the Public Trustee is a key agency within the guardianship system through its appointment as administrator for the majority of adults for whom administration orders are made. Given the significance of the power that the Public Trustee exercises in relation to people's lives, it is important, in fostering public confidence in the guardianship system, to ensure that the mechanisms for reviewing its decisions are as effective and transparent as possible.

25.92 The Commission notes that the Tribunal currently has the power to make a direction that a guardian or an administrator make a decision in a particular way.<sup>1109</sup> While this is a significant power, it is apparent from the Commission's public consultations that the Tribunal's power in this respect is not well-known or understood by the families and carers of adults with impaired capacity. Further, it may be difficult for a person who wishes to seek such a direction to know the basis on which the disputed decision was made. While the Tribunal is the appropriate body to review the Public Trustee's decisions about financial matters, the Commission considers that a more comprehensive approach is required.

25.93 In Chapter 23 of this Report, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) 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:<sup>1110</sup>

- a decision made under the Act about a personal matter for an adult (including a decision made under section 42 or 43); and
- 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.

<sup>1109</sup> See [25.54]–[23.209] above.

<sup>1110</sup> See Recommendation 23-11 of this Report.



25.94 The Commission has also recommended in Chapter 23 that the *Powers of Attorney Act 1998* (Qld) 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:<sup>1111</sup>

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

25.95 The advantages of the Commission's recommendations are twofold.

25.96 First, through the requirements that the QCAT Act imposes on the decision-makers of reviewable decisions, it creates greater transparency in relation to the decision-making process. For example, section 21(2) of the QCAT Act requires a decision-maker to give the Tribunal a written statement of the reasons for the decision and any document or thing in the decision-maker's possession or control that may be relevant to the Tribunal's review of the decision.<sup>1112</sup>

25.97 Secondly, the QCAT Act provides that the Tribunal may make written recommendations to the chief executive of the entity in which the reviewable decision was made 'about the policies, practices and procedures applying to reviewable decisions of the same kind'.<sup>1113</sup>

25.98 The Tribunal's power to make such a recommendation is an important factor for the Commission in considering whether to make the financial decisions of the Public Trustee reviewable by the Tribunal. This is because the exercise of the Tribunal's power to make recommendations has the potential to enhance the quality of decision-making in a systemic way, rather than simply making directions about individual decisions, as is currently the case.

25.99 For these reasons, the Commission is of the view that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should each be amended to provide that a decision by the Public Trustee under each of those Acts about a financial matter for an adult is a reviewable decision for the purposes of the QCAT Act.

25.100 The Commission notes that the Public Trustee, in his submission, has suggested that the decisions of other administrators, whether they be private trustee companies or individuals should also be reviewable by the Tribunal.

25.101 The Tribunal's review jurisdiction is essentially a jurisdiction for reviewing the decisions of public entities. For that reason, the Commission has decided that the extension of the Tribunal's review jurisdiction should be limited to decisions

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1111 See Recommendation 23-12 of this Report.

1112 See also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 158, which enables a person who may apply to the Tribunal for the review of a reviewable decision to obtain a statement of the reasons for the decision from the decision-maker.

1113 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 24(3).

made by the Adult Guardian and the Public Trustee, both of whom are public officeholders or entities. They are also the two bodies that are most often appointed by the Tribunal as guardians and administrators.

25.102 In comparison, appointments of individuals are less commonly made, and appointments of private trustee companies are quite rare.<sup>1114</sup> For these appointees, the Tribunal will continue to be able to make a direction that a decision be made in a particular way or, in a more serious case, make an order for the removal of the substitute decision-maker if the grounds for removal are satisfied.

## THE DECISIONS THAT SHOULD BE REVIEWABLE

### Discussion Paper

25.103 In the Discussion Paper, the Commission raised the issue of whether, if decisions of the Public Trustee are to be reviewable, all decisions made by the Public Trustee as an administrator or attorney should be reviewable or whether external review should be limited to particular classes of decisions.

25.104 The Commission noted that, although the Public Trustee may be appointed as an attorney under an enduring power of attorney for personal decisions or as an attorney under an advance health directive, the Public Trustee does not in practice accept such appointments.<sup>1115</sup> As a result, the decisions that are made by the Public Trustee as an administrator or attorney are always financial decisions. The Commission observed that, if it were considered desirable, it might be possible to limit external review to financial decisions of a particular significance, although it suggested that it could be difficult to exclude certain decisions from review in a way that operated fairly. It suggested, for example, that for an adult with fairly modest means, a decision to reduce the adult's weekly allowance by even a relatively small amount could be as significant to the adult as a decision about a larger sum of money in the context of an adult with greater financial resources.<sup>1116</sup>

25.105 The Commission sought submissions on the following question:<sup>1117</sup>

If the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are amended to provide that decisions of the Public Trustee should be reviewable by QCAT, which decisions should be reviewable:

<sup>1114</sup> In 2008–09, family members were appointed as guardians for 26% of all adults for whom a guardian was appointed: Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 41. During the same year, family members were appointed as administrators for 19.6% of all adults for whom an administrator was appointed; trustee companies were appointed for less than 2.2% of those adults: at 42.

<sup>1115</sup> The Commission has also recommended that the *Powers of Attorney Act 1998* (Qld) be amended so that the Public Trustee is eligible for appointment under an enduring power of attorney for financial matters only and so that the Public Trustee is no longer an eligible attorney for an advance health directive: see Recommendations 16-2 and 9-2 of this Report.

<sup>1116</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [19.46].

<sup>1117</sup> Ibid 189.

- (a) all of the Public Trustee's decisions made as an administrator or attorney for an adult with impaired capacity; or
- (b) particular decisions made by the Public Trustee as an administrator or attorney for an adult with impaired capacity and, if so, which ones?

## Submissions

25.106 A number of respondents, including the former Acting Public Advocate, the Adult Guardian and the Endeavour Foundation, were of the view that all of the Public Trustee's decisions should be reviewable.<sup>1118</sup>

25.107 The former Acting Public Advocate commented:<sup>1119</sup>

It is submitted that the decisions of the Public Trustee [that should be] reviewable should not be limited or restricted in any way. As noted in ... the Discussion Paper, even the most minor of financial decisions for an adult, such as a decision to spend the adult's weekly allowance in a particular way, may have significance to the adult, particularly if s/he is impecunious.

25.108 At one of the forums, it was suggested that, if certain decisions only were to be reviewable, the following decisions should be able to be reviewed:<sup>1120</sup>

- decisions in which the Public Trustee has not properly taken into account the adult's health requirements; and
- decisions in which the Public Trustee has an interest, for example, particular transactions for which the Public Trustee may charge fees.

25.109 It was suggested at another forum that it might be possible to provide for the review of 'significant financial decisions, having regard to the size of the adult's estate'. However, another person at the same forum commented that decisions involving very small amounts of money, for example, for the replacement of household items or clothing, can still have an impact on an adult's quality of life.<sup>1121</sup>

## The Commission's view

25.110 While the Commission is conscious of the resourcing implications for the Tribunal and the Public Trustee of making any decision by the Public Trustee about a financial matter reviewable, it does not consider that it is possible to limit the types of decisions that should be reviewable in a way that would be both fair and certain. While placing a monetary value on the subject-matter of the decision would undoubtedly create certainty, such an approach fails to recognise the significance to the adults concerned (many of whom have limited financial

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1118 Submissions 20B, 94I, 126, 140, 160, 163, 164; Forum 11.

1119 Submission 160.

1120 Forum 12.

1121 Forum 13.

resources) of decisions about relatively small amounts of money. On the other hand, if reviewable decisions were limited to 'significant financial decisions, having regard to the size of the adult's estate', what that meant in a particular case could ultimately be determined only by the Tribunal.

25.111 For these reasons, the Commission is of the view that any financial decision made by the Public Trustee under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) or under an enduring power of attorney should be a reviewable decision for the purposes of the QCAT Act.

25.112 The Commission is also of the view that a decision by the Public Trustee to delegate the power to make day-to-day decisions about financial matters should also be reviewable. To avoid uncertainty about whether such a decision is itself a financial decision, the legislation should provide expressly that a decision by the Public Trustee to delegate the power to make day-to-day decisions about financial matters for an adult is a reviewable decision for the purposes of the QCAT Act.

25.113 As explained above, the purpose of making the Public Trustee's decisions about financial matters subject to the Tribunal's review jurisdiction is to create a more comprehensive mechanism for reviewing 'decisions' made by the Public Trustee as a substitute decision-maker. Because the Public Trustee has a statutory entitlement to charge certain fees and costs for acting as an administrator or attorney, the charging of those fees and costs does not amount to a 'decision' by the Public Trustee and would not, therefore, be reviewable under these recommendations.

25.114 The Commission has considered whether it should be a requirement that, before a person may apply to QCAT for the review of a reviewable decision of the Public Trustee, the person must first have had the decision reviewed internally by the Public Trustee. However, for the reasons discussed in Chapter 23, the Commission has decided against recommending such a requirement.

25.115 Given that the primary purpose of recommending that decisions be subject to the Tribunal's review jurisdiction is to provide a more comprehensive approach for the review of decisions than that which can currently be achieved by an application for directions,<sup>1122</sup> the Commission considers that an application to the Tribunal for the review of a reviewable decision should not be subject to restrictions that do not apply to an application for directions.

25.116 The Commission also considers that its approach in relation to the issue of internal review is consistent with the approach that the QCAT Act takes in relation to the availability of review by the Ombudsman. The fact that a decision is also the subject of a complaint, preliminary inquiry or investigation by the Ombudsman does not limit a person's right to apply to QCAT for a review of the decision. In fact, section 18(2) of the QCAT Act expressly preserves that right.

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1122

See [25.91]–[25.92] above.

25.117 Although it will not be a requirement to have a reviewable decision of the Public Trustee reviewed internally before applying to the Tribunal for a review of the decision, that will not, of course, prevent a person who wishes to do so from seeking internal review by the Public Trustee. Despite the availability of an external review process, some people may be content with internal review by the Public Trustee or may not wish to make an application to the Tribunal. The Commission's recommendations in this chapter do not affect the circumstances in which a person may currently seek an internal review by the Public Trustee.

## PERSONS WHO MAY APPLY FOR THE EXTERNAL REVIEW OF A DECISION OF THE PUBLIC TRUSTEE

### Discussion Paper

25.118 In the Discussion Paper, the Commission raised the issue of which persons should be able to apply for the external review of a decision of the Public Trustee. The Commission noted that, in the context of the guardianship system, where the adult's interests are the primary focus, it might not be sufficient simply to enable a person who is directly affected by a decision to seek its review.<sup>1123</sup> The Commission observed that, in many cases, it is likely to be members of the adult's family and support network who are concerned about the decision that has been made for the adult who would wish to seek an external review of the decision. It therefore suggested that the term 'interested person', which is defined in the guardianship legislation to mean 'a person who has a sufficient and continuing interest in the other person',<sup>1124</sup> might be an appropriate way to capture the nature of the interest of concerned members of the adult's family and support network.<sup>1125</sup>

25.119 The Commission sought submissions on the following questions:<sup>1126</sup>

- 19-6 Who, if any, of the following should be able to apply to QCAT for the review of a reviewable decision of the Public Trustee:
- (a) the adult who is the subject of the decision;
  - (b) an interested person?
- 19-7 Should anyone else be able to apply to QCAT for the review of a reviewable decision of the Public Trustee?

1123 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [19.48].

1124 *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) sch 3.

1125 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [19.48].

1126 *Ibid* 189–90.

## Submissions

25.120 A number of respondents, including the former Acting Public Advocate, the Adult Guardian, the Endeavour Foundation and Pave the Way were of the view that the legislation should enable an application for the review of a decision by the Public Trustee to be made by the adult who was the subject of the decision.<sup>1127</sup>

25.121 The former Acting Public Advocate, the Endeavour Foundation, Pave the Way and two other respondents also supported enabling an interested person to apply to the Tribunal for a review of a decision by the Public Trustee.<sup>1128</sup>

25.122 In addition, Pave the Way considered that an aggrieved person should be able to apply for a review.<sup>1129</sup>

## The Commission's view

25.123 In the Commission's view, the adult who is the subject of the Public Trustee's decision, as well as an interested person within the meaning of the guardianship legislation,<sup>1130</sup> should be able to apply to the Tribunal for the review of a decision made by the Public Trustee in relation to a financial matter for the adult or a decision to delegate the power to make day-to-day decisions about a financial matter for the adult. The reference to an 'interested person' is wide enough to enable an application to be made by a person who is the adult's guardian. Both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to this effect.

25.124 The Commission does not, however, consider that the legislation should provide that an application may be made by a person who is aggrieved by the Public Trustee's decision. In its view, the reference to an aggrieved person is not appropriate to decision-making in the guardianship context.

## OTHER MODIFICATIONS

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

25.125 In Chapter 23 of this Report, the Commission has referred to the differences between the decisions that are currently reviewable under the QCAT Act and the decisions made by the Adult Guardian. It has observed that, where the Adult Guardian is appointed as an adult's guardian for a matter, the Adult Guardian has an ongoing decision-making role in relation to the matter for the duration of the

<sup>1127</sup> Submissions 20B, 94I, 35, 163, 160, 164.

<sup>1128</sup> Submissions 20B, 94I, 135, 160, 163.

<sup>1129</sup> Submission 135.

<sup>1130</sup> In Chapter 21 of this Report, the Commission has recommended that the definition of 'interested person' be changed to 'a person who has a sufficient and genuine concern for the adult's rights and interests': see Recommendation 21-2 of this Report.

appointment. In contrast, many of the decision-makers whose decisions are currently reviewable under the Tribunal's review jurisdiction tend to be making one-off decisions.<sup>1131</sup>

25.126 The Commission also considered that, because of its recommendation that an interested person should be able to apply for the review of a reviewable decision of the Adult Guardian, it would be difficult for the Adult Guardian to comply with the requirement in section 157 of the QCAT Act for a decision-maker to give written notice of specified matters to each person who may apply to the Tribunal for a review of a decision made by the decision-maker.<sup>1132</sup>

25.127 For these reasons, although the Commission considers that it would still be best practice for the Adult Guardian to inform relevant people of their right to apply to QCAT for a review of a reviewable decision of the Adult Guardian, it has recommended that the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to provide that section 157 of the QCAT Act does not apply to a reviewable decision of the Adult Guardian.<sup>1133</sup>

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

25.128 In the Commission's view, the decision-making role of the Public Trustee is similar to that of the Adult Guardian in that, as an adult's administrator or attorney for financial matters, the Public Trustee has an ongoing role that involves making multiple decisions for the adult. The Public Trustee would also face the same difficulties as the Adult Guardian in identifying all the persons who are an interested person for an adult to notify them of each decision made and of the right to apply for a review of the decision.

25.129 Accordingly, 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. However, the Commission still considers that it would be best practice for the Public Trustee to notify relevant people of the right to apply to QCAT for a review of its decisions.

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

25.130 In Chapter 23 of this Report, the Commission has referred to the different notice requirements that apply in relation to an application and hearing under the QCAT Act and an application and hearing under the *Guardianship and Administration Act 2000* (Qld).<sup>1134</sup>

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1131 See [23.301] above.

1132 See [23.302]–[23.303] above.

1133 See Recommendation 23-14 of this Report.

1134 See [23.305]–[23.307] above.

25.131 Because of the special nature of the guardianship system, the Commission has recommended that, if an application is made to the Tribunal for the review of a reviewable decision of the Adult Guardian, the Tribunal should have the same requirements to give notice of the application and of the hearing as would apply if the application were a proceeding under the *Guardianship and Administration Act 2000* (Qld).<sup>1135</sup>

25.132 In addition, the Commission has recommended that, to ensure that the Tribunal is aware, so far as possible, of all the persons who should be given notice of the application and the hearing, the *Guardianship and Administration Act 2000* (Qld) should include a provision, modelled on section 99E of the *Child Protection Act 1999* (Qld), requiring:<sup>1136</sup>

- the principal registrar to give notice of the review application to the Adult Guardian; and
- 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).

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

25.133 In the Commission's view, the provisions recommended in Chapter 23 in relation to notice requirements should also apply to an application for the review of a reviewable decision of the Public Trustee.

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

25.134 In Chapter 23 of this Report, the Commission has referred to the different confidentiality and related provisions that apply in relation to a proceeding and hearing under the QCAT Act and an application and hearing under the *Guardianship and Administration Act 2000* (Qld).<sup>1137</sup>

25.135 The Commission has expressed the view that, given the nature of the guardianship system, it is more appropriate that the provisions that have been specifically developed for the Tribunal's guardianship jurisdiction should apply for a review under the QCAT Act that relates to a reviewable decision of the Adult Guardian.<sup>1138</sup> Accordingly, the Commission has recommended that 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

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<sup>1135</sup> See Recommendation 23-16 of this Report.

<sup>1136</sup> See Recommendation 23-15 of this Report.

<sup>1137</sup> See [23.313]–[23.315] above.

<sup>1138</sup> See [23.317]–[23.318] above.



been recommended in Chapter 21 of this Report)<sup>1139</sup> and section 114A of the *Guardianship and Administration Act 2000* (Qld), or provisions in those terms, apply to an application to review a reviewable decision of the Adult Guardian.<sup>1140</sup>

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

25.136 In the Commission's view, the recommendations that have been made in Chapter 23 about the application of the confidentiality and related provisions of the *Guardianship and Administration Act 2000* (Qld) to an application for the review of a reviewable decision of the Adult Guardian should also apply to an application for the review of a reviewable decision of the Public Trustee.

## **RECOMMENDATIONS**

### ***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;

<sup>1139</sup> See Recommendations 21-12 to 21-14 of this Report.

<sup>1140</sup> See Recommendation 23-17 of this Report.

- (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

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## INTRODUCTION

26.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* (Qld), including:<sup>1141</sup>

- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation; and
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework.

26.2 Chapter 10 of the *Guardianship and Administration Act 2000* (Qld) provides for community visitors, whose purpose is 'to safeguard the interests of consumers at ... visitable sites'.<sup>1142</sup> Community visitors:<sup>1143</sup>

help safeguard the interests of adults who live in residential settings in the mental health, disability and private supported accommodation sectors. Their focus is on adults who have impaired decision-making capacity, or a mental or intellectual impairment.

Through regular and unannounced visits to sites, community visitors work to protect the rights of vulnerable adults who live in environments where there is historical evidence of abuse, neglect or exploitation.

## FUNCTIONS AND POWERS OF COMMUNITY VISITORS

### Functions

26.3 Community visitors have both inquiry and complaint functions, and form part of the investigative and regulatory framework of the guardianship system. Their functions are set out in section 224 of the *Guardianship and Administration Act 2000* (Qld), which provides:

#### **224 Functions**

- (1) A community visitor has inquiry and complaint functions.
- (2) The inquiry functions of a community visitor for a visitable site are to inquire into, and report to the chief executive on—
  - (a) the adequacy of services for the assessment, treatment and support of consumers at the visitable site; and

<sup>1141</sup> The terms of reference are set out in Appendix 1.

<sup>1142</sup> *Guardianship and Administration Act 2000* (Qld) s 223(1). The definitions of 'consumer' and 'visitable site' are considered at [26.17]–[26.21] below.

<sup>1143</sup> Office of the Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 64.

- (b) the appropriateness and standard of services for the accommodation, health and wellbeing of consumers at the visitable site; and
  - (c) the extent to which consumers at the visitable site receive services in the way least restrictive of their rights; and
  - (d) the adequacy of information given to consumers at the visitable site about their rights; and
  - (e) the accessibility and effectiveness of procedures for complaints about services for consumers at the visitable site; and
  - (f) at the request of the chief executive, another matter about the visitable site or consumers at the visitable site.
- (3) The complaint functions of a community visitor for a visitable site are to—
- (a) inquire into, and seek to resolve, complaints; and
  - (b) identify and make appropriate and timely referrals of unresolved complaints to appropriate entities for further investigation or resolution.

26.4 The function of a community visitor under section 224(2) is to inquire into, and report to the chief executive<sup>1144</sup> on, a range of matters in relation to the services provided to consumers at visitable sites, the adequacy of the information given to consumers at visitable sites about their rights, the procedures for complaints about services for consumers at visitable sites, and any other matter about a visitable site or the consumers at that site that may be requested by the chief executive.

26.5 There are two aspects to the complaint function of a community visitor under section 224(3). The first part of the function is to inquire into, and to seek to resolve, complaints about the matters mentioned in section 224(2).<sup>1145</sup> Section 224 recognises that not all complaints can be resolved by a community visitor. Accordingly, the second part of the complaint function is to identify unresolved complaints and to make appropriate and timely referrals of those complaints to appropriate entities for further investigation or resolution.

26.6 A community visitor for a visitable site must regularly visit the visitable site to perform the functions of a community visitor.<sup>1146</sup>

1144 Because the *Guardianship and Administration Act 2000* (Qld) is administered by the Attorney-General and Minister for Justice, the chief executive is, for this purpose, the Director-General of the Department of Justice and Attorney-General: see *Acts Interpretation Act 1954* (Qld) s 33(11)(b).

1145 *Guardianship and Administration Act 2000* (Qld) s 222 (definition of 'complaint').

1146 *Guardianship and Administration Act 2000* (Qld) s 225(1).

26.7 Queensland Aged and Disability Advocacy Inc has commented generally that ‘the role of community visitors is very important to identify instances of abuse’.<sup>1147</sup>

26.8 The comments made at the Commission’s community forums about the role of community visitors were also generally positive. A service provider at a community forum commented favourably on the Community Visitor Program. In particular, he stated that the reports prepared by community visitors following visits are very useful in identifying issues. He said that the reports can provide a history and a means of identifying whether a problem is an isolated issue or an ongoing problem.<sup>1148</sup>

26.9 However, it was suggested at one forum that the information given to community visitors was not always properly tested by them.<sup>1149</sup> Another person at the same forum commented that, in his experience, there had been instances where there had been a complete failure by some community visitors to investigate complaints properly. This comment related to a family member who was resident at a Bribie Island facility that was the subject of allegations of abuse by employees against residents.<sup>1150</sup>

## Powers

26.10 Section 227(1) of the *Guardianship and Administration Act 2000* (Qld) confers a broad power on a community visitor to ‘do all things necessary or convenient to be done to perform the community visitor’s functions’. Section 227(1) also includes a number of examples of things that may be done to perform a community visitor’s functions. These include the power to enter visitable sites and to require certain persons to answer questions and produce ‘visitable site documents’.<sup>1151</sup>

26.11 Section 227 provides:

### **227 Powers**

- (1) A community visitor for a visitable site may do all things necessary or convenient to be done to perform the community visitor’s functions, including, for example, the following things—
  - (a) enter the visitable site during normal hours without notice;
  - (b) with the chief executive’s authorisation, enter the visitable site outside normal hours without notice;

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1147 Submission 148.

1148 Forum 14. Community visitor reports are considered at [26.83]–[26.118] below.

1149 Forum 13.

1150 Several employees at the facility were ultimately convicted of a number of criminal offences.

1151 The definition of ‘visitable site document’ is set out at [26.77] below.



- (c) require a person in charge of, employed at, or providing services at, the visitable site to answer questions, and produce visitable site documents, relevant to the community visitor's functions;
  - (d) subject to subsection (2), inspect and take extracts from, or make copies of, any visitable site document;
  - (e) confer alone with a consumer or person in charge of, employed at, or providing services at, the visitable site;
  - (f) require a person in charge of, employed at, or providing services at, the visitable site to give the community visitor reasonable help, if it is practicable to give the help, to enable the community visitor to do the things mentioned in paragraphs (a) to (e).
- (2) A person who complies with a requirement under subsection (1)(c) or (f) does not incur any liability, either to the consumer or anyone else, because of the compliance.
- (3) A person must not fail to comply with a requirement under subsection (1)(c) or (f) unless the person has a reasonable excuse.
- Maximum penalty for subsection (3)—40 penalty units.
- (4) It is a reasonable excuse for a person to fail to comply with a requirement under subsection (1)(c) or (f) because compliance with the requirement might tend to incriminate the person.

26.12 Section 227(1) authorises a community visitor to enter a visitable site, without notice:

- during normal hours — that is, between 8am and 6pm;<sup>1152</sup> or
- with the chief executive's authorisation, outside normal hours.

26.13 The chief executive may authorise a community visitor's entry outside normal hours if he or she considers that the community visitor cannot adequately inquire into a complaint by entering the site during normal hours.<sup>1153</sup> In authorising an entry outside normal hours, the chief executive must specify a period of not more than two hours during which the entry is authorised.<sup>1154</sup>

1152 *Guardianship and Administration Act 2000* (Qld) s 222 (definition of 'normal hours').

1153 *Guardianship and Administration Act 2000* (Qld) s 228(1)–(2). The chief executive of the Department of Justice and Attorney-General must include in the Department's Annual Report for a financial year a report on the operations of community visitors during the year, including the number of entries of visitable sites outside normal hours authorised by the chief executive: s 237.

1154 *Guardianship and Administration Act 2000* (Qld) s 228(3).

26.14 To the greatest extent practicable, a community visitor must seek and take into account the views and wishes of a consumer before:<sup>1155</sup>

- asking a person in charge of, employed at, or providing services at, a visitable site a question relevant to a function of the community visitor in relation to the consumer; or
- inspecting, taking extracts from, or making copies of, a visitable site document relevant to a function of the community visitor in relation to the consumer.

26.15 However, regardless of the consumer's views and wishes, the community visitor must act in a way that is consistent with the consumer's proper care and protection.<sup>1156</sup>

## **'CONSUMERS', 'VISITABLE SITES' AND THE PRIORITY FOR VISITING PARTICULAR SITES**

### **The law in Queensland**

26.16 The functions and powers of community visitors are performed and exercised in relation to consumers at visitable sites.

### **Consumers**

26.17 The *Guardianship and Administration Act 2000* (Qld) includes a broad definition of 'consumer':<sup>1157</sup>

**consumer** means—

- (a) for a visitable site that is an authorised mental health service under the *Mental Health Act 2000*—any person who lives or receives services at the visitable site; or
- (b) for another visitable site—an adult—
  - (i) with impaired capacity for a personal matter or a financial matter or with a mental or intellectual impairment; and
  - (ii) who lives or receives services at the visitable site.

26.18 Because the definition refers to an adult with impaired capacity for a personal matter or a financial matter, or with a mental or intellectual impairment, the community visitor provisions have a wide application, and are not, for example, limited to adults who have had a guardian or an administrator appointed.

<sup>1155</sup> *Guardianship and Administration Act 2000* (Qld) s 229(1). A consumer's views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct: s 229(2).

<sup>1156</sup> *Guardianship and Administration Act 2000* (Qld) s 229(3).

<sup>1157</sup> *Guardianship and Administration Act 2000* (Qld) s 222.

### **Visitable sites**

26.19 The *Guardianship and Administration Act 2000* (Qld) defines ‘visitable site’ in the following terms:<sup>1158</sup>

**visitable site** means a place, other than a private dwelling house, where a consumer lives or receives services and that is prescribed under a regulation.

26.20 Private dwelling houses are excluded from the definition of ‘visitable site’. The Act includes the following definition of ‘private dwelling house’:<sup>1159</sup>

**private dwelling house** means premises that are used, or are used principally, as a separate residence for—

- (a) if a restrictive practice under chapter 5B is being used at the premises—1 family; or
- (b) otherwise—1 family or person.

### **Places prescribed as visitable sites**

26.21 Schedule 2 of the *Guardianship and Administration Regulation 2000* (Qld) prescribes the following places as visitable sites:

A place, other than a private dwelling house, that is any of the following—

- (a) a place where a consumer lives that is wholly or partly funded by—
  - (i) Disability Services Queensland; or
  - (ii) the Department of Health;
- (b) a place where a consumer—
  - (i) lives; and
  - (ii) receives services from—
    - (A) Disability Services Queensland; or
    - (B) an entity that receives financial assistance from Disability Services Queensland or the Department of Health to supply the service;
- (c) for a consumer with a mental or intellectual impairment—a place, other than an aged care facility, where the consumer—
  - (i) lives; and
  - (ii) receives services from the Department of Health;

<sup>1158</sup> *Guardianship and Administration Act 2000* (Qld) s 222.

<sup>1159</sup> *Guardianship and Administration Act 2000* (Qld) s 222.

- (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—
- (i) a residential service conducted in the premises that the place is part of is registered under the *Residential Services (Accreditation) Act 2002* and personal care services are provided in the premises; or
  - (ii) there is a current application for level 3 accreditation under that Act of a residential service conducted in the premises that the place is part of; or
  - (iii) a residential service conducted in the premises that the place is part of is accredited at level 3 under that Act;
- (e) a place declared to be an authorised mental health service under the *Mental Health Act 2000*, section 495,<sup>7</sup> where a consumer receives services as an inpatient.

<sup>7</sup> *Mental Health Act 2000*, section 495 (Declaration of authorised mental health services)

26.22 Paragraph (d) of the schedule refers to certain places registered under the *Residential Services (Accreditation) Act 2002* (Qld). That Act deals with the registration and accreditation of residential services where the main purpose of the service is to provide accommodation, in return for rent, in one or more rooms, and the room or rooms are occupied by at least four residents.<sup>1160</sup> At the time the legislation was introduced, the Explanatory Notes outlined the reasons for regulating this sector:<sup>1161</sup>

The residents of the residential services sector are some of the most vulnerable people in the Queensland community. As such they are more susceptible to exploitation than most other groups in the community and often are unable to exercise the consumer choices that might otherwise allow them to avoid situations of long-term exploitation or abuse. With few exceptions, they have limited incomes and many experience a range of disadvantages (including intellectual and/or psychiatric disability, drug and alcohol problems, brain injury, problems associated with ageing, social, economic disadvantage, and social isolation).

In most cases residents surrender a high percentage of their relevant pension to service providers, the amount of which does not always reflect the level of quality or range of services provided to them and they are not accorded protection under residential services or similar legislation.

26.23 The Act regulates two types of residential services.<sup>1162</sup>

<sup>1160</sup> *Residential Services (Accreditation) Act 2002* (Qld) s 4(1)(a)–(b).

<sup>1161</sup> Explanatory Notes, *Residential Services (Accreditation) Bill 2002* (Qld) 1.

<sup>1162</sup> There are many types of accommodation that are not covered by the *Residential Services (Accreditation) Act 2002* (Qld) but are dealt with under other legislation (such as registered retirement villages and authorised mental health services): see *Residential Services (Accreditation) Act 2002* (Qld) s 4(4); *Residential Services (Accreditation) Regulation 2002* (Qld) s 3.

26.24 The first type is essentially boarding houses and supported accommodation where each of the residents:<sup>1163</sup>

- has a right to occupy one or more rooms, but does not have a right to occupy the whole of the premises in which the rooms are situated;
- does not occupy a self-contained unit; and
- shares other rooms, or facilities outside of the resident's room, with one or more of the other residents, for example, a bathroom, kitchen, dining room or common room.

26.25 The second type of residential service is where each of the residents:<sup>1164</sup>

- has a right to occupy one or more rooms, but does not have a right to occupy the whole of the premises in which the rooms are situated; and
- is provided with a food service<sup>1165</sup> or personal care service.<sup>1166</sup>

26.26 This second type does not have the requirement that the residents share other room or facilities. Accordingly, the Act can apply to a self-contained unit provided that the resident receives a food service or a personal care service at the unit.

26.27 Residential services must be registered under the Act, and must also be accredited.<sup>1167</sup> The Act provides for three levels of accreditation, which depend on the types of services provided. A residential service may be accredited at more than one level.<sup>1168</sup>

26.28 All residential services are required to be accredited at level 1.<sup>1169</sup> To be accredited at this level, the service must meet certain basic criteria relating to the

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<sup>1163</sup> *Residential Services (Accreditation) Act 2002* (Qld) s 4(1)(c).

<sup>1164</sup> *Residential Services (Accreditation) Act 2002* (Qld) s 4(2)(a).

<sup>1165</sup> *Residential Services (Accreditation) Act 2002* (Qld) sch defines 'food service' as follows:

**food service means** a service of regularly providing meals to a resident.

<sup>1166</sup> *Residential Services (Accreditation) Act 2002* (Qld) sch defines 'personal care service' as follows:

**personal care service means** a service of regularly providing a resident with—

(a) help in—

(i) bathing, toileting or another activity related to personal hygiene; or  
(ii) dressing or undressing; or  
(iii) consuming a meal; or  
(iv) meeting a mobility problem of the resident; or  
(v) taking medication; or

(b) help in managing the resident's financial affairs.

<sup>1167</sup> *Residential Services (Accreditation) Act 2002* (Qld) ss 9, 34–39.

<sup>1168</sup> *Residential Services (Accreditation) Act 2002* (Qld) s 34(3).

<sup>1169</sup> *Residential Services (Accreditation) Act 2002* (Qld) ss 34(5)(a), 35.

recognition and observance of the rights of residents; the good repair, adequacy, safety and cleanliness, of the premises and facilities; and the management and conduct of the service.<sup>1170</sup>

26.29 A residential service that provides a food service must also have level 2 accreditation.<sup>1171</sup> To be accredited at this level, the service must meet certain criteria relating to the quantity, quality, variety and nutritional value of the food; the preparation, delivery, service and storage of the food; and the cleanliness and comfort of the dining room facilities.<sup>1172</sup>

26.30 A residential service that provides a personal care service must also have level 3 accreditation.<sup>1173</sup> The criteria that are relevant to obtaining accreditation at this level include:<sup>1174</sup>

- the extent to which the service provider provides the personal care service in a way that meets the individual needs of the residents to whom the service is provided, protects their interests and maintains and enhances their quality of life generally;
- the suitability of the staff members providing the personal care service;
- whether residents who ask for support to manage their medication are given help in accordance with medical directions;
- whether residents are encouraged and helped, where necessary, to maintain their physical, dental and mental health; and
- whether the personal hygiene needs of residents are met in a way consistent with individual needs and respect for dignity and privacy.

26.31 Figures from the Office of Fair Trading from 2007 showed that there were 322 residential services registered under the Act throughout Queensland. Of these, the overwhelming majority, 77% (248 services) had level 1 accreditation only; 5.6% (18 services) had level 2 accreditation; and 17.4% (56) had level 3 accreditation.<sup>1175</sup>

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1170 See *Residential Services (Accreditation) Act 2002* (Qld) s 42; *Residential Services (Accreditation) Regulation 2002* (Qld) s 5.

1171 *Residential Services (Accreditation) Act 2002* (Qld) ss 34(5)(b), 36.

1172 See *Residential Services (Accreditation) Act 2002* (Qld) s 43; *Residential Services (Accreditation) Regulation 2002* (Qld) s 6.

1173 *Residential Services (Accreditation) Act 2002* (Qld) ss 34(5)(c), 38. The *Guardianship and Administration Regulation 2000* (Qld) sch 2 para (d)(i) would apply to a registered residential service that provides personal care services even though it does not have level 3 accreditation and is not the subject of a current application for level 3 accreditation.

1174 See *Residential Services (Accreditation) Act 2002* (Qld) s 44; *Residential Services (Accreditation) Regulation 2002* (Qld) s 7.

1175 University of New South Wales Consortium (KR Fisher et al), *Service Needs of Residents in Private Residential Services in Queensland*, Summary Report (November 2008) 5, Table 2.2.

26.32 Some research has suggested that a fairly high proportion of the residents in this accommodation have a mental illness or psychiatric disability or an intellectual disability.<sup>1176</sup> For instance:

- Queensland service providers participating in a survey estimated that about 40% of residents had a mental illness or psychiatric disability (most in level 3 services) and about 18% had an intellectual disability;<sup>1177</sup> and
- Queensland service providers and government agencies participating in a number of focus groups also reported that many residents (more in level 1 and 2 services) have a mental illness or psychiatric disability (often combined with alcohol or drug addiction or acquired brain injury); that many residents are of retirement age; that residents with an intellectual disability are least likely to have external support services; and that many residents are vulnerable to economic exploitation.<sup>1178</sup>

26.33 Some concerns have been raised about the quality of service provision in level 2 and 3 services, and the difficulties for residents in seeking improvements or making complaints. It has been suggested that raising complaints at an individual level makes the person vulnerable to repercussions from the complaint.<sup>1179</sup>

26.34 The reason for designating as visitable sites those residential services that provide level 3 services would seem to be that they are the places where the most vulnerable adults in this sector are residing.

### ***Deciding priorities for visiting particular visitable sites***

26.35 The *Guardianship and Administration Act 2000* (Qld) provides 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.<sup>1180</sup>

26.36 The Community Visitor Program has informed the Commission that community visitors visit all authorised mental health facilities providing in-patient services and registered level 3 supported accommodation facilities. Further, in relation to sites funded and operated by Disability and Community Care Services<sup>1181</sup> (previously Disability Services Queensland) or Queensland Health, the current priority is to visit consumers who receive support 24 hours a day, 7 days a week.<sup>1182</sup> The schedule of site visits is based on the nature of the sector (mental

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1176 Ibid 8.

1177 Ibid 8–9, Tables 2.7 and 2.8.

1178 Ibid 14–15.

1179 Ibid 27.

1180 *Guardianship and Administration Act 2000* (Qld) s 225(2).

1181 Disability and Community Care Services forms part of the Department of Communities.

1182 This support need not be provided at the one location. For example, an adult might live in supported accommodation and also receive community access services that, in total, mean that the adult receives 24 hour a day support: Information provided by the Community Visitor Program 6 August 2009, 8 December 2009.

health, supported accommodation or disability sector) and the vulnerability of the consumers.<sup>1183</sup> In 2008–09, community visitors made a total of 6314 visits to 846 visitable sites.<sup>1184</sup>

## Discussion Paper

26.37 In the Discussion Paper, the Commission observed that, because community visitors exercise their functions and powers in relation to ‘visitable sites’, the effectiveness of the role of community visitors in investigating allegations of abuse, neglect and exploitation of adults with impaired capacity depends, in part, on the appropriateness of the definition of ‘visitable site’, the range of places prescribed by regulation as ‘visitable sites’, and the determination of priorities for visiting particular visitable sites.<sup>1185</sup>

26.38 Accordingly, the Commission sought submissions on whether:<sup>1186</sup>

- the definition of ‘visitable site’ is appropriate;
- the places prescribed as ‘visitable sites’ by the *Guardianship and Administration Regulation 2000* (Qld) are appropriate in terms of the places where adults with impaired capacity live and receive services; and
- the Community Visitor Program’s current priority for visiting particular visitable sites is appropriate.

## Submissions

### ***Definition of ‘visitable site’ and places prescribed as visitable sites***

26.39 The Adult Guardian and the family of an adult with impaired capacity were both of the view that the current definition of ‘visitable site’ is appropriate.<sup>1187</sup>

26.40 However, Pave the Way was of the view that the definition of ‘visitable site’ should be amended to emphasise the exclusion of private dwelling houses:<sup>1188</sup>

A number of families, whose family members with disability live in their own homes, have reported to us that community visitors have approached them, or the services through which support is provided to their family members, seeking access to those family members. This has caused some families much concern and anxiety.

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1183 Information provided by the Community Visitor Program 6 August 2009, 8 December 2009.

1184 Office of the Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 65.

1185 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [21.24].

1186 *Ibid* 216.

1187 Submissions 164, 177.

1188 Submission 135.



Despite the definition of ‘visitable site’ excluding ‘a private dwelling house’, the Community Visitors Program appears to have difficulty accepting that many people with disability who live in their own home, whether privately owned or rented, or rented from the Department of Communities (Housing), in fact live in ‘a private dwelling house’. There seems to be an assumption that, where someone receives support through funding from Disability Services, they are living in a ‘visitable site’, regardless of who owns or rents the dwelling.

Therefore we believe that the definition of ‘private dwelling house’ should state that ‘any house, flat or home unit where the consumer lives which is wholly or partly owned or rented by or on behalf of the consumer, and where, if partly owned or rented, other joint owners or tenants are private persons and not organisations, is a “private dwelling house”’.

26.41 Queensland Parents for People with a Disability Inc was critical of the fact that community visitors are entitled to visit places where several adults live independently in shared accommodation.<sup>1189</sup>

While we understand that the community visitor has an important role in protecting the lives of vulnerable people in institutional care it is our understanding that at present people living independently in a home of their own are also subjected to a visit by the Community Visitor.

... many [of our members] believe that it is an invasion of their son’s and daughter’s home that they are required to have the community visitor come into their own homes.

26.42 The parents of an adult with impaired capacity expressed similar concerns about the places that community visitors can visit:<sup>1190</sup>

what too many people forget is that any household is a ‘private dwelling’ — where people live is their private space.

26.43 However, the Adult Guardian has informed the Commission that the most common concerns raised by community visitors include ‘concerns about unsuitable co-tenancy arrangements at disability sites’.<sup>1191</sup>

26.44 Conflicting views were expressed at the Commission’s community forums about the appropriateness of excluding private dwelling houses from the definition of ‘visitable site’. One person observed that, if a person receives services from Disability Services Queensland in his or her own home, the person will not be visited by a community visitor because it is a private dwelling. It was suggested that there is no safeguard from abuse for people living in private dwellings, and that all care facilities, private or not, should be able to be visited by a community visitor.<sup>1192</sup>

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1189 Submission 167.

1190 Submission 54A.

1191 Submission 164.

1192 Forum 15.

26.45 However, another person at the same forum disagreed with this view. This person commented that people with impaired capacity often live their lives in a very structured manner and that it can disturb the dynamics of a household (particularly where it is a share house with several adults with impaired capacity) and be distressing for the adult to have a community visitor visit unexpectedly.

26.46 The family of an adult with impaired capacity was of the view that the places prescribed as 'visitable sites' by the *Guardianship and Administration Regulation 2000* (Qld) were appropriate.<sup>1193</sup>

26.47 The former Acting Public Advocate commented that the effect of the definition of 'visitable site', in combination with the places prescribed as 'visitable sites', is that community visitors are not able to visit adults with impaired capacity in the following places:<sup>1194</sup>

- private dwellings where an adult receives home or community care services;
- private dwellings where an adult receives care provided under an informal care arrangement (i.e. from the adult's family or support network);
- private dwellings where an adult receives restrictive practices for a limited period;
- residential services who do not receive funding from Disability Services or the Department of Health; and
- private mental health services not authorised under section 495 of the *Mental Health Act 2000* (Qld).

26.48 The former Acting Public Advocate considered that there was, as a result, insufficient protection of the rights and interests of adults with impaired capacity:

The current arrangements are inequitable as they fail to protect adults with [impaired decision-making capacity] residing in places outside the scope of the definition of a 'visitable site'. Research indicates that a high proportion of adults with disability (including adults with [impaired decision-making capacity]) reside with and receive services from a primary carer, most likely in private dwellings.<sup>1195</sup> In the majority of cases, care is provided by family members, or members of an adult's informal support network.<sup>1196</sup> Abuse in private dwellings is not uncommon, particularly where adults receive external support and care

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1193 Submission 177.

1194 Submission 160.

1195 In 2003, nearly 2 million Australians received assistance from carers because of disability: Australian Institute of Health and Welfare, *Australia's Welfare 2009* (November 2009) 191 <<http://www.aihw.gov.au/publications/aus/aw09/aw09.pdf>> at 18 November 2009. Seventy-eight per cent of primary carers live with the person for whom they care. In 2006, 92 per cent of older Australians resided in private dwellings as part of a family or group, or on their own: p. 88.

1196 Close family members constitute over 90 per cent of carers, of whom 41% are spouses/partners, 26% are sons/daughters and 23% are parents: Australian Institute of Health and Welfare, *Australia's Welfare 2009* (November 2009) 193 <<http://www.aihw.gov.au/publications/aus/aw09/aw09.pdf>> at 18 November 2009.

services in private homes. In these circumstances ... there is a lack of scrutiny and appropriate safeguards. In the absence of powers to visit adults with [impaired decision-making capacity] residing in private dwellings, Community Visitors are unable to identify victimisation, abuse, neglect and exploitation of those adults. These adults are arguably more vulnerable to abuse than adults residing in visitable sites through lack of accountability and monitoring mechanisms which can result in detection of wrongdoing.

In order to protect the rights and interests of adults with [impaired decision-making capacity] residing in places which do not fall within the definition of 'visitable site', the definition needs to be closely considered and some form of accountability mechanisms introduced to ensure adults residing in non-visitable sites are adequately protected. (notes in original)

26.49 Although the former Acting Public Advocate acknowledged the intrusion on the privacy of adults that would result from expanding the range of places that are 'visitable sites', he considered that the primary consideration should be the protection of the adults concerned:

It is recognised that in broadening the definition of visitable site, and the places currently prescribed as visitable sites, maintaining the privacy of other persons with whom the adult resides or receives care from, particularly in private dwellings, will need to be considered and an appropriate balance struck. It is submitted however that in formulating a recommendation and/or amendments the primary consideration should be the protection of vulnerable adults.

26.50 The Adult Guardian was of the view that the places prescribed as 'visitable sites' should be widened. She noted that community visitors are able to visit consumers living at a place where:

- a residential service conducted in the premises that the place is part of is accredited at level 3 under the *Residential Services (Accreditation) Act 2002* (Qld); or
- a residential service conducted in the premises that the place is part of is registered under the *Residential Services (Accreditation) Act 2002* (Qld) and personal care services are provided in the premises (that is, the premises *should*, under the Act, be accredited at level 3 given the services that are being provided).

26.51 The Adult Guardian suggested that it would be of assistance if community visitors were also able to visit level 1 and level 2 private accommodation services. In this respect, she noted that '[b]oth services also accommodate highly vulnerable adults'.<sup>1197</sup>

26.52 The Endeavour Foundation commented generally that the definition of 'visitable site' was not appropriate. It was also of the view that the places prescribed as 'visitable sites' are not appropriate:<sup>1198</sup>

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1197 Submission 164.

1198 Submission 163.

People with impaired capacity receive many day services at sites that are not currently included in visitable site definition.

In particular, restrictive practices are in place where the community visitor is currently not able to visit but where there is also a risk of inappropriate use of the restrictive practices.

### **Priority for visiting visitable sites**

26.53 The Adult Guardian and the family of an adult with impaired capacity were both of the view that the current priority for visiting particular visitable sites is appropriate.<sup>1199</sup> The Adult Guardian noted, however, that the priority 'requires regular review as issues within services change'.<sup>1200</sup>

26.54 The former Acting Public Advocate was of the view that 'equal priority must be given to visiting people residing in group accommodation as well as independently, as both forms of accommodation subject the adults to differing vulnerabilities which must be monitored'.<sup>1201</sup>

26.55 A person at one of the Commission's community forums commented that community visitors will only visit adults who live in 24 hour a day, 7 day a week care.<sup>1202</sup> Another person at this forum stated that more people live in community housing or rented flats and that community visitors do not visit people who live in those types of accommodation.

26.56 One respondent suggested that, although community visitors visit patients in the mental health wards of hospitals, they do not visit long-term patients with impaired capacity who are in a general ward of a hospital.<sup>1203</sup>

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

26.57 In the Commission's view, the definition of 'visitable site' in section 222 of the *Guardianship and Administration Act 2000* (Qld) is appropriate and does not require amendment. Different views have been expressed to the Commission about whether it is appropriate for private dwelling houses to be excluded from the definition. In balancing the privacy of residents with the benefits to be gained by the scrutiny of visits by community visitors, the Commission considers it appropriate that the focus is on services provided by public entities, publicly funded entities and commercial entities. Accordingly, private dwelling houses should continue to be excluded from the definition of 'visitable site'.

26.58 The Commission notes the concern raised by the Adult Guardian about the vulnerability of adults residing in residential services registered under the

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1199 Submissions 164, 177.

1200 Submission 164.

1201 Submission 160.

1202 Forum 10.

1203 Submission 77.

*Residential Services (Accreditation) Act 2002* (Qld), and her suggestion that community visitors should also be able to visit adults residing in residential services with level 1 or 2 accreditation.<sup>1204</sup> The Commission also notes the concerns that have been raised about the capacity of residents in residential services to seek improvements or to make complaints about the service provided.<sup>1205</sup> In view of these matters, schedule 2 of the *Guardianship and Administration Regulation 2000* (Qld), which prescribes specified places as ‘visitable sites’, should be amended so that community visitors may 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. Accordingly, 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*.

26.59 The Commission considers it important to have flexibility in deciding the priority for visiting particular visitable sites.<sup>1206</sup> Accordingly, it would be undesirable for the legislation to establish a priority for visiting particular sites. The chief executive should continue to have the power under section 225(2) of the *Guardianship and Administration Act 2000* (Qld) to decide priorities for visiting particular visitable sites that affect the frequency of visits to a particular visitable site by a community visitor.

## REQUESTING A VISIT

### The law in Queensland

26.60 Section 226 of the *Guardianship and Administration Act 2000* (Qld) deals with requests for a community visitor to visit a visitable site. It provides:

#### **226 Requirement to visit if asked**

- (1) A consumer at a visitable site, or a person for the consumer, may—
  - (a) ask the chief executive to arrange for a community visitor to visit the visitable site to perform the functions of a community visitor; or
  - (b) ask a person employed at the visitable site to arrange for a community visitor to visit the visitable site to perform the functions of a community visitor.

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1204 See [26.50]–[26.51] above.

1205 See [26.33] above.

1206 See [26.35]–[26.36] above.

- (2) If the request is made to a person employed at the visitable site, the person must, within 3 business days after the request is made, tell the chief executive about the request.

Maximum penalty—40 penalty units.

- (3) A community visitor for the visitable site must visit the visitable site as soon as practicable if informed of a request to visit.

26.61 Section 226(1) provides that a consumer at a visitable site, or ‘a person for the consumer’, may request that a community visitor visit a visitable site. The request may be made in one of two ways — either directly to the chief executive or, alternatively, to a person employed at the visitable site.<sup>1207</sup>

### Discussion Paper

26.62 In the Discussion Paper, the Commission observed that there is some ambiguity in relation to the meaning of the expression ‘a person for the consumer’, which is used in section 226(1) of the *Guardianship and Administration Act 2000* (Qld). The Commission considered that it is clear that, if a consumer at a visitable site asks another person to request a visit from a community visitor, that person is ‘a person for the consumer’, as the request is being made on behalf of the consumer.<sup>1208</sup>

26.63 However, it noted that in many cases, a consumer’s impaired capacity may mean that the consumer is not capable of requesting a visit, either personally or through another person. In that situation, a person with a proper interest in the consumer’s health and well-being (such as an adult child of the consumer) may wish to request a visit by a community visitor. The Commission stated that, although the practice of community visitors is to act on requests for visits made by anyone who has a concern for a consumer,<sup>1209</sup> section 226 could be amended to make it clear that such a person may request a community visit for a consumer. It considered that it is not entirely clear that the expression ‘a person for the consumer’ includes a person who wishes to initiate a visit to the visitable site for the consumer if the person is acting independently of the consumer in requesting the visit.<sup>1210</sup>

26.64 Accordingly, the Commission sought submissions about who, in addition to a consumer at a visitable site, should be able to request that a community visitor visit a visitable site to perform the functions of a community visitor.<sup>1211</sup>

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<sup>1207</sup> *Guardianship and Administration Act 2000* (Qld) s 226(1).

<sup>1208</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [21.26].

<sup>1209</sup> Information provided by the Community Visitor Program 6 August 2009.

<sup>1210</sup> Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [21.27].

<sup>1211</sup> *Ibid* 217.

## Submissions

26.65 There was considerable support in the submissions for expanding the categories of persons who may ask a community visitor to visit a visitable site.

26.66 The former Acting Public Advocate was of the view that section 226 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that ‘any person, acting either for or independently of a consumer, is able to request that a Community Visitor visit a consumer’. He commented:<sup>1212</sup>

This is essential as an adult with [impaired decision-making capacity] may not be able to communicate that s/he wishes to request a visit, identify the need for a visit, or may not understand the functions, powers and purpose of Community Visitors, namely to safeguard consumer interests.

By way of comparison, it is noted that any person may make a complaint to the Adult Guardian about the alleged actions of an attorney, guardian or administrator, or the alleged abuse, neglect or exploitation of an adult with [impaired decision-making capacity] for the Adult Guardian to investigate. Given that Community Visitors also perform functions intended to protect adults with [impaired decision-making capacity], it would be appropriate for the category of persons who may request a visit from a Community Visitor to be expanded.

It is suggested section 226(1) should be framed broadly to provide that any person may request a Community Visitor visit a visitable site to perform its functions.

26.67 The Department of Communities was also of the view that section 226 should be amended to clarify that ‘there is no limit to the sort of person who may request a community visit for a consumer’.<sup>1213</sup>

26.68 Pave the Way also suggested a substantial widening of the persons who may ask a community visitor to visit a site. It considered that the following people should be entitled to request a visit — the consumer’s guardian, administrator, statutory health attorney, informal decision-maker or any person with a proper interest in the welfare of the consumer, including representatives of advocacy organisations representing the consumer or people with disability generally.<sup>1214</sup>

26.69 The Endeavour Foundation commented that ‘anyone who has a grounded concern that harm may be coming to the person with impaired capacity’ should be able to request a visit.<sup>1215</sup>

26.70 The family of an adult with impaired capacity commented that ‘it should be made clear that the family and support group of an adult with impaired capacity

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1212 Submission 160.

1213 Submission 169.

1214 Submission 135.

1215 Submission 163.

may request a visit from a community visitor'.<sup>1216</sup>

26.71 Another family commented:<sup>1217</sup>

It is acknowledged that there are circumstances when the community visitor has been able to defuse situations within a visitable site, so interested parties should be able to request a visit. Advocates/families of consumers should have this right; there should be specific concerns articulated to warrant a visit.

26.72 The Adult Guardian suggested that it would be helpful if the Adult Guardian could ask a community visitor to visit a particular site:<sup>1218</sup>

Because of the widespread location of sites throughout Queensland but only two Offices of the Adult Guardian, client issues may be raised at sites that the community visitor regularly visits but the Adult Guardian is unable to have a guardian or investigator visit for some time.

### The Commission's view

26.73 Although a 'consumer at a visitable site, or a person for the consumer' may request a visit by a community visitor, many consumers with impaired capacity may not have the ability to make that request personally or to ask someone else to make that request on their behalf. For such adults, it is important that it is clear that persons who have an obvious interest in the adult may also request a community visit. The Commission is therefore of the view that section 226(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that a visit may be requested by the adult's substitute decision-maker (that is, by the adult's guardian, administrator, attorney or statutory health attorney) or by a person who is otherwise an interested person for the adult.<sup>1219</sup> The term 'interested person' is wide enough to enable a visit to be requested by the family and support group of an adult, as suggested by one respondent.

26.74 The Commission considers that the Adult Guardian should also be able to request a visit by a community visitor. This is consistent with the Adult Guardian's function of protecting the rights and interests of adults with impaired capacity,<sup>1220</sup> and avoids any argument about whether the Adult Guardian would be an interested person for an adult.

26.75 The Act should also enable an advocacy organisation to request a community visit. Such an organisation, or a person representing such an organisation, might otherwise have difficulty in establishing that the organisation or

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<sup>1216</sup> Submission 177.

<sup>1217</sup> Submission 54A.

<sup>1218</sup> Submission 164.

<sup>1219</sup> 'Interested person, for a person' means 'a person who has a sufficient and continuing interest in the other person': *Guardianship and Administration Act 2000* (Qld) sch 4. In Chapter 21 of this Report, the Commission has recommended that the definition of 'interested person' be changed to 'a person who has a sufficient and genuine concern in the rights and interests of the adult': see Recommendation 21-2 of this Report.

<sup>1220</sup> See *Guardianship and Administration Act 2000* (Qld) s 174(1).



the person is an interested person, even though there may be good reason to request a visit.

## ACCESS TO VISITABLE SITE DOCUMENTS

### The law in Queensland

26.76 Section 227(1)(d) of the *Guardianship and Administration Act 2000* (Qld) provides that, subject to subsection (2), a community visitor may 'inspect and take extracts from, or make copies of, any visitable site document'.<sup>1221</sup>

26.77 The Act defines 'visitable site document' to mean:<sup>1222</sup>

- (a) a document relating to the visitable site, including the visitable site's records, policies and procedures; or
- (b) a document relating to a consumer at the visitable site, including a document in the consumer's personal or medical file, regardless of who owns the file.

### Submissions

26.78 Two submissions raised concerns about the privacy implications of a community visitor's power to access and inspect visitable site documents.

26.79 One respondent was critical of the width of a community visitor's power under section 227(1)(d) of the *Guardianship and Administration Act 2000* (Qld) to inspect and make copies of any visitable site document:<sup>1223</sup>

Included in such documents could be very personal and sensitive medical information. In whole of life cases such information would most likely have been given to the service provider on a confidential basis in the interest of the adult. I suggest that the present power offends the privacy of the adult. The subsequent whereabouts of such information when it is taken, will be outside the control of the adult, the service provider and the statutory health attorney. There is no need for it to be held in any specific way to protect the privacy of the adult. I submit that this power should be deleted but at least it should be reduced such that the community visitor cannot take extracts or take copies unless the authority of the statutory health attorney has been obtained. In making such a request either verbal or written he must advise the purpose why he/she seeks the information.

26.80 The parents of an adult with impaired capacity expressed similar concerns about the community visitors' access to documents at a visitable site:<sup>1224</sup>

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1221 *Guardianship and Administration Act 2000* (Qld) s 227 is set out at [26.10] above.

1222 *Guardianship and Administration Act 2000* (Qld) s 222.

1223 Submission 27A. The definition of 'visitable site document' is set out at n 1151 above.

1224 Submission 54A.

I have reservations around ... the intrusion into the dynamics of households and privacy of the individuals in the household. ... It has come to my attention that a Community Visitor can access and copy any document within the file of an individual. As a concerned parent I have started placing in my family member's file archival material around assessments that were made many years ago that are still valid as the condition is not going to change. Such documents are valuable when applying for individualized funding. To date this function has fallen mostly to the family. However this may not continue indefinitely. These documents are not material I wish to be viewed by anyone I do not know; I certainly feel it totally inappropriate that they be copied by a third party. My alternative is to withdraw the documents which could compromise her opportunities at a later date. I also have concerns, as her statutory health attorney, that an outsider can view medical documents without my presence.

### The Commission's view

26.81 In the Commission's view, the power of a community visitor to inspect and take copies of a visitable site document is a necessary power for the proper performance of the functions of a community visitor. Accordingly, that power should be retained.

26.82 Although a community visitor is likely, in the exercise of this power, to have access to personal information of adults at a visitable site, section 249A of the *Guardianship and Administration Act 2000* (Qld) prohibits the disclosure of that information other than as provided by section 249.

## COMMUNITY VISITOR REPORTS

### The law in Queensland

26.83 Section 230 of the *Guardianship and Administration Act 2000* (Qld) requires a community visitor to prepare a report on each visit to a visitable site, and deals with a number of matters in relation to the report. It provides:

#### **230 Reports by community visitors**

- (1) As soon as practicable after a visit to a visitable site by a community visitor for the visitable site, the community visitor must—
  - (a) prepare a report on the visit; and
  - (b) give a copy of the report to the chief executive.
- (2) If the community visitor entered the visitable site outside normal hours, the community visitor must state the authority for the entry.
- (3) As soon as practicable after receiving a copy of a report in relation to a visitable site, the chief executive must give a copy of the report to a person in charge of the visitable site.
- (4) The chief executive may also give a copy of the report to any of the following—

- (a) if the report relates to a complaint—the consumer;
- (b) the adult guardian;
- (c) the public advocate;
- (d) the director of mental health appointed under the *Mental Health Act 2000*;
- (e) if a restrictive practice under chapter 5B is being used at the visitable site—
  - (i) the tribunal; or
  - (ii) a guardian or administrator for an adult in relation to whom the restrictive practice is used; or
  - (iii) the chief executive (disability services).

26.84 Under section 230 of the *Guardianship and Administration Act 2000* (Qld), the only person who is entitled to receive a copy of a community visitor report in relation to a visitable site is a person in charge of the visitable site.<sup>1225</sup> However, the chief executive *may* give a copy of the report to any of the people or entities mentioned in section 230(4).

## Discussion Paper

26.85 In the Discussion Paper, the Commission considered two issues in relation to community visitor reports.

26.86 The first issue was whether, in addition to a person in charge of the visitable site, section 230(3) should confer an entitlement to a copy of a community visitor report on any other person. The Commission suggested, for example, that an entitlement to a copy of a community visitor report might well assist the Adult Guardian in identifying systemic issues in relation to the provision of services at visitable sites.<sup>1226</sup> Similarly, it was suggested that it might assist the Director of Mental Health appointed under the *Mental Health Act 2000* (Qld), in the discharge of his or her duties, to have an entitlement to a copy of a community visitor report that relates to a visitable site that is an authorised mental health service under the *Mental Health Act 2000* (Qld).<sup>1227</sup>

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1225 *Guardianship and Administration Act 2000* (Qld) s 230(3).

1226 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [21.32]. Although the function of systemic advocacy is currently undertaken by the Public Advocate, the Government has announced its intention to transfer that function to the Adult Guardian: see Chapter 24 of this Report.

1227 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [21.32].

26.87 The second issue was whether section 230(4) should specify any additional person or persons to whom the chief executive may give a copy of a community visitor report.<sup>1228</sup>

26.88 The Commission therefore sought submissions on whether:<sup>1229</sup>

- in addition to a person in charge of the visitable site, section 230(3) of the *Guardianship and Administration Act 2000* (Qld) should confer an entitlement to receive a copy of a community visitor report about a visitable site on any other person or persons; and
- section 230(4) of the *Guardianship and Administration Act 2000* (Qld) should specify any additional person or persons to whom the chief executive may give a copy of a community visitor report.

## Submissions

### ***Mandatory provision of community visitor reports***

26.89 A number of respondents suggested that the categories of people who are entitled to receive a copy of a community visitor report should be expanded.

26.90 Pave the Way commented that any person who is entitled to request a visit by a community visitor should be entitled, on request, to receive a copy of the community visitor report.<sup>1230</sup>

26.91 The former Acting Public Advocate was of the view that section 230(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended so that the adult to whom the report relates should be entitled to receive a copy of the report. He also considered that the Public Advocate should be entitled to copies of certain reports, and suggested that:

provision be made for any reports which raise trend or systemic issues to be provided to the Public Advocate to enable thorough consideration of the matters raised. Provision should also be made for the Public Advocate to request reports about a particular consumer for the purpose of systems advocacy.

26.92 The former Acting Public Advocate also suggested that consideration should be given to amending section 230(3) so that an adult's guardians, administrators or informal decision-makers are entitled to be given a copy of a community visitor report:<sup>1231</sup>

A Community Visitor's report may identify potential abuse, neglect or exploitation of an adult; substandard or inadequate service delivery to an adult; and information and other issues which relate to or affect the health, safety or

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1228 Ibid [23.33].

1229 Ibid 218.

1230 Submission 135.

1231 Submission 160.

wellbeing of an adult. Provision of Community Visitor reports to guardians, administrators and informal decision-makers for adults with [impaired decision-making capacity] may be advantageous in providing an additional safeguard for the adult, and protecting their rights and interests. Provision of reports to an adult's guardian, administrator or informal decision-maker may also assist their decision-making about significant issues including, for example, an adult's accommodation, health care, restrictive practices, and disability services. Consideration should be given to the inclusion of guardians, administrators and informal decision-makers in section 230(3) as a category of persons entitled to receive a copy of a report.

26.93 The former Acting Public Advocate did not consider, however, that members of the adult's informal support network should automatically be entitled to receive a copy of a community visitor report. Instead, he suggested that there should be a hierarchy of informal decision-makers which would determine who was entitled to receive a report:

It is recognised however that an adult's informal support network may include extended family and relatives, as well as close friends. For reasons of privacy and protection of the adult's interests, it is not considered appropriate for all parties who comprise an adult's informal support network to have access to Community Visitor reports. To overcome this, consideration could be given to:

- the implementation of a hierarchy or priority list for informal decision-makers' access to reports; or
- members of an adult's informal decision-making and/or support network to be provided with the report only in circumstances where they have an ongoing close personal relationship and interest in the adult; or
- arrangements for informal decision-makers and the [Community Visitor Program] to negotiate and reach consensus about which members of the support network who are the adult's decision-makers should receive reports. In situations where consensus cannot be reached the matter could be referred to the QCAT for determination.

26.94 The former Acting Public Advocate referred to the privacy implications of conferring an entitlement to a community visitor report on a wider range of people, particularly where the report includes personal information about other adults at the visitable site. He suggested that, generally, reports should be disclosed only to the extent that it concerns the particular adult. He also suggested that it might be necessary to confer a discretion on the chief executive where information about another adult was relevant to the adult concerned:

In making provision for entitlement to reports it is recognised that disclosure of reports to persons other than the person in charge of the visitable site, such as substitute decision-makers, may raise concerns about breaching the privacy of other adults residing at the visitable site, particularly where several adults reside in the same dwelling. For example, if a Community Visitor identifies that one adult has developed a medical condition, inclusion of that information in the report, even if an adult is de-identified through removal of the adult's name, may still identify the adult and reveal his/her personal information. Accordingly, if the provision of reports to a substitute decision-maker is introduced such provision must occur in a way which prevents breaches to the privacy of any

other persons residing at the visitable site. It is suggested that the report may only be disclosed to the 'extent the information relates to the adult for whom the guardian/administrator is appointed, or an informal decision-maker acts'.

However, in some circumstances, information relating to another adult may also be relevant to or affect the adult for whom the substitute decision-maker acts. For example, where an adult is suffering from a particular medical condition/illness which places other residents at risk. In such cases, it may be appropriate for the chief executive to have a discretion as to whether such information should be released to other parties.

26.95 Queensland Parents for People with a Disability Inc commented that many of its members believe they should be entitled to see the reports written by community visitors who visit their sons and daughters who live independently in shared accommodation.<sup>1232</sup>

26.96 Similarly, the father of adult sons with impaired capacity suggested that, as guardian for one son and statutory health attorney for the other, community visitors should be required to advise him of matters of concern.<sup>1233</sup>

26.97 The parents of an adult with impaired capacity commented:<sup>1234</sup>

The advocates (usually families) for the members of the household should have access to the reports; privacy can be maintained by prudent reporting. Matters of concern to the community visitor should be of concern to the families; if they are not then it possible that the matters the community visitor investigates should not be within their areas of concern.

26.98 Another family was of the view that community visitor reports should be given to:<sup>1235</sup>

- the Director-General of the department from which the visitable site receives funding;
- if a community visit was made as the result of a complaint — the complainant; and
- the Public Advocate.

26.99 The Department of Communities suggested that consideration should be given to the amendment of section 230 of the *Guardianship and Administration Act 2000* (Qld) to provide that 'persons other than the person in charge of the visitable site [are] entitled to a copy of the report':<sup>1236</sup>

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1232 Submission 167.

1233 Submission 142.

1234 Submission 54A.

1235 Submission 177.

1236 Submission 169.

For example: community visitor reports would assist the Public Advocate (whose role it is to identify systemic issues in relation to the provisions of services at visitable sites), and reports that relate to a visitable site that is an authorised mental health service would assist the Director of Mental Health.

26.100 At one of the Commission's community forums, it was suggested that, if a community visitor visits an adult, the adult's family should be informed of the visit and should be given a copy of the community visitor's report. Another person at the same forum suggested that a copy of the report should be given to a family member who is listed with the adult's residential service provider.<sup>1237</sup>

26.101 However, the Adult Guardian was of the view that there were difficulties with any proposal to confer an entitlement to a community visitor report on additional persons.<sup>1238</sup>

The reports are site reports, not individual reports. They comment upon a range of issues at the site including other consumers, family members, medical issues, site management, level of support, behaviours, etc. In comparison the reports prepared for the tribunal for restrictive practices are designed to comment only upon the restrictive practices legislation as applied to an individual at a site. This is possible because of the narrowness of the focus. Both reports are snapshots of a visit on a particular day, although over time longitudinal issues may become evident.

#### ***Extending the categories of persons who may be given a community visitor report***

26.102 The former Acting Public Advocate was of the view that, if substitute decision-makers were not given an entitlement to be given a copy of a community visitor report under section 230(3) of the *Guardianship and Administration Act 2000* (Qld), they should be included under section 230(4) as persons to whom the chief executive may, in his or her discretion, give a copy.<sup>1239</sup>

26.103 The former Acting Public Advocate commented further that it was unclear whether the reference in section 230(4)(a) to 'the consumer' included the consumer's substitute decision-makers:

Although section 230(4)(a) provides that a copy of the report may be provided to the consumer, it is unclear whether a consumer includes a substitute decision-maker for an adult. A way to resolve this, and to include substitute decision-makers, is to amend section 230(4)(a) to clarify that a consumer includes a substitute decision-maker for the adult. This would also be consistent with the provisions for guardians and administrators for an adult in relation to whom a restrictive practice is used, as provided in section 230(4)(e)(ii).

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1237 Forum 13.

1238 Submission 164.

1239 Submission 160.

26.104 However, the Adult Guardian expressed concerns about extending the categories of persons to whom the chief executive may give a copy of a community visitor report.<sup>1240</sup>

Although as a matter of principle this proposition sounds attractive, the practical issues make it a much more complex issue. The manager of the community visitor program can release confidential information to a guardian, attorney, [statutory health attorney] or other decision maker under s 249 if release of the information is necessary to prevent serious risk to a person's life, health or safety.

During 2008/09 6170 visits were conducted by the community visitors program, to 714 disability sites and 71 mental health sites. Consumers raised 8270 complaints. All but 111 were resolved without referral.

### The Commission's view

#### ***Persons to whom the chief executive must give a copy of a community visitor report***

26.105 Section 230(3) of the *Guardianship and Administration Act 2000* (Qld) should continue to require the chief executive to provide a copy of a community visitor report to a person in charge of the visitable site.

26.106 The Commission has also considered whether the chief executive should be required to give a copy of a community visitor report to anyone else. Section 226(1) of the Act currently provides that a community visit may be requested by a 'consumer at a visitable site, or a person for the consumer'. Earlier in this chapter, the Commission has recommended that section 226(1) be amended to clarify that a visit to a visitable site may also be requested by:<sup>1241</sup>

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

26.107 If a person (including a consumer at a visitable site) or an advocacy organisation has requested that a community visitor visit a consumer at a visitable site, it is important that the person or organisation has the means to find out the outcome of that visit. If, for example, the community visitor report raises issues about the adequacy, appropriateness or standard of service provided at the visitable site, knowledge of those matters may well be relevant to decisions that need to be made for the consumer. On the other hand, if the community visitor provides a satisfactory report, knowledge of that outcome may help to allay the concerns that prompted the request for the visit.

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1240 Submission 164.

1241 See [26.73]–[26.74] above and Recommendation 26-4 below.



26.108 The Commission is therefore of the view that section 230(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if a community visitor report has been prepared in relation to a visit that was requested by:

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

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

***Persons to whom the chief executive must give a copy of a community visitor report, if requested***

26.109 At present, section 230(4) of the *Guardianship and Administration Act 2000* (Qld) enables the chief executive, in his or her discretion, to give a copy of a community visitor report to a number of specified persons. The section does not, however, give those persons an entitlement to be given a copy of a report, even though they would have a legitimate reason to wish to have access to a community visitor report.

26.110 The Commission notes that, in 2008–09, community visitors conducted over 6000 visits to visitable sites.<sup>1242</sup> Given the large number of community visitor reports that are prepared each year, it would be quite burdensome to impose a requirement on the chief executive to give a copy of each community visitor report routinely to each of the persons mentioned in section 230(4). Further, given the few referrals that are made of unresolved complaints,<sup>1243</sup> such a requirement would not necessarily provide any real benefit to those persons. However, the fact that the persons mentioned in section 230(4) may not be assisted by receiving, and may not wish to receive, every community visitor report that is produced each year does not mean that their access to a particular report that is of interest to them should be at the discretion of the chief executive.

26.111 Given the legitimacy of the interest of the persons mentioned in section 230(4) in receiving copies of community visitor reports, section 230(4) should be amended 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 that person.

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1242 See [26.36] above.

1243 See [26.104] above.

26.112 In addition, the list of persons mentioned in section 230(4) should be expanded to include:

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

26.113 The Commission's recommendations in relation to the requirement for the chief executive to give a copy of a report to the person who requested the visit and to certain other persons who have an interest in the adult is similar to the requirement that applies to the Adult Guardian under section 193 of the Act. That section provides that, after the Adult Guardian has carried out an investigation or audit in relation to an adult, the Adult Guardian must make a written report and give a copy of the report to any person at whose request the investigation or audit was carried out and to every attorney, guardian or administrator, for the adult. It also requires the Adult Guardian to allow an interested person to inspect a copy of the report and, at the person's own expense, to be given a copy of the report.

### **Personal information**

26.114 The Commission notes the concern raised by the Adult Guardian that community visitor reports may contain personal information about a number of adults at the visitable site, and not just about a particular adult.<sup>1244</sup> Although the Commission does not consider that a sufficient reason not to widen the categories of persons who are entitled to be given a copy of a community visitor report (whether automatically or on request), the Commission does accept that it may be necessary to redact certain personal information from the copies that are provided.

26.115 This should not be required where the report is to be given to a person with a proper interest in all the adults mentioned in the report — for example, the Adult Guardian, the Public Advocate or, where the visitable site is a place declared to be an authorised mental health service under section 495 of the *Mental Health Act 2000* (Qld), the Director of Mental Health appointed under that Act, the Tribunal or the chief executive (disability services). Those persons and entities are required to comply with the Information Privacy Principles set out in the *Information Privacy Act 2009* (Qld) or, in the case of the Director of Mental Health, with the National Privacy Principles set out in that Act.<sup>1245</sup>

26.116 However, the issue of the disclosure of personal information of other consumers will be relevant where a copy of a report is requested by a consumer, a consumer's substitute decision-maker or a person who is an interested person for a consumer. In that situation, the nature of the person's interest is properly a particular consumer at the site, rather than all the consumers at the site. For those reasons, the copy of the report that is provided should not generally include the personal information of other consumers at the site.

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<sup>1244</sup> See [26.101] above.

<sup>1245</sup> *Information Privacy Act 2009* (Qld) ss 27, 31.

26.117 Accordingly, the *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision that applies if the chief executive is required:

- under section 230(3) or (4) to give a copy of a community visitor report to:
  - a consumer;
  - a consumer’s guardian, administrator, attorney or statutory health attorney; or
  - an interested person for a consumer; or
- under section 230(3) to give a copy of a community visitor report to an advocacy organisation.

26.118 Given the nature of information that may be recorded in a community visitor report, the Commission is of the view that the Act should generally require the chief executive to remove personal information of other consumers before providing a report to a person mentioned at [26.117]. While the Commission recognises that, in some situations, it could be relevant for personal information of another consumer to be disclosed, the Commission considers that the Act should set a high bar for such disclosure. The recommended provision should therefore provide that, before giving a copy of the community visitor report to a person mentioned at [26.117], the chief executive must 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. This test is based on the test in Information Privacy Principles 10(1)(b) and 11(1)(c) and National Privacy Principle 2(1)(d) of the *Information Privacy Act 2009* (Qld).<sup>1246</sup>

26.119 In addition, to protect the privacy of the relevant adult, the Commission has made recommendations in Chapter 30 of this Report to widen the operation of section 249A of the *Guardianship and Administration Act 2000* (Qld). That section provides that a ‘relevant person’ must not use confidential information gained because of being a relevant person, or because of an opportunity given by being a relevant person, other than as provided under section 249, unless the person has a reasonable excuse. The definition of ‘relevant person’ in section 246 includes, relevantly, guardians and administrators.

26.120 Sections 74 and 74A of the *Powers of Attorney Act 1998* (Qld) are in similar terms, except that they apply to attorneys and statutory health attorneys.

26.121 Although guardians, administrators, attorneys and statutory health attorneys are subject to a prohibition on using confidential information, neither an

<sup>1246</sup>

An agency other than the Health Department must comply with the Information Privacy Principles: *Information Privacy Act 2009* (Qld) s 27. The Health Department must comply with the National Privacy Principles: s 31.

interested person nor an advocacy organisation is subject to such a prohibition. The Commission has therefore recommended that the definition of ‘relevant person’ in section 246 of the *Guardianship and Administration Act 2000* (Qld) be amended to include an interested person or advocacy organisation that receives a copy of a community visitor report under the amendments recommended in this chapter in relation to section 230(3) or (4) of the *Guardianship and Administration Act 2000* (Qld).<sup>1247</sup> That recommendation will ensure that people who receive a copy of a community visitor report under the Commission’s recommendations in this chapter will be subject to the duty of confidence imposed by section 249A of the Act.

## APPOINTMENT OF COMMUNITY VISITORS

### The law in Queensland

26.122 Community visitors are appointed by the chief executive, and may be appointed on a full-time or part-time basis for a term of up to three years.<sup>1248</sup> They are appointed under the *Guardianship and Administration Act 2000* (Qld), rather than under the *Public Service Act 2008* (Qld).<sup>1249</sup>

26.123 A person is eligible for appointment as a community visitor only if the chief executive considers that the person has ‘knowledge, experience or skills relevant to the exercise of a community visitor’s functions’.<sup>1250</sup>

26.124 However, a person may not hold office as a community visitor while:<sup>1251</sup>

- the person is a public service employee of the department in which any of the following Acts is administered:
  - the *Disability Services Act 2006* (Qld);
  - the *Health Act 1937* (Qld);
  - the *Mental Health Act 2000* (Qld); or
- the person or the person’s spouse<sup>1252</sup> has a direct pecuniary interest in any contract with any of those departments; or
- the person or the person’s spouse has a direct pecuniary interest in any visitable site.

<sup>1247</sup> See Recommendation 30-16(b) of this Report.

<sup>1248</sup> *Guardianship and Administration Act 2000* (Qld) ss 231(1)–(2), 232(1).

<sup>1249</sup> *Guardianship and Administration Act 2000* (Qld) s 231(6).

<sup>1250</sup> *Guardianship and Administration Act 2000* (Qld) s 231(4).

<sup>1251</sup> *Guardianship and Administration Act 2000* (Qld) s 231(4), (7).

<sup>1252</sup> The *Acts Interpretation Act 1954* (Qld) defines ‘spouse’ to include a de facto partner: s 36. ‘De facto partner’ is defined in s 32DA.

26.125 In appointing community visitors, the chief executive must take into account the desirability of the community visitors appointed.<sup>1253</sup>

- (a) having a range of knowledge, experience or skills relevant to the exercise of the functions of community visitors; and
- (b) reflecting the social and cultural diversity of the general community; and
- (c) consisting of equal numbers of males and females.

## Discussion Paper

26.126 In the Discussion Paper, the Commission sought submissions on whether the provisions in the *Guardianship and Administration Act 2000* (Qld) dealing with the appointment of community visitors are appropriate.<sup>1254</sup>

## Submissions

26.127 Several respondents, including the Pave the Way and the Adult Guardian, were of the view that the provisions in the *Guardianship and Administration Act 2000* (Qld) dealing with the appointment of community visitors are appropriate.<sup>1255</sup>

26.128 However, one submission,<sup>1256</sup> from the parents of an adult with impaired capacity, did not share that view.

## The Commission's view

26.129 The Commission considers that the matters that the chief executive must take into account in appointing community visitors are generally appropriate. However, the reference in section 231(5)(c) of the *Guardianship and Administration Act 2000* (Qld) to the desirability of community visitors 'consisting of equal numbers of males and females' now appears somewhat outdated, and should be replaced by a more contemporary expression of that principle.

26.130 A provision dealing with a similar requirement is found in the QCAT Act. Section 183(6) provides that the Minister, in recommending members for appointment to the Tribunal, must have regard to the following matters:

- (a) the need for balanced gender representation in the membership of the tribunal;
- (b) the need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders;

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<sup>1253</sup> *Guardianship and Administration Act 2000* (Qld) s 231(5).

<sup>1254</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 218.

<sup>1255</sup> Submissions 135, 164, 177.

<sup>1256</sup> Submission 54A. These respondents did not outline the reason for this view.

- (c) the need for the membership of the tribunal to reflect the social and cultural diversity of the general community;
- (d) the range of knowledge, expertise and experience of members of the tribunal.

26.131 In the Commission's view, section 231(5)(c) of the *Guardianship and Administration Act 2000* (Qld) should be amended to refer to the desirability of having balanced gender representation in the appointment of community visitors.

26.132 Section 231(5) should also be amended to refer to the desirability of having community visitors who include Aboriginal people and Torres Strait Islanders.

## ADMINISTRATIVE LOCATION OF THE COMMUNITY VISITOR PROGRAM WITHIN THE DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL

### Background

26.133 As mentioned above, community visitors are appointed under the *Guardianship and Administration Act 2000* (Qld), rather than under the *Public Service Act 2008* (Qld).<sup>1257</sup> However, within the Department of Justice and Attorney-General, the work of community visitors is managed and supported by a number of public servants. The 'Community Visitor Program' is used to refer collectively to the community visitors themselves and to the public servants who manage and support their work.

26.134 Within the departmental structure, the Community Visitor Program is currently located within the Office of the Adult Guardian. The Annual Report of the Adult Guardian for 2007–08 states:<sup>1258</sup>

In March 2008, [the] Director-General of the Department of Justice and Attorney-General ... announced the re-alignment of the department's reporting framework. As a result of the re-alignment, the manager of the Community Visitor Program now reports to the Director-General through the Adult Guardian. This re-alignment broadens our sphere of influence for raising awareness of resident issues and effecting the resolution of their concerns.

26.135 This is consistent with the recommendation of this Commission in its original 1996 report. The Commission referred to a number of submissions that had suggested that the proposed community visitor scheme should be under the control of the Public Advocate, rather than under the control of the Adult Guardian.<sup>1259</sup> However, the Commission concluded that community visitors were

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<sup>1257</sup> See [26.122] above.

<sup>1258</sup> Office of the Adult Guardian (Qld), *Adult Guardian Annual Report 07–08* (2008) 49.

<sup>1259</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 428–9.

more appropriately located within the Office of the Adult Guardian:<sup>1260</sup>

In the view of the Commission, the aim of establishing a community visitors scheme is to protect the rights and interests of individual residents of residential facilities and to enable action to be taken to redress infringement of those rights and interests. To the extent that the community visitors scheme offers a protective service for individual residents, it is more appropriately located within the responsibility of the Adult Guardian.

26.136 The Commission acknowledged that the work of community visitors in assisting individual residents was likely to reveal patterns that could be used to identify systemic issues for which the Public Advocate is responsible.<sup>1261</sup> However, the Commission was not persuaded that it was necessary for the Public Advocate to undertake responsibility for the community visitors scheme in order for the Public Advocate to address those systemic issues. It suggested instead that 'administrative protocols [should] be developed between the Adult Guardian and the Public Advocate so that relevant information obtained from the performance of the Adult Guardian's individual protective function is made available to the Public Advocate'.<sup>1262</sup>

26.137 The appropriate reporting structure for the Community Visitor Program has been raised again as an issue in this review.

## Discussion Paper

26.138 In the Discussion Paper, the Commission noted that the Guardianship and Reform Drivers ('GARD')<sup>1263</sup> have suggested that '[t]he legislature should again give consideration to the best location of the community visitor scheme for maximum impact in protecting people with impaired capacity'.<sup>1264</sup> In GARD's view, 'the community visitors could just as easily fit under the Public Advocate, which could help to resolve some of the issues surrounding the lack of information-compulsion powers held by the Public Advocate'.<sup>1265</sup> However, as explained in Chapter 24 of this Report, the Government has announced its intention to transfer the Public Advocate's powers to the Adult Guardian and to abolish the Public Advocate as a separate office.

26.139 It was also suggested that, in placing the Community Visitor Program within the Office of the Adult Guardian, it creates a potential conflict, for example,

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1260 Ibid 430.

1261 Ibid.

1262 Ibid.

1263 GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents for People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network.

1264 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [21.40].

1265 Ibid.

where a resident raises a concern with a community visitor about the Adult Guardian.

26.140 The Commission sought submissions on what administrative arrangements for the Community Visitor Program would maximise the independence of community visitors and their effectiveness in inquiring into allegations of abuse, neglect and exploitation.<sup>1266</sup>

## Submissions

26.141 The former Acting Public Advocate was of the view that the location of the Community Visitor Program within the Office of the Adult Guardian compromised the Program's independence:<sup>1267</sup>

the inquiry and complaint functions exercised by Community Visitors will from time to time include complaints which involve or are about the services of the Adult Guardian. There is an inherent conflict of interest if the Adult Guardian is in a position to direct the work of the Community Visitors, diminishing the safeguards available through the guardianship regime. For example, a conflict may arise where the [Community Visitor Program] is directed by the Adult Guardian how to raise a complaint with the [Office of the Adult Guardian] or the complaint relates to the service provision of the [Office of the Adult Guardian] as a guardian or statutory health attorney for an adult. Conflicts may also arise where a Community Visitor possesses information concerning the conduct of guardians or staff at the [Office of the Adult Guardian]. In such cases, a Community Visitor may be reluctant to raise concerns about the guardian in an environment where s/he works closely/collaboratively with the guardian.

It is acknowledged that many people in visitable sites do not have the Adult Guardian appointed as their guardian, nor is the Adult Guardian investigating issues relevant to that person. However, even in cases where the Adult Guardian is appointed as guardian, or is investigating, these functions should be performed independently of the [Community Visitor Program], as community visitors should be independent of the Adult Guardian's functions. This is supported by the Act, which provides for the Adult Guardian to be an independent statutory officer.

The independence of the [Community Visitor Program] is arguably compromised in the new organisational structure and conflicts of interest will arise if the [Community Visitor Program] remains embedded within the [Office of the Adult Guardian].

26.142 He therefore suggested that the Community Visitor Program should be independent of the Office of the Adult Guardian, and that it should not be required to report to the Adult Guardian. If the Program is unable to operate independently of the Office of the Adult Guardian, he suggested that 'a more suitable model may be ... to ensure an information barrier between the OAG and CVP respectively, and to maintain integrity and independence'.

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1266 Ibid 220.

1267 Submission 160.



26.143 Pave the Way also expressed concerns about the current reporting arrangements for the Community Visitor Program:<sup>1268</sup>

we are concerned that people who have concerns about the Adult Guardian's role will not complain to a community visitor, or if they do, those complaints may not be acted upon.

We believe that the Community Visitors Program should be located in a separate division of the Department of Justice and Attorney-General, with a direct line of reporting to the Chief Executive. This does not mean that the Community Visitors Program and the Adult Guardian cannot liaise, but will minimise any perceived or actual conflict of interest.

26.144 The family of an adult with impaired capacity was of the view that the Community Visitor Program should be moved to the Office of the Public Advocate.<sup>1269</sup>

26.145 The Adult Guardian noted that since the inception of the Community Visitor Program, the legislative function of community visitors has been amended to provide a monitoring function about the use of restrictive practices for individuals at disability sites in Queensland. She suggested that this change has strengthened the individual focus of the complaint and inquiry function of the role. The Adult Guardian considered that the location of the Community Visitor Program within the Office of the Adult Guardian has considerable advantages:<sup>1270</sup>

1. Individual consumer protection is reinforced because visitors are able to directly contact and collaborate with investigators and guardians to raise and resolve concerns.
2. Community visitors visit sites more regularly than guardians are able and have alerted guardians to issues at sites of which the guardians were unaware.
3. Visitors, guardians and investigators are able to work together collaboratively to protect adults.
4. Information sharing between guardians and visitors has led to identification of issues across services that would otherwise not have been apparent. In one case this has led to the investigation of a disability service.
5. The support of the Adult Guardian in raising issues identified by community visitors with services has led to the resolution of issues that the simple inquiry and complaint function of the community visitors were unable to achieve.
6. Community visitors, guardians and investigators better understand their respective roles and are able to more effectively use those roles to protect consumers.

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1268 Submission 135.

1269 Submission 177.

1270 Submission 164.

26.146 The Adult Guardian also addressed the issue of any potential conflict arising from the location of the Community Visitor Program within the Office of the Adult Guardian. She noted that, since the inception of the program, no complaints had been made to community visitors about the Adult Guardian, and that any potential conflict of interest could be managed by the current safeguards provided by the *Whistleblowers Protection Act 1994* (Qld), the Ombudsman and the Crime and Misconduct Commission. The Adult Guardian also suggested amendments to the *Guardianship and Administration Act 2000* (Qld) to ensure transparency:

To ensure transparency a requirement should be inserted in the legislation to require reporting within the annual report on the number of matters referred to either investigators, guardians or another function of the Adult Guardian, the basis of the referral and the outcome.

For matters involving the Adult Guardian's appointment as a guardian, a copy of the referral and our response should be provided to the tribunal so that the tribunal can determine whether they should initiate an application to review the appointment of the guardian or to provide advice, directions or recommendations to the guardian.

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

26.147 Given that the functions of the Public Advocate are to be transferred to the Adult Guardian, the location of the Community Visitor Program within the Office of the Adult Guardian should enhance the effectiveness of the Adult Guardian's investigative and protective roles, as well as its new role of systemic advocacy. The Commission therefore considers it appropriate that the Community Visitor Program is located within the Office of the Adult Guardian, and does not recommend any change in this regard.

26.148 However, the Commission considers that the suggestions made by the Adult Guardian to promote greater transparency in relation to community visitors should be adopted.

26.149 Accordingly, 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:

- 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;
- the basis of the referral; and
- the outcome of the referral.

26.150 Further, the *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision that applies if a matter involving the Adult Guardian's appointment as guardian is referred to the Adult Guardian. The provision should require the chief executive to give to the Tribunal a copy of the community visitor's referral to the Adult Guardian and the Adult Guardian's

response. This will give the Tribunal the opportunity to decide whether to initiate a review of the Adult Guardian's appointment as guardian.<sup>1271</sup>

## RECOMMENDATIONS

### *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;

<sup>1271</sup>

*Guardianship and Administration Act 2000* (Qld) s 29(1)(a) enables the Tribunal to review an appointment of a guardian (or an administrator) on its own initiative.

- (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

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### INTRODUCTION

27.1 The Commission's terms of reference direct it to review the law under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including:<sup>1272</sup>

whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity.

27.2 There are two situations in which protection may be relevant to a person who makes a complaint about the treatment of an adult with impaired capacity.

27.3 The first situation is where the person who makes the complaint might be exposed to liability of some kind — for example, liability in damages for defamation — as a result of making the complaint.

27.4 The second situation is where the person who makes the complaint, or another person, is subjected to a detriment of some kind — for example, harassment or vilification in the workplace — as a result of the making of the complaint. In this chapter, a detriment to which a person is subjected because a disclosure has been made about the treatment of an adult with impaired capacity is referred to as a reprisal.

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<sup>1272</sup> The terms of reference are set out in Appendix 1.

## PROTECTION FROM LIABILITY FOR MAKING A DISCLOSURE

### The current Queensland provision

27.5 Protection from liability for people who make disclosures about the treatment of adults with impaired capacity is important in encouraging them to report instances of abuse; in the absence of such protection there might be reluctance to report concerns about the abuse of adults.

27.6 Section 247 of the *Guardianship and Administration Act 2000* (Qld) provides protection from civil and criminal liability, as well as protection from liability under an administrative process, to a person who discloses certain kinds of information to an 'official':

#### 247 Whistleblowers' protection

- (1) A person is not liable, civilly, criminally or under an administrative process, for disclosing to an official information about a person's conduct that breaches this Act or the *Powers of Attorney Act 1998*.
- (2) Without limiting subsection (1)—
  - (a) in a proceeding for defamation the discloser has a defence of absolute privilege for publishing the disclosed information; and
  - (b) if the discloser would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice, the discloser—
    - (i) does not contravene the Act, oath, rule of law or practice for disclosing the information; and
    - (ii) is not liable to disciplinary action for disclosing the information.
- (3) A person's liability for the person's own conduct is not affected only because the person discloses it to an official.
- (4) In this section—
 

**official** means—

  - (a) the principal registrar or a registrar under the QCAT Act or another member of the administrative staff of the registry under that Act; or
  - (b) the adult guardian, a member of the adult guardian's staff or an adult guardian's delegate for an investigation; or
  - (c) the public advocate or a member of the public advocate's staff; or
  - (d) a community visitor.



## The current requirement for an actual breach

27.7 Section 247(1) applies if the information disclosed to an official is about a person's conduct that is in breach of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). The wording of section 247(1) suggests that the protection will be available only if the conduct reported *actually* breaches the legislation. This means that a person who suspects wrongdoing by, for example, a guardian, administrator or attorney may not be protected from liability for disclosing information about the person's conduct, despite having reasonable grounds for the suspicion, unless the conduct amounts to a breach of the legislation. While it is important that people are not protected from liability for making baseless complaints, it is also important that the Act provides adequate protection in respect of appropriate disclosures as they may trigger an investigation or other action that is necessary to protect an adult from neglect, exploitation or abuse.

27.8 The requirement under section 247(1) of the *Guardianship and Administration Act 2000* (Qld) of an actual breach of the legislation is a much higher threshold for protection than that which applies under the *Whistleblowers Protection Act 1994* (Qld) to a person who makes a 'public interest disclosure'.<sup>1273</sup> A 'public interest disclosure' is a particular type of disclosure that is defined by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made.<sup>1274</sup>

27.9 Section 39 of the *Whistleblowers Protection Act 1994* (Qld) provides, in terms similar to section 247 of the *Guardianship and Administration Act 2000* (Qld), that a person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure. The making of public interest disclosures is addressed in sections 15 to 20 of the Act. While sections 15 to 18 deal with the making of a public interest disclosure by a public officer about particular conduct,<sup>1275</sup> sections 19 and 20 deal with those public interest disclosures that may be made by anybody. Of particular relevance to this review is section 19, which provides:

**19 Anybody may disclose danger to person with disability or to environment from particular contraventions**<sup>1276</sup>

(1) This section applies if anybody has information about—

- (a) a substantial and specific danger to the health or safety of a person with a disability; or

<sup>1273</sup> A public interest disclosure is defined to mean 'a disclosure of information specified in sections 15 to 20 of the Act made to an appropriate entity and includes all information and help given by the discloser to an appropriate entity': *Whistleblowers Protection Act 1994* (Qld) sch 6.

<sup>1274</sup> *Whistleblowers Protection Act 1994* (Qld) s 7(3).

<sup>1275</sup> *Whistleblowers Protection Act 1994* (Qld) ss 15 (Public officer may disclose official misconduct), 16 (Public officer may disclose maladministration), 17 (Public officer may disclose negligent or improper management affecting public funds), 18 (Public officer may disclose danger to public health or safety or environment).

<sup>1276</sup> *Whistleblowers Protection Act 1994* (Qld) sch 6 provides that '**disability**' of a person has the same meaning as in the *Disability Services Act 2006* (Qld).

- (b) the commission of an offence against a provision mentioned in schedule 2, if commission of the offence is or would be a substantial and specific danger to the environment; or
  - (c) a contravention of a condition imposed under a provision mentioned in schedule 2, if the contravention is or would be a substantial and specific danger to the environment.
- (2) The person may make a public interest disclosure of the information. (emphasis added; note added)

27.10 The Act specifies when a person has information about conduct or danger specified in sections 15 to 20 of the Act.<sup>1277</sup>

A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.

27.11 This means that the protection for making a public interest disclosure under section 19 of the *Whistleblowers Protection Act 1994* (Qld) does not depend on a finding that there was, in fact, a substantial and specific danger to the health or safety of a person with a disability. The requirement of an honest belief on reasonable grounds is important in discouraging baseless complaints. In addition, the *Whistleblowers Protection Act 1994* (Qld) makes it an indictable offence if a person:<sup>1278</sup>

- makes a statement to an appropriate entity intending that it be acted on as a public interest disclosure; and
- in the statement, or in the course of inquiries into the statement, intentionally gives information that is false or misleading in a material particular.

27.12 The narrow protection available under section 247(1) of the *Guardianship and Administration Act 2000* (Qld) also differs from the protection given under similar provisions in other legislation. For example:

- under the *Aged Care Act 1997* (Cth), a person is protected from liability for disclosing a reportable assault if the person 'has reasonable grounds to suspect that the information indicates that a reportable assault has occurred' and 'makes the disclosure in good faith';<sup>1279</sup>

<sup>1277</sup> *Whistleblowers Protection Act 1994* (Qld) s 14(2).

<sup>1278</sup> *Whistleblowers Protection Act 1994* (Qld) s 56. The maximum penalty under s 56(1) is 167 penalty units (that is, \$16 700) or two years' imprisonment: see *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

<sup>1279</sup> *Aged Care Act 1997* (Cth) s 96.8. That provision applies to disclosures made by approved providers of residential care or staff members of such providers and was inserted into that Act as part of amendments made by the *Aged Care Amendment (Security and Protection) Act 2007* (Cth) to establish a scheme of compulsory reporting of abuse: see Explanatory Memorandum, *Aged Care Amendment (Security and Protection) Bill 2007* (Cth) 1. A 'reportable assault' is defined to include unlawful sexual contact, unreasonable use of force or other specified assault inflicted on a person when the person is receiving residential care from approved providers under that Act: s 63-1AA(9).

- under the *Disability Services Act 2006* (Qld), a person acting on behalf of a funded non-government service provider is protected from liability for giving information to the chief executive if the person acts honestly and on reasonable grounds;<sup>1280</sup>
- a person is protected from liability for disclosing to the Commissioner for Children and Young People and Child Guardian 'information that would help the commissioner in assessing or investigating a complaint'.<sup>1281</sup>

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

27.13 In the ACT, the *Public Advocate Act 2005* (ACT) includes a provision that protects a person from liability as a result of giving information to the Public Advocate.<sup>1282</sup> Section 15 of the *Public Advocate Act 2005* (ACT) provides:

#### **15 Giving of information protected**

- (1) This section applies if any information is given honestly and without recklessness to the public advocate.
- (2) The giving of the information is not—
  - (a) a breach of confidence; or
  - (b) a breach of professional etiquette or ethics; or
  - (c) a breach of a rule of professional conduct.
- (3) Civil or criminal liability is not incurred only because of the giving of the information.

27.14 Because section 15 applies if the information is given 'honestly and without recklessness', the scope of the protection given by that section is wider than that given by the *Guardianship and Administration Act 2000* (Qld).

27.15 The guardianship legislation in the other Australian jurisdictions does not include a provision giving any protection from liability to persons who complain about the treatment of an adult with impaired capacity.

### **Discussion Paper**

27.16 In the Discussion Paper, the Commission raised as an issue for consideration whether section 247(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended so that the protection given by the section to a person who discloses information is not limited to the situation where the information relates to an actual breach of that Act or the *Powers of Attorney Act*

<sup>1280</sup> *Disability Services Act 2006* (Qld) s 224.

<sup>1281</sup> *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 394(1). Section 394(2)–(3) of that Act is in the same terms as *Guardianship and Administration Act 2000* (Qld) s 247(2)–(3).

<sup>1282</sup> The ACT Public Advocate has similar functions to the Queensland Adult Guardian: see *Public Advocate Act 2005* (ACT) s 10.

1998 (Qld). It was suggested, for example, that the protection given by the section could be extended to protect a person who discloses information if:<sup>1283</sup>

- the person honestly believes on reasonable grounds that the information tends to show a breach of the relevant legislation; or
- the person suspects, on reasonable grounds, that a person has breached the relevant legislation; or
- the information would help in the assessment or investigation of a complaint about a breach of the relevant legislation.

27.17 The Commission commented that the wider scope of such protection may encourage people to report instances of abuse and other wrongdoing in relation to adults with impaired capacity. At the same time, the scope of the protection would not be so wide as to encourage frivolous or vexatious complaints.<sup>1284</sup>

27.18 The Commission therefore sought submissions on the following questions:<sup>1285</sup>

- 22-1 Is it appropriate that the protection currently given by section 247(1) of the *Guardianship and Administration Act 2000* (Qld) to a person who discloses information is limited to the disclosure of information that reveals an actual breach of the relevant legislation?
- 22-2 If no to Question 22-1, should section 247(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to extend the availability of the protection given by the section so that it applies to a person who discloses information in a wider range of circumstances, for example:
- (a) if the person honestly believes on reasonable grounds that the information tends to show a breach of the relevant legislation;
  - (b) if the person suspects, on reasonable grounds, that a person has breached the relevant legislation;
  - (c) if the information would help in the assessment or investigation of a complaint about a breach of the relevant legislation; or
  - (d) if some other circumstance applies (and, if so, what circumstance)?

### **Submissions**

27.19 A number of respondents, including the Adult Guardian, the Public Trustee, the former Acting Public Advocate, the Department of Communities and the Endeavour Foundation, expressed support for broadening the circumstances in

<sup>1283</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.19].

<sup>1284</sup> Ibid [22.20].

<sup>1285</sup> Ibid 227–8.

which section 247 of the *Guardianship and Administration Act 2000* (Qld) protects relevant disclosures.<sup>1286</sup>

27.20 The Department of Communities considered that section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide for the protection of whistleblowers who act honestly and on reasonable grounds when disclosing information of a suspected breach of the Act.<sup>1287</sup>

27.21 The former Acting Public Advocate was of the view that section 247(1) is unnecessarily restrictive, and that protection should be available in respect of a disclosure provided that the person 'holds an honest belief on reasonable grounds; or suspects, on reasonable grounds that [the relevant] conduct has occurred'. It was noted that this 'would remove the requirement for the complaint to be substantiated before protection is available'.<sup>1288</sup>

27.22 The Adult Guardian considered that section 247 should be amended to protect a person who disclosed information if the information would help in the assessment or investigation of a complaint about a breach of the relevant legislation. She observed that:<sup>1289</sup>

The relevance of the information may be unknown to the individual reporting it and it may only be that information from a number of sources creates sufficient gravitas to warrant an investigation.

27.23 Another respondent supported all of the options set out in Question 22-2(a)–(c) of the Discussion Paper.<sup>1290</sup>

27.24 The Public Trustee generally favoured amending section 247 to achieve consistency with the corresponding provisions of the *Whistleblowers Protection Act 1994* (Qld). On this basis, the Public Trustee provided tentative support for the view that the protection given by section 247 should not be restricted to the disclosure of information of conduct that amounts to an actual breach of the guardianship legislation.<sup>1291</sup>

27.25 The Endeavour Foundation commented generally that the 'Act should be amended to not just protect whistleblowers, it should encourage whistleblowing'.<sup>1292</sup>

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1286 Submissions 156A, 160, 163, 164, 169, 177.

1287 Submission 169.

1288 Submission 160.

1289 Submission 164.

1290 Submission 177.

1291 Submission 156A.

1292 Submission 163.

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

27.26 In the Commission's view, the protection given by section 247(1) of the *Guardianship and Administration Act 2000* (Qld), which applies only in relation to information that reveals an *actual* breach of the guardianship legislation, is too narrow. It is desirable that protection be available to a person who discloses something less than an actual breach of the legislation. The existence of protection for disclosures of that kind is necessary to encourage disclosures of wrongdoing and to enable allegations to be investigated by an appropriate person. Whether an actual breach has occurred is a matter that, in most cases, will not be known at the time a disclosure is made but only after an allegation has been investigated.

27.27 Accordingly, protection from liability should be given in respect of a wider class of disclosures than is currently the case under section 247 of the *Guardianship and Administration Act 2000* (Qld).

27.28 Section 19 of the *Whistleblowers Protection Act 1994* (Qld) deals with public interest disclosures about 'a substantial and specific danger to the health or safety of a person with a disability'.<sup>1293</sup> Although some disclosures about a possible breach of the guardianship legislation would fall within section 19, many would not — for example, a disclosure that an adult was the subject of financial abuse. Because the *Whistleblowers Protection Act 1994* (Qld) is primarily concerned with public interest disclosures about public sector conduct, the Commission considers it is preferable to amend section 247 of the *Guardianship and Administration Act 2000* (Qld) to widen the types of protected disclosures rather than to amend the *Whistleblowers Protection Act 1994* (Qld) to achieve that result.

27.29 It is desirable, however, that the protection given by section 247(1) of the *Guardianship and Administration Act 2000* (Qld) be framed in terms that are as consistent as possible with the scope of the protection given by the *Whistleblowers Protection Act 1994* (Qld) in respect of public interest disclosures. Accordingly, section 247(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person is not liable, civilly, criminally or under an administrative process, for disclosing information to an official if the person honestly believes on reasonable grounds that the person has information that tends to show that another person has breached the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

27.30 Additionally, as suggested by the Adult Guardian,<sup>1294</sup> section 247(1) should be amended so that a person is not liable for disclosing information to an official if the information would help in the assessment or investigation of a complaint about a breach of the relevant legislation.

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<sup>1293</sup> *Whistleblowers Protection Act 1994* (Qld) s 19 is set out at [27.9] above.

<sup>1294</sup> See [27.22] above.

## Disclosures that an adult is being neglected, exploited or abused

### *Discussion Paper*

27.31 In the Discussion Paper, the Commission raised as a further issue whether section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended to give protection from liability for a disclosure of information that does not relate to a breach, or suspected breach, of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) or another specified Act, but that nevertheless relates to the neglect, exploitation or abuse of an adult with impaired capacity. For example, an allegation that an adult is being neglected, exploited or abused might not amount to a breach of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) if the alleged perpetrator is not a guardian, administrator, attorney or statutory health attorney.<sup>1295</sup>

27.32 The Commission suggested that it may be desirable to give protection from liability to a person who makes a disclosure that relates to the neglect, exploitation or abuse of an adult because, like the disclosure of a breach or suspected breach of the guardianship legislation, it has the potential to trigger action that may be needed to protect an adult from neglect, exploitation or abuse.<sup>1296</sup>

27.33 The Commission noted that the considerations that apply to whether the *Guardianship and Administration Act 2000* (Qld) should give protection from liability only for the disclosure of an actual breach of the relevant legislation or should also give protection from liability for the disclosure of a suspected breach of the relevant legislation were also relevant to any amendment of the Act giving protection from liability for a disclosure about the neglect, exploitation or abuse of an adult with impaired capacity. It noted that the relevant issues were:<sup>1297</sup>

- whether protection from liability should be available only for the disclosure of an actual instance of neglect, exploitation or abuse; and
- if protection is to be given in respect of a wider range of circumstances, how those circumstances should be framed.

27.34 The Commission suggested that it was desirable for the scope of any protection to be consistent with the approach taken in relation to a disclosure of a breach, or suspected breach, of the relevant legislation.<sup>1298</sup>

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<sup>1295</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.24]

<sup>1296</sup> Ibid [22.25].

<sup>1297</sup> Ibid [22.26].

<sup>1298</sup> Ibid [22.27].

27.35 The Commission sought submissions on whether section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended to protect a person from liability for disclosing information to an official if:

- the person honestly believes on reasonable grounds that the information tends to show that an adult has been, or is being, neglected, exploited or abused;
- the person suspects, on reasonable grounds, that an adult is being, or has been, neglected, exploited or abused;
- the information would help in the assessment or investigation of a complaint about the neglect, exploitation or abuse of an adult; or
- some other circumstance applies (and, if so, what circumstance).<sup>1299</sup>

### **Submissions**

27.36 A number of respondents, including the former Acting Public Advocate, the Adult Guardian, the Department of Communities and the Public Trustee, were of the view that protection should be provided to persons who disclose information that relates to the neglect, exploitation or abuse of an adult with impaired capacity, although several different formulations were supported.<sup>1300</sup>

27.37 The Department of Communities considered that section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide protection for whistleblowers who disclose information that relates to the neglect, exploitation or abuse of an adult with impaired capacity, even if it does not relate to the breach of any legislation.<sup>1301</sup>

27.38 The Adult Guardian was of the view that section 247 should be amended so that it protects a person from liability for disclosing information to an official if the information would help in the assessment or investigation of a complaint about the neglect, exploitation or abuse of an adult.<sup>1302</sup>

27.39 The family of an adult with impaired capacity supported both of these options. They also suggested, as an additional ground, that a person should be protected under section 247 for making a disclosure if the person has reasonable grounds to believe that the adult's health or welfare is in danger due to the behaviour of another person.<sup>1303</sup>

27.40 The former Acting Public Advocate was of the view that protection should attach in respect of disclosures that an adult with impaired capacity is being, or has

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1299 Ibid 230.

1300 Submissions 156A, 160, 164, 169, 177.

1301 Submission 169.

1302 Submission 164.

1303 Submission 177.



been, subject to abuse, neglect or exploitation. He also considered that protection could be extended to the disclosure of:<sup>1304</sup>

circumstances of unlawful, improper and negligent conduct towards an adult; and/or conduct that otherwise comprises, causes detriment to, or adversely affects the rights and/or interests of an adult. In each case, the protection should apply where:

- the complaint/disclosure relates to potential and/or suspected conduct; and
- the person holds an honest and reasonable belief that the conduct is occurring and/or has occurred.

27.41 Like the Adult Guardian, the former Acting Public Advocate supported providing protection if the disclosure to an official was of information that would help in the assessment or investigation of a complaint about the neglect, exploitation or abuse of an adult.

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

27.42 Given that the primary focus of the guardianship legislation is on the interests of the adult with impaired capacity, it is important for the legislation to give protection from liability to a disclosure that relates to the neglect (including self-neglect), exploitation or abuse of the adult even if the disclosure does not amount to a breach or possible breach of the guardianship legislation.

27.43 To ensure that protection is not given in relation to baseless disclosures, the provision should be consistent with the Commission's earlier view about the extension of protection given by section 247 of the *Guardianship and Administration Act 2000* (Qld).

27.44 The *Guardianship and Administration Act 2000* (Qld) should therefore be amended to provide that a person is not liable, civilly, criminally or under an administrative process, for disclosing information to an official if the person honestly believes on reasonable grounds that the person has information that tends to show that an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse.

27.45 Additionally, as suggested by the Adult Guardian and the former Acting Public Advocate,<sup>1305</sup> section 247(1) should be amended so that a person is not liable for disclosing information to an official if the information would help in the assessment or investigation of a complaint about the neglect, exploitation or abuse of an adult.

27.46 In view of these recommendations, it is not necessary to further recommend that a person be protected from liability if the person has reasonable grounds to believe that an adult's health or welfare is in danger due to the

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1304 Submission 160.

1305 See [27.38], [27.41] above.

behaviour of another person, as suggested by one respondent.<sup>1306</sup> Where a person had such a belief, he or she would be protected under the amendment recommended at [27.44] above and may well also be protected by the further amendment recommended at [27.45] above.

## Disclosure to the Adult Guardian by a health provider or another relevant person

### Background

27.47 Section 43 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may exercise power for a health matter for an adult if the adult's substitute decision-maker refuses to make a decision about a health matter or makes a decision about a health matter and the refusal or the decision, as the case may be, is contrary to the Health Care Principle.<sup>1307</sup> If an adult's health provider is concerned about a decision that the adult's substitute decision-maker has made about a health matter, the appropriate course is for the health provider to refer the matter to the Adult Guardian.

27.48 At present, the referral of such a decision to the Adult Guardian is not the subject of a specific provision. In Chapter 11, however, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to include a new provision to deal specifically with the power of health providers and other relevant persons to refer a decision about a health matter to the Adult Guardian. The recommended provision is in the following terms:

#### 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—

<sup>1306</sup> See [27.39] above.

<sup>1307</sup> In Chapter 23, the Commission has recommended that s 43(1) of the *Guardianship and Administration Act 2000* (Qld) be amended to refer in paragraph (a) to a refusal that is contrary to the *General Principles* or the Health Care Principle and in paragraph (b) to a decision that is contrary to the *General Principles* or the Health Care Principle: see Recommendation 23-4 of this Report.

- (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.
- (4) In this section—

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

27.49 The inclusion of this new provision raises an issue about its relationship with section 247 of the *Guardianship and Administration Act 2000* (Qld).

27.50 The new provision does not of itself provide any protection from liability for making the relevant disclosure. In the absence of any further amendment of section 247, whether or not a health provider or another relevant person who refers a matter to the Adult Guardian under the new provision will be protected from liability will depend on whether the general requirements of section 247, as amended in accordance with the Commission's recommendations, are satisfied.

27.51 The guardianship legislation requires a substitute decision-maker to apply the General Principles and, for a decision about a health matter, the Health Care Principle.<sup>1308</sup> While it would be contrary to the legislation for a substitute decision-maker not to apply those principles, a failure to apply the principles is not an offence under the legislation. Arguably, however, if an adult's substitute decision-maker was not applying the principles, a health provider would have reasonable grounds to believe that he or she has information that tends to show that the adult is, or has been, the subject of neglect, exploitation or abuse.

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

27.52 The purpose of recommending the provision set out at [27.48] above is to make health providers and other relevant persons more aware of their role in referring matters to the Adult Guardian and to create greater certainty for them. For that reason, the protection given by section 247 of the *Guardianship and Administration Act 2000* (Qld) should be expressly extended to a person who makes a disclosure in accordance with the new provision.

27.53 As a disclosure of this kind might, depending on the facts, also be protected under the Commission's other recommendations for the amendment of

<sup>1308</sup>

*Guardianship and Administration Act 2000* (Qld) s 34; *Powers of Attorney Act 1998* (Qld) s 76.

section 247(1), the provision that gives effect to this recommendation should make it clear that it does not limit the protection otherwise given by section 247(1).

## Disclosure about breaches of particular Acts

### *Discussion Paper*

27.54 In the Discussion Paper, the Commission observed that the protection given by section 247 of the *Guardianship and Administration Act 2000* (Qld) applies in relation to liability arising from the disclosure of information about conduct that breaches either the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).<sup>1309</sup>

27.55 It referred to the suggestion made by the former Public Advocate that, for systems advocacy work, the protection given by section 247 is too narrow and should not be confined to breaches of only those two Acts.<sup>1310</sup>

In relation to systems advocacy work, much broader protections are appropriate. Potentially, whistleblowers will provide information regarding breaches relating to many different systems in addition to the guardianship legislative system. These may include, for example, breaches under the *Mental Health Act 2000* and the *Disability Services Act 2006*.<sup>1311</sup> (note added)

27.56 The Commission also considered whether, in light of the Adult Guardian's statutory function of protecting adults with impaired capacity from neglect, exploitation or abuse,<sup>1312</sup> the reference in section 247(1) to conduct that breaches the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) may be too narrow for that function.<sup>1313</sup>

27.57 The Commission therefore sought submissions on:<sup>1314</sup>

- whether section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that the protection given by that section is not limited to the disclosure of a person's conduct that breaches, or is suspected of breaching, the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), but applies also to the disclosure of a person's conduct that breaches, or is suspected of breaching, some other Act or Acts (to the extent that the conduct relates to an adult with impaired capacity); and

<sup>1309</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.21].

<sup>1310</sup> Ibid [22.22], referring to correspondence from the former Public Advocate 24 July 2009.

<sup>1311</sup> *Disability Services Act 2006* (Qld) s 224 deals with protection from liability for giving information. However, it applies only to the giving of information to the chief executive by a funded non-government service provider.

<sup>1312</sup> *Guardianship and Administration Act 2000* (Qld) s 174(2)(a). The functions and powers of the Adult Guardian are considered in Chapter 23 of this Report.

<sup>1313</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.23].

<sup>1314</sup> Ibid 229.

- if so, the other Act or Acts to which section 247 of the *Guardianship and Administration Act 2000* (Qld) should refer.

### **Submissions**

27.58 Several respondents, including the Adult Guardian, the Department of Communities, the Public Trustee and the Endeavour Foundation, considered that section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that it also protects persons who disclose information about breaches of Acts other than the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>1315</sup>

27.59 The Adult Guardian and the family of an adult with impaired capacity were both of the view that section 247 of the *Guardianship and Administration Act 2000* (Qld) should be amended so that it also applies in respect of the disclosure of a person's conduct that breaches, or is suspected of breaching, the *Mental Health Act 2000* (Qld) and the *Disability Services Act 2006* (Qld) (to the extent that the conduct relates to an adult with impaired capacity).<sup>1316</sup>

27.60 The former Acting Public Advocate, however, did not generally favour providing protection based on the disclosure of conduct that breaches, or is suspected of breaching, particular Acts. In his view, such an approach would be too restrictive. However, the former Acting Public Advocate suggested that, if this approach were adopted, protection should be given in relation to the disclosure of possible breaches of the following Acts, which relate to and govern systems that affect adults with impaired capacity:<sup>1317</sup>

- the *Disability Services Act 2006* (Qld);
- the *Mental Health Act 2000* (Qld);
- the *Corrective Services Act 2006* (Qld);
- the *Housing Act 2003* (Qld);
- the *Residential Services (Accreditation) Act 2002* (Qld); and
- the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

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

27.61 Earlier in this chapter, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to protect a person from liability for disclosing information to an official if the person honestly believes on reasonable grounds that the person has information that tends to show that an adult is, or has been, the subject of neglect (including self-neglect), exploitation or

<sup>1315</sup> Submissions 156, 163, 164, 169, 177.

<sup>1316</sup> Submission 177.

<sup>1317</sup> Submission 160.

abuse.<sup>1318</sup> In view of that recommendation, it is not necessary to provide, in addition, that a person is not liable for disclosing information that tends to show a breach of another Act. If the breach of an Act (for example, assault or theft) is committed in relation to an adult with impaired capacity, disclosure of the relevant conduct would satisfy the test that the information tends to show that the adult is, or has been, the subject of neglect, exploitation or abuse.

27.62 This approach also avoids the need to identify all the Acts that might contain offences that would be relevant to the interests and safety of adults with impaired capacity.

### Relevant ‘officials’

27.63 The protection from liability given by section 247(1) of the *Guardianship and Administration Act 2000* (Qld) applies if the relevant information is disclosed to an ‘official’. ‘Official’ is defined in section 247(4) of the Act.<sup>1319</sup>

(4) In this section—

**official** means—

- (a) the registrar or a member of the tribunal staff; or
- (b) the adult guardian, a member of the adult guardian’s staff or an adult guardian’s delegate for an investigation; or
- (c) the public advocate or a member of the public advocate’s staff; or
- (d) a community visitor.

27.64 Paragraph (d) of the definition refers to ‘a community visitor’. Chapter 10 of the *Guardianship and Administration Act 2000* (Qld) provides for the appointment of community visitors, whose statutory purpose is to safeguard the interests of consumers at visitable sites.<sup>1320</sup> As explained earlier in this Report, the work of community visitors is managed and supported by a number of public servants. The ‘Community Visitor Program’ is used to refer collectively to the community visitors themselves and to the public servants who manage and support their work.<sup>1321</sup> While community visitors are appointed under the *Guardianship and Administration Act 2000* (Qld),<sup>1322</sup> the public servants who support and manage their work are appointed under the *Public Service Act 2008* (Qld).

<sup>1318</sup> See [27.42]–[27.44] above.

<sup>1319</sup> *Guardianship and Administration Act 2000* (Qld) s 247 is set out in full at [27.6] above.

<sup>1320</sup> *Guardianship and Administration Act 2000* (Qld) s 223(1). The role of community visitors is considered in Chapter 26 of this Report.

<sup>1321</sup> See [26.133] above.

<sup>1322</sup> *Guardianship and Administration Act 2000* (Qld) s 231.

27.65 While a community visitor is an official for the purpose of section 247 of the *Guardianship and Administration Act 2000* (Qld), a public servant employed within the Community Visitor Program is not. In contrast, section 247(4) includes as an official a member of the Adult Guardian's staff and a member of the Public Advocate's staff.

27.66 In practical terms, this means that, if a person contacts the Community Visitor Program to request that a community visitor visit a consumer at a visitable site and, in the course of that request, discloses information about a person's conduct that breaches the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld), section 247(1) will not protect the person from liability as the information is not disclosed to an 'official' within the meaning of section 247.

### **Discussion Paper**

27.67 In the Discussion Paper, the Commission considered whether the definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include those public servants who are involved in the administration of the Community Visitor Program.<sup>1323</sup>

27.68 The Commission noted that, although the *Guardianship and Administration Act 2000* (Qld) generally refers only to community visitors, the term 'relevant person', which is used in sections 249 and 249A of the Act,<sup>1324</sup> is defined in section 246 of the Act to include:<sup>1325</sup>

- (f) a community visitor or a public service officer involved in the administration of a program called the community visitor program; ...

27.69 The Commission sought submissions on whether the definition of 'official' in section 247(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include 'a public service officer involved in the administration of a program called the community visitor program'.<sup>1326</sup>

### **Submissions**

27.70 A number of respondents, including the former Acting Public Advocate, the Adult Guardian and the Department of Communities, were of the view that the definition of 'official' in section 247(4) of the *Guardianship and Administration Act*

<sup>1323</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.32].

<sup>1324</sup> See *Guardianship and Administration Act 2000* (Qld) ss 249 (Protected use of confidential information), 249A (Prohibited use of confidential information).

<sup>1325</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.33]. Sections 246, 249 and 249A were inserted by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld). That Act implemented the recommendations contained in the Commission's 2007 report on confidentiality: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007).

<sup>1326</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 232.

2000 (Qld) should be amended to include ‘a public service officer involved in the administration of a program called the community visitor program’.<sup>1327</sup>

27.71 The Adult Guardian referred to the importance of clarifying this aspect of the legislation:<sup>1328</sup>

Recently I have been approached by a lawyer who has been engaged by two staff members who report receiving counselling from their employer for speaking with a community visitor at a visitable site. On subsequent visits the supervisor has accompanied the community visitor. Our approach will be to try and work with that organisation through education and collaboration to understand the role of the visitor. However legislative safeguards would make the role and relationship about disclosure clearer.

27.72 The Public Trustee considered that amending the definition of ‘official’ to include public servants involved in the administration of the community visitor program had merit.<sup>1329</sup>

### ***The Commission’s view***

27.73 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’. This recognises the role that those officers perform and is consistent with the approach taken in section 247(4) to members of the Adult Guardian’s staff and members of the Public Advocate’s staff.<sup>1330</sup>

## **PROTECTION FROM A REPRISAL**

### **The law in Queensland**

#### ***Guardianship and Administration Act 2000 (Qld)***

27.74 Although section 247 of the *Guardianship and Administration Act 2000* (Qld) protects a person from civil and criminal liability, and from liability under an administrative process, for making certain disclosures to an official, the Act does not protect a person who makes such a disclosure from being subjected to a reprisal as a result of making the disclosure; nor does it protect an adult with impaired capacity (or any other person) from being subjected to a reprisal as a result of a disclosure made by another person.

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1327 Submissions 160, 164, 169, 177.

1328 Submission 164.

1329 Submission 156A.

1330 See *Guardianship and Administration Act 2000* (Qld) s 247(4)(b)–(c), which is set out at [27.63] above.



**Whistleblowers Protection Act 1994 (Qld)**

27.75 As mentioned earlier in this chapter, the *Whistleblowers Protection Act 1994* (Qld) gives protection from liability to a person who makes a public interest disclosure.<sup>1331</sup> In addition, the Act provides that a person must not subject a person to a reprisal because, or in the belief that, anybody has made, or may make, a public interest disclosure. It also makes it an offence for a public officer to take a reprisal, and creates a remedy for a person who is the subject of a reprisal.

27.76 Sections 41 to 43 of the *Whistleblowers Protection Act 1994* (Qld) provide:

**41 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 made, or may make, a public interest disclosure.
- (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.

**42 Reprisal is an indictable offence**

- (1) A public officer who takes a reprisal commits an offence.  
Maximum penalty—167 penalty units or 2 years imprisonment.
- (2) The offence is an indictable offence.
- (3) If a public officer commits the offence, the Criminal Code, sections 7 and 8 apply even though a person other than a public officer may also be taken to have committed the offence because of the application.

**43 Damages entitlement for reprisal**

- (1) A reprisal is a tort and a person who takes a reprisal is liable in damages to anyone who suffers detriment as a result.
- (2) Any appropriate remedy that may be granted by a court for a tort may be granted by a court for the taking of a reprisal.
- (3) If the claim for the damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.

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*Whistleblowers Protection Act 1994* (Qld) s 39.

27.77 Anyone who takes a reprisal is liable in damages to a person who suffers detriment as a result.<sup>1332</sup> However, it is an offence for a person to take a reprisal only if the person who does so is a public officer or, under sections 7 or 8 of the Criminal Code (Qld), the person:<sup>1333</sup>

- is a party to an offence committed by a public officer; or
- the person and a public officer form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.

### Other Queensland Acts

27.78 A number of Queensland Acts that deal with matters of public health,<sup>1334</sup> public safety,<sup>1335</sup> the protection of vulnerable persons<sup>1336</sup> or environmental matters<sup>1337</sup> also include provisions dealing with reprisals. The provisions in these Acts are similarly worded to the provisions of the *Whistleblowers Protection Act 1994* (Qld) set out above. Generally these Acts provide that:

- a person must not cause a detriment to another person because, or in the belief that, anybody has made a complaint to a relevant official or given assistance to a relevant official of a particular kind, and that a contravention of this requirement is a 'reprisal'; and
- a person who takes a reprisal commits an offence,<sup>1338</sup> and
- a reprisal is a tort and a person who takes a reprisal is liable in damages to any person who suffers detriment as a result.

1332 *Whistleblowers Protection Act 1994* (Qld) s 43(1).

1333 *Whistleblowers Protection Act 1994* (Qld) s 42(1), (3).

1334 See eg *Ambulance Service Act 1991* (Qld) ss 36X–36Z; *Dental Technicians Registration Act 2001* (Qld) ss 137–139; *Health Practitioners (Professional Standards) Act 1999* (Qld) ss 388–390; *Health Quality and Complaints Commission Act 2006* (Qld) ss 193–195; *Health Services Act 1991* (Qld) ss 38ZF–38ZH; *Medical Radiation Technologists Registration Act 2001* (Qld) ss 148–150; *Residential Services (Accreditation) Act 2002* (Qld) ss 173–175; *Speech Pathologists Registration Act 2001* (Qld) ss 133–135; *Transplantation and Anatomy Act 1979* (Qld) ss 49A–49C.

1335 See eg *Coal Mining Safety and Health Act 1999* (Qld) ss 275AA–275AB; *Explosives Act 1999* (Qld) ss 126A–126B; *Mining and Quarrying Safety and Health Act 1999* (Qld) ss 254A–254B; *Petroleum and Gas (Production and Safety) Act 2004* (Qld) ss 708C–708D.

1336 See eg *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 387–389; *Family Responsibilities Commission Act 2008* (Qld) ss 128–130.

1337 *Transport Operations (Marine Pollution) Act 1995* (Qld) ss 128E–128F.

1338 Of the Acts mentioned in n 1334 above, the following provisions make it an indictable offence to take a reprisal: *Ambulance Service Act 1991* (Qld) s 36Y; *Dental Technicians Registration Act 2001* (Qld) ss 138, 189(1); *Health Practitioners (Professional Standards) Act 1999* (Qld) ss 368(2), 389; *Health Quality and Complaints Commission Act 2006* (Qld) ss 194, 196; *Health Services Act 1991* (Qld) s 38ZG; *Medical Radiation Technologists Registration Act 2001* (Qld) ss 149, 200(1); *Speech Pathologists Registration Act 2001* (Qld) ss 134, 185(1). Section 388 of the *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 387–389 also makes it an indictable offence (specifically, a crime) to take a reprisal.

27.79 By way of example, the *Health Quality and Complaints Commission Act 2006* (Qld) provides that:

**193 Reprisal and grounds for reprisals**

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
  - (a) any person—
    - (i) has made or may make a health complaint; or
    - (ii) has provided or may provide assistance to the commission, a commission member or an authorised person; or
  - (b) any person—
    - (i) has made a health service complaint under the repealed Act; or
    - (ii) has provided assistance to the Health Rights Commissioner or an authorised person under the repealed Act.
- (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 mentioned in subsection (3) 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.

**194 Offence for taking reprisal**

- (1) A person who takes a reprisal commits an offence.  
Maximum penalty—167 penalty units or 2 years imprisonment.
- (2) The offence is an indictable offence that is a misdemeanour.

**195 Damages entitlement for reprisal**

- (1) A reprisal is a tort and a person who takes a reprisal is liable in damages to any person who suffers detriment as a result.
- (2) Any appropriate remedy that may be granted by a court for a tort may be granted by a court for the taking of a reprisal.
- (3) If the claim for damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.

## The law in other jurisdictions

27.80 As is the case in Queensland, the guardianship legislation in the other Australian jurisdictions does not include any provisions to protect a person who complains about the treatment of an adult with impaired capacity from being subjected to a reprisal for making the complaint.

## Discussion Paper

27.81 In the Discussion Paper, the Commission noted that, although it had not previously sought submissions on the issue of whistleblower protection, one respondent had commented on the current lack of protection from reprisals. That respondent was employed by a publicly-funded non-government organisation ('NGO') that provided services to adults with impaired capacity. He recounted his experience of reporting to the management of the NGO his suspicion that several of the adults at a particular facility were being abused, and of subsequently reporting his suspicions to the Adult Guardian. He stated that, as a result of raising these concerns, he and other whistleblowers employed by the NGO were harassed and vilified at their workplace.<sup>1339</sup> His submission referred to the importance of protecting whistleblowers from reprisals:<sup>1340</sup>

as a general rule, families do not want to bring up the abuse allegations — either due to old age, lack of ability to advocate, or intimidation / worries that [their] child will lose residential care. The majority of allegations (around 80%) come from front line staff who have no protection at all. These people are the intellectually disabled person's 'voice'.

27.82 The Commission noted that a similar concern was raised during a Commission forum about the risk of reprisals faced by people who make complaints to a community visitor:<sup>1341</sup>

If it is a worker at the site who has complained and requested a visit, they may be afraid of retribution at work or of losing their job.

If it is a parent who has complained, they may be afraid the consumer may lose their place in the facility or suffer retribution.

27.83 The Commission suggested that, if it is considered desirable for the *Guardianship and Administration Act 2000* (Qld) to deal with the taking of a reprisal against a person because he or she disclosed information to which section 247(1) of the Act applies, the existing provisions in the *Whistleblowers Protection Act 1994* (Qld) and in the other Acts referred to above may provide a suitable model.<sup>1342</sup>

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1339 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [22.36].

1340 Ibid.

1341 Ibid [22.37].

1342 Ibid [22.45].

27.84 The Commission observed that, although the terms of reference refer to providing 'protection for people who make complaints about the treatment of an adult with impaired capacity', a reprisal that is made as a result of a person's complaint might not necessarily be made against that person. For example, where a parent makes a complaint about the treatment of his or her adult child with impaired capacity, the reprisal could be taken against the child, rather than against the parent. The Commission considered, however, that the wording used in section 41(1) of the *Whistleblowers Protection Act 1994* (Qld), which is the same as that used in the other reprisal provisions mentioned above, is wide enough to cover this situation. Section 41(1) does not simply prohibit the taking of a reprisal against a person who made a public interest disclosure; rather it prohibits the taking of a reprisal against a person 'because, or in the belief that, *anybody* has made, or may make, a public interest disclosure'.<sup>1343</sup>

27.85 The Commission therefore sought submissions on whether the *Guardianship and Administration Act 2000* (Qld) should be amended.<sup>1344</sup>

- 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.
- to provide that a person who takes a reprisal commits an offence; and
  - to include a provision to the effect of section 43 of the *Whistleblowers Protection Act 1994* (Qld):
    - to make it a tort for a person to take a reprisal; and

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1343 Ibid [22.46].

1344 Ibid 236–7.

- to make a person who takes a reprisal liable in damages to anyone who suffers detriment as a result.

## Submissions

27.86 The submission from the Endeavour Foundation highlighted the importance of this issue:<sup>1345</sup>

Care Bribie Island highlights the structural difficulties faced by whistleblowers when reporting abuse. The outcomes for the staff whistleblowers were less than satisfactory. They lost their jobs and were subject to harassment and intimidation including vandalism of their homes.

The allegations of abuse at the Care facility did lead to criminal convictions for the abusers. This is a rare outcome, many allegations of abuse by whistleblowers do not ensure the protection and access to the justice system that is the right of people with disability in Queensland.

People with disability are some of the most vulnerable people in Queensland. A key element to affording some semblance of security and protection is the ability of whistleblowers to be able to raise concerns when they occur to address the situation and prevent protracted cases of abuse as indicated by the Care incidents.

27.87 Several respondents, including the former Acting Public Advocate, the Adult Guardian and the Department of Communities, were of the view that the *Guardianship and Administration Act 2000* (Qld) should include a provision, based on section 41 of the *Whistleblowers Protection Act 1994* (Qld), to the effect that a person must not take a reprisal against a person because of a disclosure made to an official mentioned in section 247 of the *Guardianship and Administration Act 2000* (Qld).<sup>1346</sup>

27.88 The family of an adult with impaired capacity commented on the importance of including such a provision:<sup>1347</sup>

We point out that persons with impaired capacity may also have impaired communication, and that the only people in possession of information about their abuse, neglect or exploitation may be the front line workers in visitable sites. The protection of front line workers who make complaints is therefore vital to protecting the interests of adults with impaired capacity.

27.89 The Adult Guardian strongly supported amendments that would ensure protection against reprisals. In her view, this would build confidence in the sector about the role of the guardianship agencies.<sup>1348</sup>

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1345 Submission 163.

1346 Submissions 160, 164, 169, 177.

1347 Submission 177.

1348 Submission 164.

27.90 The submissions supported the inclusion of a new provision making it an offence for a person to take a reprisal against another person.<sup>1349</sup>

27.91 The former Public Advocate commented that it should be an offence for any person, and not just a public officer, to take a reprisal.<sup>1350</sup> He also commented that the amended provision should be sufficiently broad to capture the circumstances in which a person takes a reprisal against an adult with an impaired capacity, or another person, rather than the person who made the disclosure.

27.92 The submissions also supported the inclusion of a new provision, based generally on section 43 of the *Whistleblowers Protection Act 1994* (Qld), to make it a tort for a person to take a reprisal, and to make a person who takes a reprisal liable in damages to anyone who suffers detriment as a result.<sup>1351</sup>

27.93 The Public Trustee commented generally that provisions such as those that exist in the *Whistleblowers Protection Act 1994* (Qld) might be appropriately reflected in section 247 of the *Guardianship and Administration Act 2000* (Qld), although it suggested that it may be appropriate for section 247, as amended, to be relocated to the *Whistleblowers Protection Act 1994* (Qld).<sup>1352</sup>

### The Commission's view

27.94 In some situations, the real disincentive against making a disclosure may not be the person's potential liability for the disclosure (for which the person may well have a defence of qualified privilege),<sup>1353</sup> but the risk that the person making the disclosure or some other person, such as the adult with impaired capacity, will be subjected to a reprisal as a result of the disclosure.

27.95 Proper protection for making appropriate disclosures must not only include protection from liability, but also protection from being subjected to a reprisal as a result of the disclosure. Accordingly, the *Guardianship and Administration Act 2000* (Qld) should be amended to include provisions based on sections 41 to 43 of the *Whistleblowers Protection Act 1994* (Qld).

27.96 As a result, the *Guardianship and Administration Act 2000* (Qld) should provide that:

- a person must not take a reprisal against another person because, or in the belief that, anybody has disclosed, or may disclose, to an official information mentioned in section 247(1);
- a person who takes a reprisal commits an indictable offence; and

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1349 Submissions 160, 164, 177.

1350 Submission 160.

1351 Submissions 160, 164, 177.

1352 Submission 156A.

1353 See *Defamation Act 2005* (Qld) s 30.

- a person who takes a reprisal commits a tort for which the person may be liable in damages.

27.97 In the Commission's view, it is appropriate that the recommended provisions should be located in the *Guardianship and Administration Act 2000* (Qld). Although the *Whistleblowers Protection Act 1994* (Qld) includes some provisions of general application,<sup>1354</sup> its main purpose is to deal with 'public interest disclosures' made by 'public officials'. The provisions recommended by the Commission will have a wider application as they will apply to a relevant disclosure made by *any* person. For that reason, it is more appropriate for the new provisions dealing with reprisals to be located in the *Guardianship and Administration Act 2000* (Qld) than in the *Whistleblowers Protection Act 1994* (Qld).

## RECOMMENDATIONS

### ***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**

<sup>1354</sup>

See eg *Whistleblowers Protection Act 1994* (Qld) s 19.



- (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

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### INTRODUCTION

#### The requirement for a litigation guardian

28.1 In Queensland, a person under a legal incapacity may start or defend a legal proceeding only by the person's litigation guardian.<sup>1355</sup> Unless the *Uniform Civil Procedure Rules 1999* (Qld) provide otherwise, anything required or permitted

<sup>1355</sup>

*Uniform Civil Procedure Rules 1999* (Qld) r 93(1).

by the rules to be done by a party may, if the party is a person under a legal incapacity, be done only by the party's litigation guardian.<sup>1356</sup>

28.2 The term 'person under a legal incapacity' means:<sup>1357</sup>

- (a) a person with impaired capacity; or
- (b) a young person.

28.3 The term 'person with impaired capacity' is in turn defined as follows:<sup>1358</sup>

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

28.4 If the court finds that a plaintiff is a person under a legal incapacity, it may order that no further step be taken in the action until a person files written consent in the registry to be the plaintiff's litigation guardian pursuant to rule 95(1).<sup>1359</sup>

28.5 If a defendant is a person under a legal incapacity and does not file a notice of intention to defend within the time limited, the plaintiff may not continue the proceeding unless a person is made litigation guardian of the defendant.<sup>1360</sup>

28.6 Further, if a party to a proceeding becomes a person with impaired capacity during the proceeding, a person may take any further step in the proceeding for or against the party only if:<sup>1361</sup>

- the court gives the person leave to proceed; and
- the person follows the court's directions on how to proceed.

### Persons who may be a litigation guardian

28.7 A person may be a litigation guardian of a person under a legal incapacity if the person:<sup>1362</sup>

<sup>1356</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 93(2). If a party's litigation guardian is not a solicitor, the litigation guardian may act only by a solicitor — that is, the litigation guardian may not act in person for the party: r 93(3).

<sup>1357</sup> *Uniform Civil Procedure Rules 1999* (Qld) sch 4; *Supreme Court of Queensland Act 1991* (Qld) sch 2 (definition of 'person under a legal incapacity', para (a)).

<sup>1358</sup> *Uniform Civil Procedure Rules 1999* (Qld) sch 4; *Supreme Court of Queensland Act 1991* (Qld) sch 2 (definition of 'person with impaired capacity').

<sup>1359</sup> See *Jelicic v Salter* [2001] QSC 68, [14] (Mackenzie J); *Fowkes v Lyons* [2005] QSC 7, 5 (Wilson J).

<sup>1360</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 96.

<sup>1361</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 72(1). This rule also applies if a person becomes bankrupt or dies during a proceeding.

<sup>1362</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 94(1).

- is not a person under a legal incapacity; and
- has no interest in the proceeding adverse to the interest in the proceeding of the person under a legal incapacity.

28.8 If a person is authorised by or under an Act to conduct legal proceedings in the name of, or for, a person with impaired capacity, the authorised person is, unless the court orders otherwise, entitled to be the litigation guardian of the person with impaired capacity in any proceeding to which the authorised person's authority extends.<sup>1363</sup>

28.9 A corporation, other than the Public Trustee or a trustee company under the *Trustee Companies Act 1968* (Qld), may not be a litigation guardian.<sup>1364</sup>

### Rules not affected by the *Guardianship and Administration Act 2000* (Qld)

28.10 The *Guardianship and Administration Act 2000* (Qld) provides that it does not affect 'rules of court of the Supreme Court, District Court or Magistrates Courts about a litigation guardian for a person under a legal incapacity'.<sup>1365</sup> Accordingly, the appointment of a person as an adult's administrator does not have the effect of constituting the person as the adult's litigation guardian for a proceeding that relates to the adult's financial or property matters.

### Liability of a litigation guardian

28.11 Where a litigation guardian is representing a plaintiff, the litigation guardian is normally personally liable for the costs that may be awarded against the plaintiff.<sup>1366</sup> However, where a litigation guardian is acting for a defendant, the litigation guardian is not generally liable for the plaintiff's costs.<sup>1367</sup>

28.12 A litigation guardian for a plaintiff or a defendant is primarily liable for the costs of the legal representatives that he or she engages.<sup>1368</sup>

28.13 However, a litigation guardian is entitled to be reimbursed, out of the estate of the person whom he or she represents, for the costs and expenses

<sup>1363</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 94(2).

<sup>1364</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 94(3).

<sup>1365</sup> *Guardianship and Administration Act 2000* (Qld) s 239.

<sup>1366</sup> *Rhodes v Swithenbank* (1889) 22 QBD 577; *NSW Insurance Ministerial Corporation v Abualfoul* (1999) 94 FCR 247, 253–4 (Sackville J); *Farrell v CSL (No 2)* [2004] VSC 551, [3] (Bongiorno J).

<sup>1367</sup> See R Quick and D Garnsworthy, *Quick on Costs* (Thomson Reuters online service) [4.4440] at 31 August 2010. However, it has been suggested that gross misconduct of the litigation guardian in relation to the conduct of the defence could render a litigation guardian liable for the plaintiff's costs: *Morgan v Morgan* (1865) 12 LT 199.

<sup>1368</sup> *Hawkes v Cottrell* (1858) 3 H & N 243; 157 ER 462; *Re Flower* (1871) 19 WR 578; *Murray v Kirkpatrick* (1940) WN (NSW) 162, 163 (Williams J); *Stephenson v Geiss* [1998] 1 Qd R 542, 558 (Lee J).

properly incurred,<sup>1369</sup> including any costs of the other party for which the litigation guardian may be liable.<sup>1370</sup>

## Settlement of proceedings

28.14 If a party to a proceeding is a person under a legal incapacity, a settlement or compromise of the proceeding is ineffective unless it is approved by the court or the Public Trustee acting under section 59 of the *Public Trustee Act 1978* (Qld).<sup>1371</sup>

28.15 Section 59 of the *Public Trustee Act 1978* (Qld) deals with the approval (or sanction) of proceedings involving a person under a ‘legal disability’ — that is, a child or, relevantly for this review, a person with impaired capacity for a matter within the meaning of the *Guardianship and Administration Act 2000* (Qld). It provides in part:

**59 Compromise of actions by or on behalf of persons under a legal disability claiming moneys or damages valid only with sanction of court or public trustee**

(1A) In this section—

**appropriate person**, for a person under a legal disability, means—

- (a) an administrator for the person under the *Guardianship and Administration Act 2000*; or
- (b) if the person does not have an administrator—an attorney for a financial matter for the person under an enduring power of attorney under the *Powers of Attorney Act 1998*; or
- (c) if the person does not have an administrator or an attorney mentioned in paragraph (b)—the public trustee.

**court** means a court within whose jurisdiction an amount or damages are claimed by or for a person under a legal disability suing either alone or with others, and includes a judge or magistrate of the court.

**person under a legal disability** means—

- (a) a child; or
- (b) a person with impaired capacity for a matter within the meaning of the *Guardianship and Administration Act 2000*.

**taxing officer of a court** means an officer of the court whose duties include the taxation or other assessment of costs in the court.

<sup>1369</sup> *Murray v Kirkpatrick* (1940) WN (NSW) 162, 163 (Williams J); *Stephenson v Geiss* [1998] 1 Qd R 542, 558 (Lee J).

<sup>1370</sup> *Steeden v Walden* [1910] 2 Ch 393, 400 (Eve J); *Pryor v Hennessy* [1973] VR 221, 222 (Newton J).

<sup>1371</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 98. See Supreme Court Practice Directions 9 of 2007 and 3 of 2009, which apply if the Supreme Court is asked to sanction the compromise of a plaintiff’s claim under s 59 of the *Public Trustee Act 1978* (Qld): <<http://www.courts.qld.gov.au/989.htm>> at 2 September 2010.

- (1) In any cause or matter in any court in which money or damages is or are claimed by or on behalf of a person under a legal disability suing either alone or in conjunction with other parties, no settlement or compromise or acceptance of money paid into court, whether before, at or after the trial, shall, as regards the claim of such person under a legal disability, be valid without the sanction of a court or the public trustee, and no money or damages recovered or awarded in any such cause or matter in respect of the claims of any such person under a legal disability, whether by verdict, settlement, compromise, payment into court or otherwise, before or at or after the trial, shall be paid to the next friend<sup>1372</sup> of the plaintiff or to the plaintiff's solicitor or to any person other than the public trustee unless the court otherwise directs.
  - (2) Any claim for money or damages by or on behalf of a person under a legal disability claiming either alone or in conjunction with other parties may be settled or compromised out of court before action brought, with the sanction of a court or the public trustee, but no money or damages agreed to be paid in respect of the claim of any such person, whether by settlement or compromise, shall be paid to any person other than the appropriate person for the person under a legal disability unless by direction of a court upon application made in that behalf.
  - (3) Every settlement, compromise, or acceptance of money paid into court when sanctioned by a court or the public trustee under this section shall be binding upon the person under a legal disability by or on whose behalf the claim was made.
- ... (note added)

28.16 Section 59(1) deals with sanction by the court or the Public Trustee of the settlement of a claim after proceedings have been commenced. Section 59(2) deals with sanction by the court or the Public Trustee of the settlement of a claim before any proceedings have been commenced.

## THE COURT'S POWER TO APPOINT A LITIGATION GUARDIAN

### The law in Queensland

28.17 Rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) deals with the court's power to appoint or remove a litigation guardian for a person under a legal incapacity.<sup>1373</sup> It provides:

<sup>1372</sup> Historically, 'next friend' was the term used for a person who represented a plaintiff who was under a legal incapacity, while 'guardian *ad litem*' (literally, litigation guardian) was the term used for a person who represented a defendant who was under a legal incapacity. In most Australian jurisdictions, the term 'litigation guardian' is now used for a person who is acting in either capacity.

<sup>1373</sup> As mentioned earlier, a 'person under a legal incapacity' includes 'a person with impaired capacity': see [28.2] above.

## 95 Appointment of litigation guardian

- (1) Unless a person is appointed as a litigation guardian by the court, a person becomes a litigation guardian of a person under a legal incapacity for a proceeding by filing in the registry the person's written consent to be litigation guardian of the party in the proceeding.
- (2) If the interests of a party who is a person under a legal incapacity require it, the court may appoint or remove a litigation guardian or substitute another person as litigation guardian.

28.18 When the *Uniform Civil Procedure Rules 1999* (Qld) commenced in 1999, rule 95(3) provided that the court could appoint a person as a litigation guardian only if the person consented to the appointment. That subrule was omitted in 2000.<sup>1374</sup> Arguably, subject to any specific legislative restriction on the court's power to appoint a litigation guardian,<sup>1375</sup> the court has the power to appoint a person as a party's litigation guardian even if the person does not consent to the appointment.

28.19 However, even though rule 95 no longer provides that a person may be appointed as a litigation guardian only if the person consents, the court's power to appoint a litigation guardian still requires that the appointment is in the interests of the person under a legal incapacity.<sup>1376</sup> If a person did not consent to being appointed as a litigation guardian, the court might not in the circumstances be satisfied that it would be in the interests of the party under a legal incapacity for the person to be appointed. In *Deputy Commissioner of Taxation v P*,<sup>1377</sup> Hodgson J commented on the rationale for the rule in New South Wales that a person cannot be appointed as a tutor (the equivalent of a litigation guardian for a plaintiff) without the tutor's consent:<sup>1378</sup>

a person made a tutor without his consent might not exercise the necessary diligence in seeking to uphold the interests of the infant. Even assuming that the Court has power to dispense with compliance with that particular rule, I do not think it would be proper for the Court to do so, certainly not in this case.

28.20 Although rule 95(2) does not include, as an express requirement for appointing a person as a party's litigation guardian, that the person consents to the appointment, that rule needs to be read in light of section 27 of the *Public Trustee Act 1978* (Qld). Section 27(1) provides for the appointment of the Public Trustee in a variety of capacities, including as a 'next friend'. However, section 27(3) requires the consent of the Public Trustee to that appointment unless the *Public Trustee Act 1978* (Qld) or another Act provides otherwise. Section 27 provides:

<sup>1374</sup> *Uniform Civil Procedure Amendment Rule (No. 1) 2000* (Qld) s 13.

<sup>1375</sup> See eg *Public Trustee Act 1978* (Qld) s 27(3), which is discussed at [28.20] below.

<sup>1376</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 95(2).

<sup>1377</sup> (1987) 11 NSWLR 200.

<sup>1378</sup> *Ibid* 204.



## 27 Rights and duties to which public trustee may be appointed

- (1) Where any person or corporation may be appointed or act as a trustee, executor, administrator, next friend,<sup>1379</sup> guardian, committee, agent, attorney, liquidator, receiver, manager or director or to or in any other office of a fiduciary nature the public trustee may be so appointed or may so act.
- (2) Where an official liquidator may be appointed liquidator by a court or judge, such appointment may be made of the public trustee where, in the opinion of the court or judge, there are special reasons for so doing.
- (3) Notwithstanding subsections (1) and (2), the public trustee's appointment to any office or capacity shall, except where by this or any other Act it is otherwise provided, be subject to the public trustee consenting thereto.
- (4) The public trustee may charge and receive such fees and remuneration as are fixed under this Act, or if not fixed under this Act, as may be allowed by law, for acting in any capacity to which the public trustee may be appointed under this section. (emphasis added; note added)

## The law in other jurisdictions

28.21 In the Northern Territory, South Australia and Victoria, the rule dealing with the court's power to appoint a litigation guardian is expressed in similar terms to rule 95(1) of the *Uniform Civil Procedure Rules 1999* (Qld).<sup>1380</sup>

28.22 In the ACT<sup>1381</sup> and New South Wales,<sup>1382</sup> however, it appears that the court may not appoint a person as a litigation guardian (in New South Wales, a 'tutor') unless the person has agreed to be appointed.

28.23 In Tasmania, rule 295 of the *Supreme Court Rules 2000* (Tas) provides:

### 295 Appointment by Court or judge of litigation guardian

If a person under disability does not have a litigation guardian, the Court or a judge may appoint as litigation guardian—

- (a) an appropriate person, with that person's consent; or
- (b) the Director of Public Prosecutions.

28.24 Rule 295(a) enables the court to appoint a person as a litigation guardian only if the person consents. However, rule 295(b) does not require the consent of the Director of Public Prosecutions in order for the court to appoint the Director of

1379 See n 1372 above.

1380 *Supreme Court Rules* (NT) r 15.03(4), (6); *Supreme Court Civil Rules 2006* (SA) r 79(3); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(4)(a), (6).

1381 *Court Procedures Rules 2006* (ACT) rr 276(1)(d), 280(2), (7)(b).

1382 *Uniform Civil Procedure Rules 2005* (NSW) r 7.18(1)(a), (5)(b). See also *Deputy Commissioner of Taxation v P* (1987) 11 NSWLR 200, 204 (Hodgson J).

Public Prosecutions as a person's litigation guardian. In effect, this enables the Director of Public Prosecutions to be appointed as litigation guardian when no-one else is willing to be appointed.

28.25 In Western Australia, the position is relatively complex. The *Rules of the Supreme Court 1971 (WA)* do not include an express power authorising the court to appoint a next friend, although the court may do so in the exercise of its *parens patriae* jurisdiction.<sup>1383</sup> However, the rules require a guardian or an administrator who is appointed for a represented person under the *Guardianship and Administration Act 1990 (WA)* to act as next friend or guardian *ad litem* of the represented person in any proceedings.<sup>1384</sup>

### Issues for consideration

28.26 If no-one is willing to be appointed as the litigation guardian for a person under a legal incapacity and the court does not have the power to appoint a person as a litigation guardian without the person's consent, it may mean that some actions simply cannot be commenced or continued.<sup>1385</sup>

28.27 This raises the issue of whether, if no-one is willing to be appointed as a litigation guardian for a person under a legal incapacity, the court should have the power to appoint a public entity or office-holder, such as the Public Trustee or the Adult Guardian, as the person's litigation guardian, even if the public entity or office-holder does not consent to the appointment.

28.28 As explained earlier in this Report,<sup>1386</sup> the Public Trustee may be appointed as an administrator to exercise power for financial matters for an adult, which, subject to the terms of the appointment, includes making decisions about a legal matter relating to the adult's financial or property matters.<sup>1387</sup> Similarly, the Adult Guardian may be appointed as a guardian to exercise power for personal matters for an adult, which, subject to the terms of the appointment, includes making decisions about a legal matter not relating to the adult's financial or property matters.<sup>1388</sup>

28.29 In the Discussion Paper, the Commission suggested that the Public Trustee may potentially be suitable to fulfil the role of litigation guardian of last resort as the Public Trustee already has a number of statutory functions of a

1383 *Farrell v Allregal Enterprises Pty Ltd (No 2)* [2009] WASC 65, [20]–[27] (Pullin J). This decision is considered at [28.34]–[28.41] below.

1384 *Rules of the Supreme Court 1971 (WA)* O 70 r 3(3). However, if the guardian or administrator is appointed under a limited order, rather than under a plenary order, he or she is only required to act as the next friend or guardian *ad litem* in 'proceedings of the kind that the limited guardianship or limited administration order authorises that person to conduct': *Farrell v Allregal Enterprises Pty Ltd (No 2)* [2009] WASC 65, [19] (Pullin J).

1385 See [28.4]–[28.6] above.

1386 See Chapter 6 of this Report.

1387 *Guardianship and Administration Act 2000 (Qld)* sch 2 s 1(p) (definition of 'financial matter').

1388 *Guardianship and Administration Act 2000 (Qld)* sch 2 s 2(i) (definition of 'personal matter').

special public nature, as well as powers of management in relation to the estates of vulnerable persons.<sup>1389</sup> In Chapter 14 of this Report, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended so that the Tribunal may appoint the Public Trustee as administrator without the Public Trustee's consent.<sup>1390</sup> The purpose of this recommendation is to ensure that there is always an appropriate entity that is capable of being appointed as an adult's administrator.

28.30 For litigation that does not concern an adult's financial or property matters, it might, however, be more appropriate for the Adult Guardian to be appointed as the adult's litigation guardian. The *Domestic and Family Violence Protection Act 1989* (Qld) provides that an application for a protection order may be made by certain specified persons, including 'an aggrieved' and a person acting under another Act for the aggrieved.<sup>1391</sup> The latter category includes the Adult Guardian if the Adult Guardian considers that the aggrieved does not have capacity to make an application for a protection order.<sup>1392</sup> Another example of a proceeding that does not concern an adult's financial or property matters is a proceeding under the *Child Protection Act 1999* (Qld) in relation to a child of the adult.

28.31 A consideration in appointing the Public Trustee or the Adult Guardian as a litigation guardian without consent is the potential liability that the Public Trustee or the Adult Guardian would be assuming.

28.32 The appointment of a person as a litigation guardian without that person's consent may have significant implications. As mentioned earlier in this chapter, a litigation guardian for a plaintiff is generally personally liable for the costs that may be awarded against the plaintiff,<sup>1393</sup> subject to an entitlement to be reimbursed out of the assets of the adult whom he or she represents.<sup>1394</sup> Further, a litigation guardian for a plaintiff or a defendant is primarily liable for the costs of the legal representatives engaged by the litigation guardian,<sup>1395</sup> again, subject to a right to reimbursement.<sup>1396</sup> In *Fowkes v Lyons*,<sup>1397</sup> Wilson J expressed her reluctance to appoint a litigation guardian who did not consent to the appointment:<sup>1398</sup>

1389 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [23.30], referring to *Public Trustee Act 1978* (Qld) pts 5–7.

1390 See Recommendation 14-7 of this Report.

1391 *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)(a), (d).

1392 *Domestic and Family Violence Protection Act 1989* (Qld) s 14(4)(b).

1393 See [28.11] above.

1394 See [28.13] above.

1395 See [28.12] above.

1396 See [28.13] above.

1397 [2005] QSC 7. In this case, the Public Trustee was the plaintiff's administrator for all financial matters including legal matters (except for the management of the plaintiff's disability support pension): at 2.

1398 *Ibid* 3–4. In the circumstances, it was not necessary for Wilson J to consider the issue of whether the Public Trustee *could* be appointed as the plaintiff's litigation guardian in the absence of the Public Trustee's consent.

No-one has been found who is willing to act as litigation guardian. Although the Public Trustee might do so, he is unwilling to do so in this case, and I would be loath to appoint someone who did not consent to the appointment.

28.33 In *Re CAC*,<sup>1399</sup> the Supreme Court transferred to the Tribunal a proceeding brought against CAC in the Supreme Court to the extent of determining CAC's capacity for that proceeding.<sup>1400</sup> The Tribunal referred to the Public Trustee's submission, which explained why the Public Trustee did not wish to accept an appointment as CAC's litigation guardian:<sup>1401</sup>

MN told the Tribunal that the Public Trustee of Queensland would not be in a position to accept the role of litigation guardian for CAC in the Supreme Court action. If the Public Trustee of Queensland were to be appointed as administrator for CAC for legal matters, advice would have to be obtained as to the litigation in which CAC is involved. The Public Trustee of Queensland would not accept responsibility for costs in the litigation and would not place corporate funds at risk [by] becoming involved in the litigation on behalf of CAC, particularly if there was any doubt about the ability to obtain instructions from CAC.

28.34 The issue of the appointment of a public entity as a litigation guardian was recently considered by the Supreme Court of Western Australia in *Farrell v Allregal Enterprises Pty Ltd (No 2)*.<sup>1402</sup> The question was whether the Court had the power to appoint the Public Trustee or the Public Advocate (the equivalent of the Adult Guardian in Queensland) as next friend<sup>1403</sup> to represent Mrs Farrell in three appeals that she had instituted if no other person was willing to be appointed. Both the Public Trustee and the Public Advocate made submissions resisting an order for their appointment, stating that they were too under-funded or under-resourced to be able to take on the role.<sup>1404</sup>

28.35 Pullin J held that the *Guardianship and Administration Act 1990 (WA)* did not confer power on the Court to appoint the Public Advocate as next friend.<sup>1405</sup>

28.36 Pullin J then considered whether the Public Trustee could be appointed as next friend. His Honour referred to section 7(1) of the *Public Trustee Act 1941 (WA)*, which provides, in similar terms to section 27(1) of the *Public Trustee Act 1978 (Qld)*, that where a court can appoint a next friend, 'any such appointment

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1399 [2008] QGAAT 45.

1400 See [28.131] below.

1401 [2008] QGAAT 45, [44].

1402 [2009] WASC 65.

1403 Western Australia still maintains the distinction between a next friend and a guardian *ad litem*: see *Rules of the Supreme Court 1971 (WA)* O 70.

1404 [2009] WASC 65 [2], [41] (Pullin J).

1405 *Ibid* [15]. However, Pullin J noted (at [15]) that, if the Public Advocate had been appointed by the State Administrative Tribunal as Mrs Farrell's guardian or administrator and she had then become involved in litigation, O 70 r 3 of the *Rules of the Supreme Court 1971 (WA)* had the effect that the Public Advocate should act as guardian *ad litem* or next friend unless someone else was appointed by the court.

may be made of the Public Trustee'.<sup>1406</sup> That raised the threshold question of whether the court has the power to appoint a next friend. Although Pullin J considered that there is no express general power in Order 70 of the *Rules of the Supreme Court 1971* (WA) authorising the court to appoint a next friend,<sup>1407</sup> his Honour held that the court has the power to appoint a next friend in the exercise of its *parens patriae* jurisdiction.<sup>1408</sup>

28.37 Pullin J then considered whether the Public Trustee could be appointed as next friend without its consent. His Honour referred to the 1941 Parliamentary Debates for the original Bill and noted that, although it had originally been proposed that section 7 of the *Public Trustee Act 1941* (WA) should require the consent of the Public Trustee before the Public Trustee could be appointed, the relevant clause was omitted before the Bill was passed.<sup>1409</sup> His Honour held:<sup>1410</sup>

This deliberate decision to eliminate any requirement that the Public Trustee consent, confirms that s 7 means what it says, namely that the Public Trustee may be appointed without the precondition that it first give consent.

28.38 Pullin J rejected the Public Trustee's submission that 'at common law a citizen does not have a right to present his or her case by counsel or to have his or her case presented at public expense', holding that the court has a duty 'to ensure that incapacitated persons are properly represented in litigation'.<sup>1411</sup>

28.39 It was submitted by the Public Trustee that, if appointed, a condition should be imposed to provide some form of protection for the Public Trustee in relation to the costs for which the Public Trustee could be liable. Pullin J considered that it was not possible to formulate any condition about costs at that time.<sup>1412</sup>

28.40 Given the urgency of the litigation, Pullin J appointed the Public Trustee as next friend for Mrs Farrell's three appeals.<sup>1413</sup>

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1406 Ibid [16]–[17].

1407 Ibid [20]. However, the *Rules of the Supreme Court 1971* (WA) provide in specific circumstances for the appointment of a next friend or guardian *ad litem* by the court: O 70 rr 3(5)–(6), 5.

1408 Ibid [21]–[27], where Pullin J analysed the conferral on the Supreme Court of Western Australia, as a result of s 16(1)(d) of the *Supreme Court Act 1935* (WA), of the *parens patriae* jurisdiction that was exercisable by the Lord Chancellor of England in 1861.

1409 Ibid [30]. In this respect, s 7 of the *Public Trustee Act 1941* (WA) differs from s 27 of the *Public Trustee Act 1978* (Qld). As mentioned above, s 27(3) of the Queensland Act requires the Public Trustee's consent before it can be appointed as a next friend.

1410 Ibid.

1411 Ibid [33].

1412 Ibid [35]. Pullin J considered, however, that at the appropriate time the fact that the Public Trustee had been appointed without its consent was a matter that could be taken into account on the question of costs: at [35].

1413 Ibid [40].

28.41 Pullin J commented, however, that ‘legislative attention is required in this area’.<sup>1414</sup>

28.42 A similar view has recently been expressed in the decision of the Supreme Court of Queensland in *Energex Limited v Sablatura*.<sup>1415</sup> In that case, Energex applied for orders, pending trial, that the respondent permit Energex to conduct certain works on a registered easement that it had over the respondent’s land and that the respondent be restrained from interfering with or obstructing the exercise of Energex’s rights in relation to the easement. The respondent had impaired capacity and the Public Trustee had been appointed as his administrator for managing all financial matters except day-to-day finances and Centrelink payments.<sup>1416</sup> As mentioned earlier, the *Guardianship and Administration Act 2000* (Qld) does not affect the rules of court about the appointment of a litigation guardian.<sup>1417</sup> Accordingly, although the Public Trustee was the respondent’s administrator for financial matters, which included legal matters relating to the respondent’s financial or property matters, that did not have the effect of making the Public Trustee the respondent’s litigation guardian for the proceeding that Energex had instituted against the respondent.

28.43 Although the Public Trustee ultimately consented to being appointed as the respondent’s litigation guardian, the Public Trustee initially ‘asserted that it would not accept appointment by the Court’, despite Energex’s ‘offer in open Court to indemnify the Public Trustee for any costs incurred by the Public Trustee in acting as litigation guardian’.<sup>1418</sup> Atkinson J expressed concern about the court’s inability to appoint the Public Trustee as a litigation guardian if the Public Trustee did not consent to the appointment under section 27(3) of the *Public Trustee Act 1978* (Qld):<sup>1419</sup>

It is, of course, a matter of some concern to the Court that, where the defendant is or comes under a legal disability, an applicant or plaintiff may not be able to vindicate its rights if there is no-one who is able to act as litigation guardian, apart from the Public Trustee; the Court is of the view that the Public Trustee is the appropriate person to be appointed; the Public Trustee nevertheless has the statutory power to refuse appointment; and exercises that power to refuse appointment.

In those circumstances, either the statute needs amendment or the Court would have to look to other public officials to undertake this important public duty. It would be hard to imagine that another public official would be appropriate, where the Public Trustee was the administrator for such matters, but as a final resort, the Court would presumably have to look to the Attorney General in the Court’s exercise of its *parens patriae* jurisdiction over infants and those who lack legal capacity.

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1414 Ibid [41].

1415 [2009] QSC 356.

1416 Ibid 2–3.

1417 See [28.10] above.

1418 [2009] QSC 356, 6 (Atkinson J).

1419 Ibid 6.

28.44 Her Honour commented further:<sup>1420</sup>

This is a topic which is in need of law reform to clarify when the Public Trustee must act as litigation guardian particularly where there is no-one else willing and able to act. Such law reform should consider if conditions may be attached to the Public Trustee's appointment particularly as to costs.

28.45 A further issue for consideration is whether rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) should be amended to clarify whether, apart from any specific provision enabling the court to appoint a public entity or office-holder without its consent, a person's consent should be required in order for the person to be appointed as a litigation guardian.

## Discussion Paper

28.46 In the Discussion Paper, the Commission stated that, if it was considered desirable for the court to have the power under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) to appoint the Public Trustee as a litigation guardian without the Public Trustee's consent, then it may be necessary to amend section 27 of the *Public Trustee Act 1978* (Qld) so that the requirement in section 27(3) does not apply to the appointment of the Public Trustee as a litigation guardian under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld).<sup>1421</sup>

28.47 The Commission therefore sought submissions on the following questions:<sup>1422</sup>

- 23-1 Should a person's consent generally be required in order for the court to appoint the person as a litigation guardian for a person under a legal incapacity?
- 23-2 Should section 27 of the *Public Trustee Act 1978* (Qld) be amended so that section 27(3), which requires the consent of the Public Trustee, does not apply to the appointment of the Public Trustee as a litigation guardian for an adult under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld)?
- 23-3 Alternatively, or in addition, should the *Guardianship and Administration Act 2000* (Qld) 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 not relating to the adult's financial or property matters';
  - (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

<sup>1420</sup> Ibid 7.

<sup>1421</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [23.33].

<sup>1422</sup> Ibid 245, 250.

adult in a proceeding not relating to the adult's financial or property matters; and

- (c) to provide that the court may, under rule 95(2) of the *Uniform Civil Procedure Rules 1999* (Qld), appoint the Adult Guardian, without the Adult Guardian's consent, as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters?

## Submissions

### **Consent requirement generally**

28.48 A number of respondents, including the former Acting Public Advocate, the Public Trustee, the Adult Guardian, the Department of Communities and the Perpetual Group of Companies, were of the view that a person's consent should, or should generally, be required in order for the court to appoint the person as a litigation guardian for a person under a legal incapacity.<sup>1423</sup>

28.49 The former Acting Public Advocate commented:<sup>1424</sup>

Given the potential financial liability arising from appointment as a litigation guardian it is difficult to see how a person could be appointed without their consent and be subjected to the risk of financial detriment.

28.50 He also raised doubts about whether a litigation guardian who was appointed against his or her wishes would act in the adult's interests:

Issues as to the suitability and appropriateness of a person being appointed without consent as a litigation guardian are a significant concern. Where an individual agrees to be a litigation guardian, it is generally the case that their interests are aligned with the adult's and that they are willing to act in the adult's interests. If an individual were able to be appointed [as] a litigation guardian without consent, it is questionable as to whether they may be willing or motivated to act in the interests of the adult. Given the heightened vulnerability of adults with [impaired decision-making capacity], such an arrangement may be adverse to their interests, and is not desirable.

28.51 The Public Trustee commented that the court should not be able to appoint a person as an adult's litigation guardian without consent because of a litigation guardian's personal liability for costs and the costs of legal representation, 'as well as the responsibilities of the task itself':<sup>1425</sup>

To do otherwise would be to adversely affect the rights and interests of the litigation guardian appointed without agreement.

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1423 Submissions 20B, 155, 156A, 160, 164, 169, 177.

1424 Submission 160.

1425 Submission 156A.



28.52 The Perpetual Group of Companies commented:<sup>1426</sup>

We submit it would be contrary to normal community standards if a person other than a publicly funded body were to be appointed without its consent. The legislation should preclude it.

### ***Appointment of the Public Trustee without consent***

28.53 Several respondents were of the view that section 27(3) of the *Public Trustee Act 1978* (Qld) should be amended so that the Public Trustee's consent is not required in order for the Public Trustee to be appointed as the litigation guardian for an adult under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld).<sup>1427</sup>

28.54 The Self-Representation Civil Law Service ('SRCLS'), which is independently operated by the Queensland Public Interest Law Clearing House Inc ('QPILCH'), was of the view that section 27(3) of the *Public Trustee Act 1978* (Qld) should be amended to ensure that the Public Trustee 'does not unreasonably refuse to consent to act as litigation guardian where a self-represented indigent litigant's proceedings will stall without the Public Trustee's intervention'.<sup>1428</sup> It commented:

The SRCLS is mindful of the resourcing, accountability for funding and liability issues which face the Public Trustee in these types of matters. Nevertheless, the Public Trustee remains the only body capable of assisting indigent self-represented litigants to progress their litigation if they lack legal capacity.

28.55 The family of an adult with impaired capacity, which also agreed with this approach, commented:<sup>1429</sup>

We are persuaded by the argument of Pullin J that the court has a duty 'to ensure that incapacitated persons are properly represented in litigation'<sup>1430</sup> and support the appointment of the Public Trustee as litigation guardian of last resort without its consent. (note added)

28.56 As explained below,<sup>1431</sup> Caxton Legal Centre Inc was of the view that the Adult Guardian should be the primary body that may be appointed as a litigation guardian without consent. However, it considered that, where there was some reason why the Adult Guardian would not be appropriate for appointment as litigation guardian, the court should be able to appoint the Public Trustee without requiring the Public Trustee's consent.<sup>1432</sup>

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1426 Submission 155.

1427 Submissions 96, 169, 177.

1428 Submission 96.

1429 Submission 177.

1430 See [28.38] above.

1431 See [28.70] below.

1432 Submission 174.

28.57 However, the former Acting Public Advocate raised concerns about appointing the Public Trustee as an adult's litigation guardian without the Public Trustee's consent. The main concern expressed was the financial liability to which the Public Trustee would be exposed by acting in this capacity. However, the former Acting Public Advocate did not seem to oppose the appointment of the Public Trustee, without the Public Trustee's consent, if that financial risk could be avoided:<sup>1433</sup>

The appointment of the Public Trustee as a litigation guardian without consent is ... problematic. Such an arrangement could subject the Public Trustee to significant corporate exposure to legal fees for solicitors and barristers engaged to represent a person with impaired capacity, and adverse costs orders where the litigation is wholly or partly unsuccessful. ...

If it were possible for the Public Trustee to be appointed without consent, to overcome commercial difficulties a fund could be established to enable the Public Trustee to fund legal proceedings as litigation guardian, and to pay costs orders awarded against an adult. Where the adult is successful in the litigation, monies outlaid by the Public Trustee could be recovered/reimbursed from the adult's estate, and damages award. In the absence of such an arrangement however, commercial decisions may be made not to pursue claims.

28.58 The Public Trustee raised a number of concerns about amending section 27(3) of the *Public Trustee Act 1978* (Qld) to enable the court to appoint the Public Trustee, without the Public Trustee's consent, as litigation guardian for an adult with impaired capacity.

28.59 The Public Trustee considered that such a power could have unintended consequences, in that it might give parties to litigation against an adult with impaired capacity an advantage in terms of having the Public Trustee effectively guarantee their costs if successful against the adult:<sup>1434</sup>

Given (particularly in respect of costs of legal representatives and the defendant's costs where the litigation guardian acts as plaintiff) there would be great attraction both for solicitors for the plaintiff and defendants to favour the Public Trustee as litigation guardian — that is well beyond the Public Trustee acting as litigation guardian of last resort.

The State as surety for those costs would be attractive both for other parties to the litigation and the solicitors of the incapacitated adult — in short that which would likely emerge is the Public Trustee as a litigation guardian of choice given the favoured position of costs that a State agency offers to other parties.

This would be a most concerning trend if it were to materialise particularly in light of the preferred position currently that family members assist adults with incapacities and others should be sought out for their views if not assumption of such a role, as litigation guardian.

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1433 Submission 160.

1434 Submission 156A.

28.60 The Public Trustee also commented that his experience is in acting as an administrator in relation to financial matters and does not extend to decisions about ‘personal matters’:

The Public Trustee’s experience and knowledge extends to acting as financial administrator for adults with impaired capacity. It does not apply for example to ‘personal matters’.

The Public Trustee appointed litigation guardian where the matters agitated are largely if not wholly, dealing with personal matters would put the Public Trustee in a difficult position of acting in a role beyond his existing competence and knowledge.

An illustration may assist. In that matter of *Energex Limited v Sablatura ...*, the relief sought was relief to (physically) restrain if necessary an adult with an incapacity from interfering with the rights of Energex.

The Public Trustee (at the end of the day) agreed to act as litigation guardian in response to that application.

In truth however the litigation very much dealt with personal matters — the physical integrity of the adult with an incapacity.<sup>1435</sup>

Other litigation might be imagined where the Public Trustee might be compelled to act as litigation guardian; family law matters, custody matters, matters dealing with where the adult lives, health care matters to name but a few are all matters which ordinarily are attended to within the scope of the legislative framework by a guardian and if they were to be litigated should be attended to by first a person who accepts such an appointment and second, a person (or organisation) with existing competence in respect of such areas.

Judgments in this area are fine ones and a simple default position of the Public Trustee may not be appropriate in many circumstances — or desirable for the adult with an incapacity. (note added)

28.61 The Public Trustee commented that, if the current consent requirement were removed, the Public Trustee might ‘be compelled to act in matters and cases which properly should be the province of others, including other entities with competence in those areas (personal matters as they are understood in the GAA)’.

28.62 The Public Trustee observed that there is a difference between matters where the Public Trustee has already been appointed as an adult’s administrator and those where the Public Trustee is not the adult’s administrator.

28.63 Where the Public Trustee is the adult’s administrator, ‘close scrutiny and involvement in any litigation (where there is a plenary order) has already occurred — given that the Public Trustee has a decision-making role in *legal* matters’.

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See the discussion of *Energex Limited v Sablatura* [2009] QSC 356 at [28.42]–[28.44] above. Note also the Commission’s view at [6.59] above that the litigation, which concerned the enforcement of the applicant’s rights under a registered easement over the respondent adult’s property, fell within the definition of a ‘financial matter’ (and not the definition of a ‘personal matter’, as suggested by the Public Trustee) because it directly concerned the adult’s property matters.

28.64 Where the Public Trustee is not the adult's administrator:

This is different from matters where the Public Trustee has no connection with the adult concerned previously. That absence of a connection puts beyond reach the powers of an administrator to fully inform the administrator of all of the circumstances attending upon the adult, including a recourse to the adult's assets should the case so demand.

...

Further, the absence of any nexus with the adult with an incapacity may prove very difficult for the Public Trustee to properly conduct any such litigation.

28.65 The Public Trustee referred in his submission to the suggestion made in the Discussion Paper that the Public Trustee might potentially be suitable to fulfil the role of litigation guardian where no other person is available. In his view, a 'clear analogy cannot be drawn':

The Public Trustee remains able to consent to (or refuse) appointments of a fiduciary capacity pursuant to section 27. The functions of a public nature are limited temporally and in terms of endeavour and effort.

These are discussed elsewhere in this paper but include a quasi judicial power to sanction (section 59) to audit trusts (section 60) to sign release of mortgages and transfers (sections 61 and 62). Those functions are finite in resources required and time involved.

Even the obligation to administer the property of prisoners is subject to the Public Trustee's capacity to discontinue such management (see part 7 of the *Public Trustee Act 1978*).

28.66 The Public Trustee also referred to the costs implications of enabling the Public Trustee to be appointed as a litigation guardian without the Public Trustee's consent:

That which might emerge from such a proposal is that the Public Trustee as litigation guardian be exhausted in terms of resources with the introduction of a de facto legal aid scheme through the amendment proposed.

That is not to say that the Public Trustee is not vitally interested in the proper husbanding of litigation in respect of adults with an incapacity — rather it places into focus the type of resources that might be required should the Public Trustee be compelled to act in all or any matter where a litigant has a relevant incapacity.

28.67 The Public Trustee suggested, as an alternative to enabling the Public Trustee to be appointed as litigation guardian without the Public Trustee's consent, that it should be possible for an attorney or administrator of an adult with impaired capacity to bring or defend proceedings in the name of the adult. That proposal is set out in greater detail below.<sup>1436</sup>

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See [28.85] below.

### ***Appointment of the Adult Guardian without consent***

28.68 There was also some support in the submissions for enabling the Tribunal to appoint the Adult Guardian as an adult's litigation guardian, without consent, in a proceeding not relating to the adult's financial or property matters.

28.69 The family of an adult with impaired capacity was of the view that the *Guardianship and Administration Act 2000* (Qld) should be amended:<sup>1437</sup>

- to include, as an additional function of the Adult Guardian in section 174, 'acting as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters';
- 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 not relating to the adult's financial or property matters; and
- to provide that the court may, under rule 95(2) of the *Uniform Civil Procedure Rules 1999* (Qld), appoint the Adult Guardian, without the Adult Guardian's consent, as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters.

28.70 Caxton Legal Centre Inc considered that there should be a public body that may be compelled to be an adult's litigation guardian. In its view, the Adult Guardian would generally be more appropriate to be appointed than the Public Trustee. It suggested that the Public Trustee should be an alternate appointee 'where there are good reasons why the Adult Guardian ought not be appointed, such as a conflict of duties arising in [the] litigation'.<sup>1438</sup> Caxton Legal Centre Inc referred in its submission to the definition in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) of 'legal matter', and suggested that '[i]t is not immediately clear that an easily defined line exists between the roles of the Public Trustee and the Adult Guardian'. It commented:

The Adult Guardian is responsible for housing and accommodation for an adult. To access this may require obtaining legal advice on rights and obligations to find the most appropriate package. Strictly such work should be referred to the Public Trustee, however, due to the impracticality of implementing such a referral strategy, it must be adhered to in the breach more than in practice.

Accordingly, the appropriateness of appointing the Public Trustee as litigation guardian should be considered within an overall framework that reflects its origins; namely that the Adult Guardian came after and to an extent grew out of the Public Trustee, and the above delineation preserves the pre-existing regime of the Public Trustee at practical expense to the role of the Adult Guardian.

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1437 Submission 177.

1438 Submission 174.

28.71 Caxton Legal Centre Inc considered, however, that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that one or other of the Adult Guardian or the Public Trustee may be appointed as litigation guardian without the consent of that entity.

28.72 The former Acting Public Advocate considered that it should not be possible for the court to appoint the Adult Guardian as an adult's litigation guardian without the Adult Guardian's consent. In his view:<sup>1439</sup>

the Adult Guardian's resources would be better directed towards service provision for individual adults with [impaired decision-making capacity], and the investigation of abuse, neglect and exploitation.

28.73 The Adult Guardian was also of the view that the *Uniform Civil Procedure Rules 1999* (Qld) should not be amended to enable the Adult Guardian to be appointed as an adult's litigation guardian without the Adult Guardian's consent. However, she did not appear to be opposed to an amendment that would facilitate the Adult Guardian's appointment as an adult's litigation guardian (with consent), and supported the amendment of the *Guardianship and Administration Act 2000* (Qld):<sup>1440</sup>

- to include, as an additional function of the Adult Guardian in section 174, 'acting as the litigation guardian of an adult in a proceeding not relating to the adult's financial or property matters'; and
- 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 not relating to the adult's financial or property matters.

### **General comment**

28.74 The Department of Communities commented that 'if no-one volunteers to be the litigation guardian for an adult, the situation should not arise where an adult is unable to commence or continue legal proceedings'. In its view:<sup>1441</sup>

Where there is no appropriate volunteer who can be appointed, a public official should be appointed by the court as the litigation guardian, and their consent should not be required.

The court should have the power to appoint a litigation guardian in the following order of priority:

- (1) an appropriate person, with that person's consents ; or
- (2) if no-one volunteers, a public official.

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1439 Submission 160.

1440 Submission 164.

1441 Submission 169.

***Jurisdiction to appoint a litigation guardian***

28.75 The Self-Representation Civil Law Service ('SRCLS') noted that it has examined a number of decisions by the Guardianship and Administration Tribunal ('GAAT') and the Supreme Court in which it was necessary to determine whether a litigant had capacity for the proceeding. It commented that the various decisions 'highlight the difficulty of the decision, the varied approaches that can be taken, and the potentially inflexible outcome should the court determine that the litigant lacks capacity where there is no litigation guardian willing to assist'.<sup>1442</sup>

28.76 The SRCLS suggested that there should be a single statutory scheme that applies to determine whether a civil litigant has capacity and, if not, provides for the appointment of a litigation guardian including the guardian's powers, duties and responsibilities, and that it should be the Tribunal, rather than the courts, that should be responsible for determining capacity and appointing litigation guardians for civil litigants.<sup>1443</sup> In its view:<sup>1444</sup>

a single forum for considering capacity and making orders with respect to litigation guardians would improve consistency in the application of the statutory definition of capacity. We consider GAAT may be best-equipped to deal with the question of capacity and guardians in a user-friendly forum.

28.77 However, the SRCLS suggested that the courts should be responsible for addressing the issue of capacity where there is a reasonable suspicion that a self-represented litigant appears to lack capacity by referring the matter to the Tribunal for a determination and appointment of a litigation guardian if appropriate.<sup>1445</sup>

***The test for capacity***

28.78 The SRCLS suggested that it is confusing that different definitions of 'impaired capacity' apply under the *Uniform Civil Procedure Rules 1999* (Qld) and under the *Guardianship and Administration Act 2000* (Qld).<sup>1446</sup> As mentioned earlier, a person has impaired capacity for the purpose of the *Uniform Civil Procedure Rules 1999* (Qld) if the person 'is not capable of making the decisions required of a litigant for conducting proceedings'.<sup>1447</sup> Under the *Guardianship and Administration Act 2000* (Qld), a person has impaired capacity for a matter if the

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1442 Submission 96.

1443 Ibid 15.

1444 Ibid.

1445 Ibid 22. The referral to the Tribunal of the issue of an adult's capacity is considered at [28.122]–[28.140] below.

1446 Ibid 11–12.

1447 See [28.1]–[28.3] above.

person does not have capacity for the matter.<sup>1448</sup> 'Capacity, for a person for a matter' is defined to mean that the person is capable of:<sup>1449</sup>

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

28.79 The SRCLS suggested that a new definition of 'capacity' is required:<sup>1450</sup>

For self-represented litigants, the question of capacity in a practical sense is more complex than simply whether the litigant is able to make free and rational decisions and communicate those decisions effectively because, as a self-represented litigant, there is a lot more than just 'decision-making' that is required of them.

Self-represented litigants must not only be able to understand the factual matters affecting their case sufficiently to make informed decisions about it, but they must also understand the legal issues and civil procedures which apply, and have the necessary skills (such as legal drafting skills and in-court advocating skills) to effectively communicate their legal position to the court and the other parties.

28.80 The SRCLS expressed the view that 'the decision-making model of capacity' may be a valuable way of ascertaining whether a litigant lacks capacity entirely. However, it considered that:

a lesser, task-based assessment be considered as an 'intermediate' measure of capacity, particularly for self-represented litigants. This is because ... a self-represented litigant may be capable of making and communicating sensible decisions, but this does not necessarily reflect whether they may also have a condition which renders it difficult (or impossible) to conduct their litigation unassisted.

A task-based assessment of capacity could inquire about a litigant's ability to undertake specific tasks required in litigation, such as:

- Corresponding with parties (by telephone and in writing);
- Drafting pleadings;
- Reading and applying legislation and procedural rules;
- Adhering to short time limits;
- Participating in conferences / mediation in person or by telephone;
- Attending interlocutory hearings;

<sup>1448</sup> *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of '**impaired capacity**, for a person for a matter').

<sup>1449</sup> *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of '**capacity**, for a person for a matter').

<sup>1450</sup> Submission 96.



- Negotiating and compromising with other parties; and
- Conducting a trial.

28.81 The SRCLS commented:

Rather than assessing the more abstract notion of whether the litigant is able to make and communicate decisions, this test could specifically identify which tasks a litigant requires assistance to complete. A potential practical benefit of this model is that it would allow existing services (in particular, the Public Trustee) to provide more support to self-represented litigants, without necessarily taking over conduct of the entire matter or assuming the associated legal costs risks.

28.82 The SRCLS was also critical of what it described as the ‘all-or-nothing’ effect of rule 93 of the *Uniform Civil Procedure Rules 1999* (Qld), which provides that a person under a legal incapacity may start or defend a proceeding only by a litigation guardian. It commented:

There are no shades of grey, which might allow litigants with capacity issues to take some steps but not others, to take steps with assistance that falls short of full representation, or to at least take adequate steps (such as applying for a stay, an injunction or to have a judgment set aside) to protect their own interests. A litigant with impaired capacity finds themselves in a situation where their civil rights and powers are frozen completely until a litigation guardian agrees to act on their behalf.

28.83 In the view of the SRCLS, a ‘task-based’ test for capacity should be adopted. That test should be capable of responding to the different causes and effects of incapacity and the possibility that a litigant may lack capacity to undertake specific tasks required in their litigation.

28.84 It also suggested the establishment of ‘a system whereby the Public Trustee of Queensland is funded to assist low income litigants with impaired capacity as litigation guardian on a discrete task or full-representation basis’.

### ***Other suggestions***

28.85 The Public Trustee suggested, as an alternative to enabling the Public Trustee to be appointed as litigation guardian without consent, that it should be possible for an attorney or administrator of an adult with impaired capacity to bring or defend proceedings in the name of the adult:<sup>1451</sup>

Might an adult with an incapacity commence or defend litigation through his or her attorney or administrator (and not as litigation guardian) and that the attending rules or provisions expressly provide that the costs of other parties might be visited only upon the adult with an incapacity and not the attorney or administrator?

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1451

Submission 156A.

The rationale for the position of the litigation guardian qua costs described in *Rhodes v Swithenbank* (1889) 22 QBD 577 ... is to ensure the proper and appropriate conduct of the litigation guardian. This is also reflective of that which is discussed in footnote 963 [of the Discussion Paper] that the litigation guardian, in the role of defendant generally is not liable for costs, but as plaintiff is exposed.

The Courts retain now close supervision of all litigation but particularly civil litigation. It would be unusual for an administrator or attorney as it is proposed conducting litigation on behalf of an adult to do so inappropriately; moreover the prudential framework attending administrators for the present adds another layer of assurance in this regard.

Such a change would enable adults with an incapacity through their attorneys or administrators to litigate as would be the case for any other person with capacity — that is putting at risk on the most dour approach the adult's property (but not that of the administrator or attorney).

In one way presently it is of greater advantage for a defendant to have litigation progressed by a plaintiff with an incapacity for there [is] (assuming an indemnity is available) recourse to the funds not only of the adult with an incapacity through the indemnity but of the litigation guardian.

This would seem to be a curious position and one which is unnecessary.

In short rather than that which is propounded in the discussion paper the Commission should be minded given the framework which exists and the curious results which attend through the engagement of the litigation guardian provision to statutorily permit attorneys and administrators to litigate on behalf of incapacitated adults in the name of the adult.

28.86 The former Acting Public Advocate also suggested, as a means of overcoming the difficulties associated with the unwillingness of persons to be appointed as litigation guardians for adults with impaired capacity, that it should be possible for civil proceedings in the name of the adult to be commenced or defended by the adult's substitute decision-maker (that is, the adult's guardian, administrator or attorney, depending on the subject matter of the litigation). This suggestion was premised on the view that a substitute decision-maker, unlike a litigation guardian, would not have any liability for costs or expenses incurred in bringing or defending a proceeding in the name of an adult:<sup>1452</sup>

It is essential that substitute decision-makers for adults with [impaired decision-making capacity] be encouraged to bring proceedings as litigation guardians for adults where there are good prospects of success to avoid potential disadvantage and detriment to adults. If the arrangements suggested above were in place, costs in the event would flow from an adult's funds and ordinarily there would be no recourse to the substitute decision-maker personally. This places adults with impaired capacity in the position of adults with capacity in respect of costs issues. If there were concerns about security for costs in a particular matter, the existing rules would appear to be adequate to enable security to be given by a particular substitute decision-maker in appropriate circumstances. Such an amendment might specify that guardians,

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Submission 160.

administrators or other interested persons acting are not liable in respect of costs.

28.87 He suggested that, if there was a concern that these changes might prompt a substitute decision-maker to pursue litigation that had poor prospects of success, the guardianship legislation provides for the Tribunal to order a substitute decision-maker who fails to comply with his or her obligations under the legislation to pay compensation.<sup>1453</sup>

28.88 An alternative suggestion made by the former Acting Public Advocate was that 'the UCPR be amended so that litigation guardians are not liable in respect of costs'. He observed, however, that:

it would be undesirable for substitute decision-makers, whether as litigation guardians or otherwise, to unreasonably commence or defend actions without prospects simply because there were no costs ramifications for them personally.

28.89 QPILCH suggested that the *Uniform Civil Procedure Rules 1999* (Qld) could be amended to provide a specific exemption from an adverse costs order for the Public Trustee when appointed as a litigation guardian without its consent.<sup>1454</sup>

## The Commission's view

### *The appropriate body to exercise jurisdiction to appoint a litigation guardian*

28.90 In the Commission's view, the most appropriate body to appoint a litigation guardian is the court in which the relevant proceeding has been, or is to be, brought. Accordingly, the courts should continue to have exclusive jurisdiction to appoint a litigation guardian.

28.91 The Commission accepts, however, that there is merit in enabling the Tribunal to make an assessment of an adult's capacity for a proceeding. Accordingly, if the court has concerns about the capacity of an adult who is a party to the proceeding, it would be appropriate for the court to refer to the Tribunal, for its determination, the issue of whether the party is a person under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld).<sup>1455</sup>

28.92 The Tribunal, as well as making a declaration about the party's capacity,<sup>1456</sup> should have the power to make a finding about who would be

<sup>1453</sup> The former Acting Public Advocate referred to the *Guardianship and Administration Act 2000* (Qld) ss 35 (Act honestly and with reasonable diligence), 59 (Compensation for failure to comply), 60 (Power to apply to court for compensation for loss of benefit in estate) and to the *Powers of Attorney Act 1998* (Qld) ss 66 (Act honestly and with reasonable diligence), 106 (Compensation for failure to comply), 107 (Power to apply to court for compensation for loss of benefit in estate).

<sup>1454</sup> Submission 96A.

<sup>1455</sup> Later in this chapter, the Commission has made a recommendation to clarify that the court has the power to refer the issue of an adult's capacity to the Tribunal: see [28.137]–[28.138] and Recommendation 28-8(a) below.

<sup>1456</sup> See [28.119]–[28.121] and Recommendations 28-5, 28-6 below regarding the test that is to be applied.

appropriate to be appointed as the party's litigation guardian. The *Guardianship and Administration Act 2000* (Qld) should therefore be amended to give that power to the Tribunal. The Act should also be amended to provide that a finding by the Tribunal that a person would be appropriate to be appointed as an adult's litigation guardian is, in a proceeding in a court in which that is in issue, evidence about the appropriateness of the person to be appointed as the adult's litigation guardian.<sup>1457</sup>

### ***Appointment of a litigation guardian generally under rule 95***

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

### ***Appointment of the Public Trustee as litigation guardian without consent***

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

28.95 The Commission is conscious of the financial and administrative burden that the role of litigation guardian entails for the Public Trustee, both in relation to the Public Trustee's potential liability to pay the costs of the other party and the internal cost to the Public Trustee of actually conducting the litigation. However, that consideration needs to be balanced against the importance of ensuring appropriate safeguards for the rights and interests of adults with impaired capacity.

28.96 In the Commission's view, the burden for the Public Trustee in being appointed as a litigation guardian without consent is outweighed by the need to ensure that there is a mechanism for ensuring that the interests of adults with impaired capacity can be adequately advanced (for a plaintiff) and safeguarded (for a defendant). There is also a public interest in ensuring that proceedings against adults under a legal incapacity are not indefinitely stalled simply because there is no available litigation guardian.

28.97 It therefore recommends that section 27 of the *Public Trustee Act 1978* (Qld) should be amended to ensure that the Public Trustee's consent is not required for it to be appointed as a litigation guardian under rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld).

28.98 In addition, rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) should be amended to provide that, despite the requirement that a person's consent is generally required in order to be appointed as the litigation guardian of a person under a legal incapacity,<sup>1458</sup> the court may appoint the Public Trustee, without the Public Trustee's consent, as litigation guardian for an adult in a proceeding that

<sup>1457</sup> For a similar provision, see s 147 of the *Guardianship and Administration Act 2000* (Qld).

<sup>1458</sup> See [28.93] above.

relates to the adult's financial or property matters. By limiting the power to a proceeding of this kind, it avoids the situation where the Public Trustee could be appointed as litigation guardian for a proceeding that does not relate to the adult's financial or property matters.<sup>1459</sup>

28.99 Rule 95 should also be amended to include a note that refers to section 27 of the *Public Trustee Act 1978* (Qld), which is the source of the Public Trustee's power to act as a litigation guardian.

28.100 This does not mean that in every case where an adult is under a legal incapacity the court will necessarily appoint the Public Trustee as litigation guardian if no other person is willing to be appointed. However, it means that, in an appropriate case, the court will have the power to appoint the Public Trustee as litigation guardian.

### ***Appointment of the Adult Guardian as litigation guardian without consent***

28.101 If the proceeding for which an adult is under a legal incapacity does not concern the adult's financial or property matters, it is more appropriate for the Adult Guardian to be the litigation guardian of last resort rather than the Public Trustee. Because rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) does not provide expressly that a litigation guardian may be appointed without his or her consent, rule 95 should be amended to provide that, despite the requirement that a person's consent is generally required in order to be appointed as the litigation guardian of a person under a legal incapacity,<sup>1460</sup> the court may appoint the Adult Guardian, without the Adult Guardian's consent, as litigation guardian for an adult in a proceeding that does not relate to the adult's financial or property matters.

28.102 Further, to avoid any argument about the scope of the Adult Guardian's functions and powers, the *Guardianship and Administration Act 2000* (Qld) should be amended:

- 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
- 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 not relating to the adult's financial or property matters.

28.103 The latter amendment will ensure that the Adult Guardian is also capable of consenting to being appointed as an adult's litigation guardian.

28.104 If the one proceeding relates, in part, to the adult's financial or property matters and, in part, to matters not concerning the adult's financial or property matters, there should be one litigation guardian, which should be the Public

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1459 See the discussion of the Public Trustee's concern about this issue at [28.60]–[28.61] above.

1460 See [28.93] above.

Trustee. The effect of framing the Adult Guardian's function and power in the way proposed above is that, if a proceeding relates to matters concerning the adult's financial or property matters and also to other matters, it will not constitute a proceeding 'that does *not* relate to the adult's financial or property matters'. Accordingly, the Adult Guardian will not be eligible to be appointed as the litigation guardian.

## Costs

28.105 The Commission recognises that the potential liability for costs is an issue for anyone who is deciding whether to consent to being appointed as a litigation guardian. It is also an issue for the Public Trustee and the Adult Guardian, whether they are appointed without their consent or are deciding whether to consent to being appointed.

28.106 Ordinarily, a person who commences a proceeding assumes the risk that, even if successful in the proceeding, it might not be possible to recover his or her costs from the party against whom the proceeding has been brought. For that reason, a litigation guardian who is acting for a defendant is not ordinarily liable for the plaintiff's costs.<sup>1461</sup> In the ACT, this principle is reflected in rule 277(3) of the *Court Procedures Rules 2006* (ACT), which provides:

### 277 Litigation guardian—liability for costs

...

- (3) A litigation guardian for a defendant is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct.

28.107 In the Commission's view, if a party brings a proceeding against a defendant or respondent who requires a litigation guardian to defend the proceeding, that party should not generally be in a better position in terms of recovering his or her costs than he or she would be if the defendant or respondent did not require a litigation guardian. Accordingly, the *Uniform Civil Procedure Rules 1999* (Qld) should be amended 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. This rule should create more certainty for the Public Trustee and the Adult Guardian when acting as an adult's litigation guardian. In addition, the greater certainty provided for litigation guardians generally might encourage persons who are otherwise unwilling to be a litigation guardian to perform that role.

28.108 This recommendation will make it clearer that a litigation guardian for a defendant or respondent will not normally be liable for the costs of the other party to the proceeding, even where the other party is successful in the proceeding.

<sup>1461</sup>

See [28.11] above.

28.109 However, a litigation guardian for a defendant or respondent may nevertheless still have concerns about his or her liability for the costs involved in defending the proceeding. As explained earlier, a litigation guardian for a defendant (or plaintiff) is primarily liable for the costs of the legal representatives he or she engages.<sup>1462</sup> While a litigation guardian is entitled to be reimbursed for those costs and expenses out of the assets of the represented person, that right will be illusory if the represented person does not have sufficient assets. The Commission has therefore considered whether the court's power to award costs under the *Uniform Civil Procedure Rules 1999* (Qld) is wide enough to enable the court to order that another party pay the costs incurred by the litigation guardian in performing the role of litigation guardian or whether specific provision should be made in the rules for such an order to be made.

28.110 Rule 681 of the *Uniform Civil Procedure Rules 1999* (Qld) confers on the court a broad power to make orders in relation to the costs of a proceeding:

**681 General rule about costs**

- (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
- (2) Subrule (1) applies unless these rules provide otherwise.

28.111 In *Knight v FP Special Assets Limited*,<sup>1463</sup> a majority of the High Court held that Order 91 rule 1 of the *Rules of the Supreme Court 1900* (Qld),<sup>1464</sup> which was the predecessor of rule 681, was wide enough to confer jurisdiction on the court to make a costs order against receivers who were not parties to the proceeding.

28.112 Mason CJ and Deane J commented on the width and generality of Order 91 rule 1:<sup>1465</sup>

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1462 See [28.12] above.

1463 (1992) 174 CLR 178.

1464 *Rules of the Supreme Court 1900* (Qld) O 91 r 1 provided:

**Costs to be in the discretion of the Court**

- 1.(1) Subject to the provisions of the *Judicature Act 1876* and these rules, the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge.
- (2) However, nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he or she would be entitled according to the rules heretofore acted upon in courts of equity.
- (3) In addition, subject to rule 2, when any cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such cause, matter, or issue is tried, or the Court, shall for good cause otherwise order.

1465 (1992) 174 CLR 178, 190.

it is impossible to construe the wide and general words of O 54, r 1 and its successor O 91, r 1 as delimiting the jurisdiction to order payment of costs as one which was and is confined to parties to the proceedings. ... It is preferable to interpret the words of the rule according to their natural and ordinary meaning as conferring a grant of jurisdiction to order costs not limited to parties on the record and ensure that the jurisdiction is exercised responsibly.

28.113 Their Honours emphasised, however, that the broader power conferred by the rule must be exercised judicially:<sup>1466</sup>

The conclusion that the wide words of O 91, r 1 should not be read down so as to preclude jurisdiction to make an order for costs against a non-party does not, of course, mean that a judge has an unfettered discretion to make any order that he or she chooses. The wide jurisdiction conferred by the rule 'must be exercised judicially and in accordance with general legal principles pertaining to the law of costs', to take up the words of Lambert JA in *Oasis Hotel Ltd v Zurich Insurance Co*.

Obviously, the prima facie general principle is that an order for costs is only made against a party to the litigation. As our discussion of the earlier authorities indicates, there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. ...

For our part, we consider it appropriate to recognize a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. ... Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made. (notes omitted; emphasis added)

28.114 Dawson J expressed a similar view in that case:<sup>1467</sup>

Order 91, r 1 of the Queensland Rules of the Supreme Court places the costs of and incident to all proceedings in the court in the discretion of the court or a judge. True it is that the rule does not expressly say that the discretion extends to determining who shall pay the costs as does the English Act of 1890. But no limit is imposed upon the discretion conferred and in the absence of any implied limit there is no justification for confining the jurisdiction with regard to the persons against whom costs may be awarded. ... The circumstances in which it would be appropriate to award costs to a non-party would necessarily be confined, but that is a question of discretion, not jurisdiction. I should add that the discretion to award costs is to be exercised judicially ...

28.115 It is important to ensure that, if a party to a proceeding has a litigation guardian, the court's power to make an order about costs is wide enough to make an order, in an appropriate case, as to who is to pay the party's costs. As explained above, rule 681 of the *Uniform Civil Procedure Rules 1999 (Qld)* is expressed in very broad terms. As a result, the court would have jurisdiction to make an order that another party pay the costs of the party who is represented by a litigation guardian. Nonetheless, the Commission is of the view that there is value

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1466 Ibid 192.

1467 Ibid 202–3.



in including an express rule in the *Uniform Civil Procedure Rules 1999* (Qld), which specifies the existence of the power to make such an order. The inclusion of a rule that refers to the court's power in this regard also has the advantage that it serves to highlight the existence of the court's power in this particular situation.

28.116 The rules should also be amended to ensure that the court may make such an order at any time in the proceeding.<sup>1468</sup> While it would be usual for the court to make any order as to costs at the conclusion of the proceeding, the court might consider it appropriate, when deciding to appoint the Public Trustee or Adult Guardian without their consent, to make a costs order at the time of the appointment.

28.117 The Commission is therefore of the view that the *Uniform Civil Procedure Rules 1999* (Qld) should be amended to include a new rule to the following general effect:

- (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.

28.118 The Commission notes the suggestion made by the Public Trustee and the former Acting Public Advocate to the effect that, to avoid costs orders being made against litigation guardians, substitute decision-makers should be able to commence and defend proceedings in the name of the adult without the need for a litigation guardian. In view of the Commission's recommendations in relation to costs, it does not consider it necessary to recommend an alternative system for bringing and defending proceedings by, or against, adults under a legal incapacity.

### ***The test for capacity***

28.119 As explained earlier, the *Uniform Civil Procedure Rules 1999* (Qld) defines 'person under a legal incapacity' to mean, relevantly, 'a person with impaired capacity', which is in turn defined in the *Supreme Court of Queensland Act 1991* (Qld) as follows:<sup>1469</sup>

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

28.120 The Commission is generally satisfied with this definition. However, because capacity to make the decisions required of a litigant for conducting

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<sup>1468</sup> Because the recommended rule will not refer to 'the costs a court may award', it will confer a slightly wider power than is found in r 682(1)(a) of the *Uniform Civil Procedure Rules 1999* (Qld), which provides that the 'costs a court may award may be awarded at any stage of a proceeding or after the proceeding ends'.

<sup>1469</sup> See [28.2]–[28.3] above.

proceedings varies greatly depending on the nature and complexity of the proceedings, the definition of 'person with impaired capacity' in the *Supreme Court of Queensland Act 1991* (Qld) should be amended by omitting both occurrences of the word 'proceedings' and inserting the words 'the proceeding'. This change is intended to ensure that the person's capacity is determined in relation to the proceeding that is in contemplation or that has been commenced.

28.121 In addition, 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.

## THE COURT'S POWER TO TRANSFER THE ISSUE OF AN ADULT'S CAPACITY TO THE TRIBUNAL

### Background

28.122 As explained earlier, the *Uniform Civil Procedure Rules 1999* (Qld) provide that, if a person is under a legal incapacity, the person may start or defend a proceeding only by a litigation guardian. Further, if a party to a proceeding is under a legal incapacity, anything required or permitted by the rules to be done by the party may be done only by the party's litigation guardian.<sup>1470</sup>

28.123 In some situations, the court may be satisfied on the basis of the evidence before it that one of the parties to the proceeding before it is a person under a legal incapacity and that the party therefore needs a litigation guardian for the proceeding.<sup>1471</sup> However, the situation may arise where the court has concerns that one of the parties to a proceeding may be an adult with impaired capacity for the proceeding, although there is insufficient evidence for the court to decide the issue. In that situation, the court may consider that it is more appropriate for that issue to be resolved by the Tribunal.

### Issues for consideration

28.124 Section 146 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may make a declaration about the capacity of various persons, including an adult, for a matter. This would include making a declaration about the capacity of an adult to make the decisions required of a litigant in conducting proceedings. Section 146 provides in part:

#### **146 Declaration about capacity**

- (1) The tribunal may make a declaration about the capacity of an adult, guardian, administrator or attorney for a matter.

<sup>1470</sup> See [28.1] above.

<sup>1471</sup> See eg *Fowkes v Lyons* [2005] QSC 7.

- (2) The tribunal may do this on its own initiative or on the application of the individual or another interested person.

...

28.125 The Tribunal may make a declaration about an adult's capacity on its own initiative or on application. If the court has concerns about the capacity of a party to conduct a proceeding before it and no-one applies to the Tribunal for a declaration about the party's capacity, the matter can only come before the Tribunal if the court has the power to refer the question of the adult's capacity to the Tribunal.

28.126 Section 241 of the *Guardianship and Administration Act 2000* (Qld) deals with the transfer of proceedings by the Supreme Court to the Tribunal. It provides:

**241 Transfer of proceeding**

- (1) The court may, if it considers it appropriate, transfer a proceeding within the tribunal's jurisdiction to the tribunal.
- (2) The tribunal may, if it considers it appropriate, transfer a proceeding within the court's jurisdiction to the court.
- (3) The transfer may be ordered on the court's or tribunal's initiative or on the application of an active party to the proceeding.

28.127 The reference to 'court' in section 241 means the Supreme Court.<sup>1472</sup>

28.128 Section 241 is in similar terms to the draft provision recommended in the Commission's original 1996 Report.<sup>1473</sup> The draft provision was one of several provisions recommended by the Commission to facilitate its primary recommendation that the Supreme Court and the Tribunal should exercise concurrent jurisdiction in relation to enduring powers of attorney.<sup>1474</sup>

28.129 Although the purpose of section 241 was to ensure that, in exercising concurrent jurisdiction in relation to enduring powers of attorney, both the Supreme Court and the Tribunal could transfer a proceeding about an enduring power of attorney to the other so that it was heard in the most appropriate forum, the terms of section 241 do not limit the type of proceeding that may be transferred.

<sup>1472</sup> *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'court').

<sup>1473</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 2, Draft Assisted and Substituted Decision Making Bill 1996 cl 313.

<sup>1474</sup> *Ibid* vol 1, 89. The Commission also recommended (at 89) that the Tribunal should be given the power, either on its own motion or on the application of a participant in either proceeding, to stay a hearing about an enduring power of attorney if a concurrent proceeding has been brought in the Supreme Court. See now *Guardianship and Administration Act 2000* (Qld) s 242, which provides:

**242 Stay of proceeding concerning an enduring document**

If there is a Supreme Court proceeding, and a tribunal proceeding, about an enduring document or attorneys under an enduring document, other than to the extent necessary for section 243, the tribunal must stay the tribunal proceeding unless the court transfers the Supreme Court proceeding to the tribunal.

28.130 Section 241 has been used by the Supreme Court to transfer to the Tribunal the determination of the question of an adult's capacity.<sup>1475</sup> For example, the Tribunal's decision in *Re MAE*,<sup>1476</sup> which involved an application for a declaration of capacity for an adult, records that the matter was transferred to the Tribunal following an order of the Supreme Court that:<sup>1477</sup>

Pursuant to section 241 of the *Guardianship and Administration Act 2000* the Applicant be transferred to the Guardianship and Administration Tribunal for the determination of the question of whether or not the Applicant has impaired capacity for conducting the application before the Court.

28.131 The Tribunal's decision in *Re CAC*<sup>1478</sup> also records that the Supreme Court:<sup>1479</sup>

transferred the proceeding as against CAC to this Tribunal to the extent of determining the question as to whether CAC has capacity for the proceeding and the question as to whether an administrator should be appointed (generally and specifically for the proceeding) for CAC.

28.132 This raises an issue of whether section 241 should be amended to clarify that it applies not only to the transfer of the whole of a proceeding, but also to the transfer of an issue arising in a proceeding — that is, the issue of the capacity of a party.

28.133 A further issue is that section 241(1) applies only to the Supreme Court. The issue of a party's capacity, and the need for a litigation guardian if the party is in fact a person under a legal incapacity, may also arise in a proceeding before the District Court or a Magistrates Court. This raises an issue about whether section 241 should be amended to enable the District Court or a Magistrates Court to refer to the Tribunal a proceeding to the extent of determining the question of the capacity of a party to the proceeding.

## Discussion Paper

28.134 In the Discussion Paper, the Commission sought submissions on whether:<sup>1480</sup>

- section 241 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, for section 241(1), 'proceeding' includes an issue about the capacity of a party to a proceeding before the court; and

<sup>1475</sup> Another way to achieve the same result would be for the Supreme Court to stay the proceeding in that court until the adult obtained a declaration of capacity from the Tribunal.

<sup>1476</sup> [2008] QGAAT 34.

<sup>1477</sup> Ibid [25].

<sup>1478</sup> [2008] QGAAT 45.

<sup>1479</sup> Ibid [3]. The decision does not mention s 241 of the *Guardianship and Administration Act 2000* (Qld), although that would appear to be the basis for the transfer by the Supreme Court.

<sup>1480</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 253.

- section 241 of the *Guardianship and Administration Act 2000* (Qld) be amended so that the power to transfer to the Tribunal an issue about the capacity of a party to a proceeding before the court may also be exercised by:
  - (a) the District Court; and
  - (b) a Magistrates Court.

## Submissions

28.135 A number of respondents, including the former Acting Public Advocate, the Adult Guardian, the Public Trustee, the Department of Communities, the Perpetual Group of Companies, and the family of an adult with impaired capacity, were of the view that section 241 of the *Guardianship and Administration Act 2000* (Qld) should be amended:<sup>1481</sup>

- to clarify that the court's power to transfer a proceeding to the Tribunal includes the power to transfer to the Tribunal an issue about the capacity of a party to a proceeding before the court; and
- so that the District Court and a Magistrates Court have the same power as the Supreme Court to transfer to the Tribunal an issue about the capacity of a party to a proceeding before the court.

28.136 The Public Trustee commented:<sup>1482</sup>

It is a very real issue for Courts attended by litigation when there are concerns raised sometimes directly but sometimes indirectly in evidence about matters of capacity of one of the parties.

## The Commission's view

28.137 Section 241 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, for section 241(1), 'proceeding' includes the issue of the capacity of a party to a proceeding before the court.

28.138 Because the issue of a party's capacity can arise in any jurisdiction, section 241 should also be amended 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.

28.139 Although section 146(1) of the *Guardianship and Administration Act 2000* (Qld) provides generally that the Tribunal may make a declaration about the capacity of an adult for a matter, the Act should be amended to provide specifically that, if a court transfers to the Tribunal the issue of whether an adult is a person

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<sup>1481</sup> Submissions 20B, 155, 156A, 160, 164, 169, 177.

<sup>1482</sup> Submission 156A. See also the comment by the SRCLS at [28.77] above.

under a legal incapacity within the meaning of the *Uniform Civil Procedure Rules 1999* (Qld), the Tribunal may make a declaration about the person's capacity.

28.140 It should also be amended to provide that the court is entitled to rely on the Tribunal's declaration.

## JURISDICTION OF THE SUPREME COURT AND DISTRICT COURT TO APPOINT A GUARDIAN OR AN ADMINISTRATOR

### Background

28.141 Section 245 of the *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, the Supreme Court or the District Court may exercise the powers of the Tribunal under Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) as if it were the Tribunal. Importantly, Chapter 3 confers on the Tribunal the power to appoint a guardian or an administrator for an adult with impaired capacity for a matter.<sup>1483</sup>

28.142 Section 245 provides:<sup>1484</sup>

#### **245 Settlements or damages awards**

- (1) This section applies if, in a civil proceeding—
  - (a) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; and
  - (b) the court considers the adult is a person with impaired capacity for a matter.
- (2) The court may exercise all the powers of the tribunal under chapter 3.
- (3) Chapter 3 applies to the court in its exercise of these powers as if the court were the tribunal.
- (4) As soon as practicable after a court makes an order under this section, the registrar of the court must give a copy of the order to the tribunal.
- (5) In this section—

**court** means the Supreme Court or the District Court.

**settlement** includes compromise or acceptance of an amount paid into court.

<sup>1483</sup> *Guardianship and Administration Act 2000* (Qld) s 12.

<sup>1484</sup> Justice and Other Legislation Amendment Bill 2010 cl 75 will insert new subsections (5) and (6) and renumber s 245(5) as s 245(7).

28.143 Section 245 applies in two situations where the court considers that the adult has impaired capacity for a matter:

- The first situation is where the court sanctions a settlement between another person and an adult.<sup>1485</sup>
- The second situation is where the court orders an amount to be paid by another person to an adult (including where, as part of the settlement of a proceeding, the parties consent to judgment being entered for the adult).<sup>1486</sup>

28.144 Because section 245 enables the court to exercise the powers of the Tribunal under Chapter 3 of the *Guardianship and Administration Act 2000* (Qld), the court may, if it is satisfied that a plaintiff has impaired capacity ‘for a matter’ (for example, to receive and manage the proceeds of the settlement or the amount that is ordered to be paid), appoint an administrator to receive and manage those funds. This avoids the need for a separate application to be made to the Tribunal for the appointment of an administrator.

### Issue for consideration

28.145 Under the *Guardianship and Administration Act 2000* (Qld), an adult’s capacity is specific to a particular matter. An adult may have capacity for some matters, but not for other matters. It is possible that an adult may have the capacity to make the decisions required of a litigant (so that any settlement of the proceeding does not need to be sanctioned) and yet have impaired capacity for the decisions involved in receiving and managing the proceeds of the litigation.<sup>1487</sup>

28.146 If the court does not sanction the settlement (because sanction is not required), but nevertheless orders that an amount be paid to the adult, the court will have jurisdiction to exercise the Tribunal’s power under Chapter 3 of the Act to appoint an administrator.<sup>1488</sup>

28.147 However, if the court does not sanction the settlement and the terms of the settlement do not involve a court order for the payment of an amount to the adult, section 245 will not apply. That was the situation that arose for consideration in *Welland v Payne*.<sup>1489</sup> In that case, the plaintiff had suffered a closed head injury but was capable of giving instructions to conduct the proceedings, including giving instructions to settle his claim for damages.<sup>1490</sup> The proceedings had settled on the basis that the defendant pay the plaintiff a sum of \$485 000 by way of damages,

1485 As mentioned earlier in this chapter, if a party to a proceeding is a person under a legal incapacity, a settlement of the proceeding is effective only if it is sanctioned by either the court or the Public Trustee: see [28.14]–[28.16] above.

1486 Eg *Brown v Stewart* [2007] 1 Qd R 205, 206–7 (Helman J).

1487 Ibid 206, 210 (Helman J); *Welland v Payne* [2000] QSC 431, [29] (Mullins J).

1488 *Brown v Stewart* [2007] 1 Qd R 205, 206–7 (Helman J).

1489 [2000] QSC 431.

1490 Ibid [1], [29] (Mullins J).

plus costs and fund administration fees. Medical evidence suggested that the adult plaintiff did not have the capacity to manage this settlement sum. The plaintiff therefore applied to the court for an order appointing his father-in-law as his administrator (incorrectly referred to in the application as a 'trustee') to 'take possession and control and manage' the settlement sum.<sup>1491</sup>

28.148 Mullins J considered that the court did not have the power to order the appointment of an administrator in these circumstances. In her Honour's view, the proceeding was not one involving the sanction of a settlement between the adult plaintiff and the defendant (the first situation mentioned in section 245(1)(a)).<sup>1492</sup> Nor did the proceeding involve an order by the court for the payment of an amount to the plaintiff (the second situation mentioned in section 245(1)(a)). In the circumstances, Mullins J considered that 'there is no room for the operation' of this section of the *Guardianship and Administration Act 2000* (Qld).<sup>1493</sup> Consequently, her Honour held that:<sup>1494</sup>

If the applicant does have impaired capacity for a financial matter relevant to receiving, investing and managing the [settlement sum], it would be necessary to transfer the application to the Tribunal pursuant to section 241(1) of the GAA or, alternatively, the applicant could make application to the Tribunal for appointment of Mr Cooper as his administrator for the financial matters relevant to receiving, investing and managing the [settlement sum].

28.149 This raises the issue of whether section 245 of the *Guardianship and Administration Act 2000* (Qld) should be amended to apply to a situation such as that which arose in *Welland v Payne*. It may be considered desirable to amend section 245(1)(a) to include the circumstance where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court. If section 245(1)(a) were amended in that way, the court would have jurisdiction to exercise the power of the Tribunal to appoint an administrator where, in the absence of a court sanction or order, the plaintiff was to receive a settlement sum and the court considered that the plaintiff had impaired capacity to receive, invest and manage that sum.

## Discussion Paper

28.150 In the Discussion Paper, the Commission sought submissions on whether section 245(1)(a) of the *Guardianship and Administration Act 2000* (Qld) should be amended to include the circumstance where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court.<sup>1495</sup>

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1491 Ibid [1]–[3].

1492 Ibid [29].

1493 Ibid [28].

1494 Ibid [30].

1495 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 256.



## Submissions

28.151 Suncorp Metway Insurance Limited submitted that the power of the Supreme Court and the District Court to appoint an administrator, even when a settlement is not required, should be increased in order to eliminate ‘the split jurisdiction between the Courts and the Tribunal’.<sup>1496</sup>

28.152 The former Acting Public Advocate, the Adult Guardian, the Department of Communities, and the family of an adult with impaired capacity were also in favour of amending section 245(1)(a) of the *Guardianship and Administration Act 2000* (Qld) so that the section also applies where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court.<sup>1497</sup>

28.153 The Public Trustee also appeared to support such an amendment:<sup>1498</sup>

Section 245(1)(a) should be amended so that the Court has broader power to appoint an administrator or refer the matter to QCAT and in particular where the jurisdiction of the Court is not otherwise currently triggered.

28.154 The Perpetual Group of Companies did not directly address this issue, but commented:<sup>1499</sup>

Perpetual is neutral as to whether s 245(1)(a) of the GAAA should be amended to allow the court to appoint an administrator where an amount is payable under a settlement agreement by another person to an adult, not being a settlement sanctioned by the court. It might be cheaper to make the application to the tribunal, although it might be considerably slower. On the other hand if, for example, the settlement were reached part way through a trial, evidence of incapacity and need for an administrator might already be before the court.

## The Commission’s view

28.155 If an adult has the capacity to make the decisions required of a litigant in a proceeding, it is not necessary for a settlement of the proceeding to be sanctioned under section 59 of the *Public Trustee Act 1978* (Qld).<sup>1500</sup> However, it is possible that the adult may not have the capacity to receive and manage the settlement proceeds. At present, if the settlement has not been sanctioned by the court, the court does not have the power to appoint an administrator for the adult to receive and manage the settlement proceeds unless the court has ordered that an amount be paid by a person to the adult.

28.156 Accordingly, if an amount is payable to the adult under the terms of a settlement agreement but there is no judgment to that effect, the court does not

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<sup>1496</sup> Submission 21.

<sup>1497</sup> Submissions 160, 164, 169, 177.

<sup>1498</sup> Submission 156A.

<sup>1499</sup> Submission 155.

<sup>1500</sup> See *Public Trustee Act 1978* (Qld) s 59; *Uniform Civil Procedure Rules 1999* (Qld) r 98(1).

have the power to appoint an administrator for the adult. Instead, application must be made to the Tribunal for the appointment of an administrator.

28.157 In the Commission's view, this does not adequately protect the interests of the parties. There is a risk that, if the money is paid to the adult, it may be dissipated before an application is made to the Tribunal and an administrator can be appointed. Further, the party that is required to pay the sum of money to the adult may be unsure whether the adult has the capacity to give a valid discharge in respect of the payment.

28.158 For these reasons, section 245(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended so that the section applies if:

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

## RECOMMENDATIONS

### *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

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### THE ADULT GUARDIAN AND THE PUBLIC TRUSTEE

#### Introduction

29.1 The two public entities that provide guardianship and administration services in Queensland are the Adult Guardian, who may be appointed as an adult’s guardian (and provide guardianship services in other circumstances), and the Public Trustee, who may be appointed as an adult’s administrator (and provide administration services in other circumstances).

29.2 The Adult Guardian does not have any statutory entitlement to charge for the guardianship services provided:

- as a guardian under the *Guardianship and Administration Act 2000* (Qld);
- as an attorney or statutory health attorney under the *Powers of Attorney Act 1998* (Qld);
- when acting as an attorney for personal matters under section 196 of the *Guardianship and Administration Act 2000* (Qld) during the suspension of the operation of a power of attorney;

- when the Adult Guardian makes decisions about health matters under sections 42 or 43 of the *Guardianship and Administration Act 2000* (Qld).<sup>1501</sup>

29.3 In contrast, the *Public Trustee Act 1978* (Qld) provides that the Public Trustee may, by notice in the gazette, fix reasonable fees and charges for its services.<sup>1502</sup> When the Public Trustee is appointed as an adult's administrator for financial matters under the *Guardianship and Administration Act 2000* (Qld), the Public Trustee is generally entitled to charge the following:<sup>1503</sup>

- a personal financial administration fee ranging from \$922 to \$6459, depending on the type of support received by the adult;<sup>1504</sup>
- an asset management fee that varies according to the value of the adult's assets;<sup>1505</sup> and
- a fee of \$693 for each real estate property or other place of residence.<sup>1506</sup>

29.4 These fees also apply when the Public Trustee acts as an attorney for financial matters under the *Powers of Attorney Act 1998* (Qld).<sup>1507</sup>

29.5 However, if an attorney's power for a financial matter is suspended under section 195 of the *Guardianship and Administration Act 2000* (Qld) and the Public Trustee acts as the adult's attorney during the period of suspension,<sup>1508</sup> the Public Trustee's fee is calculated at the rate of \$186 per hour.<sup>1509</sup>

29.6 The Public Trustee's Annual Report for 2008–09 notes that, while the management of the financial affairs of some clients is commercially viable, there are many clients for whom the cost of administration and legal services exceeds their ability to pay. The Annual Report states that, during the reporting period, the

1501 The Adult Guardian's powers under ss 42 and 43 of the *Guardianship and Administration Act 2000* (Qld) are considered in Chapter 23 of this Report.

1502 *Public Trustee Act 1978* (Qld) s 17.

1503 *Public Trustee (Fees and Charges Notice) (No 1) 2009* pt 3, published *Queensland Government Gazette*, 12 June 2009, 583–609.

1504 *Public Trustee (Fees and Charges Notice) (No 1) 2009* s 13(1)(b), sch 4. The maximum fee of \$6459 is payable where the adult is receiving personal financial administration assistance from the Public Trustee and contact with the Public Trustee is more than once per fortnight.

1505 *Public Trustee (Fees and Charges Notice) (No 1) 2009* s 13(2), sch 6. Schedule 6 notes that the 'value of real estate property or other place of residence, motor vehicles, household furniture, effects, chattels and personal jewellery are excluded from the calculation of the value of assets for determining the level of the asset management fee payable'.

1506 *Public Trustee (Fees and Charges Notice) (No 1) 2009* s 13(3), sch 6. However, this fee is not payable if the property is occupied by the adult as his or her principal place of residence: s 14.

1507 *Public Trustee (Fees and Charges Notice) (No 1) 2009* ss 16(a), 17(a).

1508 See *Guardianship and Administration Act 2000* (Qld) s 196(3).

1509 *Public Trustee (Fees and Charges Notice) (No 1) 2009* ss 16(c), 17(b), sch 15 (definition of 'hourly rate').



cost to the Public Trustee of managing these commercially uneconomical estates was \$14 000 000.<sup>1510</sup>

29.7 As far as the Commission is aware, the Queensland position in relation to both the Adult Guardian and the Public Trustee is consistent with the position that applies in the other Australian jurisdictions.

## Issues for consideration

### *The threshold issue*

29.8 The fact that the Adult Guardian does not charge for guardianship services, but that the Public Trustee does charge for administration services, raises a fundamental question about whether there are unique features of their respective roles that justify the different approaches.

29.9 The guardianship of an adult involves matters of an inherently personal nature, for example, decisions about where to live and health care decisions. On one view, it may be inappropriate for the state to charge for the provision of these services. In contrast, while there is no doubt that the appointment of an administrator for an adult has an effect on the adult's lifestyle decisions, the decisions of themselves are of a less personal nature. That may be some justification for the more commercial approach that is taken by the *Public Trustee Act 1978* (Qld) in relation to the Public Trustee's entitlement to remuneration.

29.10 On the other hand, if guardianship is seen as a service for which the state should accept responsibility, on the basis that its purpose is to safeguard the interests of a vulnerable group of people,<sup>1511</sup> the same can be said of the appointment of an administrator for an adult. On that basis, there is an argument that both guardianship and administration services should be provided at no cost to the adult.

### *Is a uniform approach possible?*

29.11 If a uniform approach is to be adopted, the further issues are whether the Adult Guardian should charge for guardianship services (at least where the adult has the capacity to pay) or whether the Public Trustee, like the Adult Guardian, should be publicly funded to provide administration services at no cost to the adult.

29.12 In many cases, the adults for whom the Adult Guardian is appointed would not have the capacity to pay for the services provided. However, there may be some cases where the adults for whom the Adult Guardian is appointed would have the capacity to pay for those services.

29.13 If the Adult Guardian could charge for guardianship services, those additional resources could arguably be employed in enhancing the level of the service provided by the Office of the Adult Guardian (assuming that the Office of

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<sup>1510</sup> Public Trustee (Qld), *Annual Report 2008–2009* (2009) 33.

<sup>1511</sup> See T Carney, *Law at the Margins: Towards social participation* (1991) 83.

the Adult Guardian continued to be publicly funded at its present level and was able to retain any fees that it received for its guardianship services). On the other hand, the collection of the fees charged would of itself entail administrative costs to the Office, and the fees charged might not necessarily be able to be recovered.

29.14 If the Adult Guardian were to charge for guardianship services, two critical issues would need to be resolved.

29.15 The first issue is the basis on which an adult's capacity to pay would be assessed. For example, an adult might have a valuable home, but might have a limited income. This raises a question about whether an adult's liability to be charged for guardianship services should be assessed on the basis of the adult's assets or income or some combination of both.

29.16 The second issue is the scale of fees that should be charged. In the case of the Public Trustee, the fees charged are to a certain extent based on the level of support that the adult receives from the Public Trustee. However, the Public Trustee is also entitled to charge an asset management fee that is referable to the value of the adult's assets. While the first of these fees might be an appropriate model for charging for guardianship services, a fee based on the value of the adult's assets would not have any bearing on the extent, or complexity, of the guardianship services provided.

29.17 Alternatively, if the Public Trustee were required to act as an adult's administrator without being entitled to charge, the Public Trustee would need significant public funding to enable it to carry out that role. Unlike the Office of the Adult Guardian, which is publicly funded to provide guardianship services, the Public Trustee does not receive public funding to provide administration services to adults with impaired capacity.

## Discussion Paper

29.18 In the Discussion Paper, the Commission sought submissions on whether, as a matter of principle, it is appropriate that:<sup>1512</sup>

- (a) the Adult Guardian does not charge for services when the Adult Guardian acts as an adult's guardian; and
- (b) the Public Trustee does charge for services when it is appointed as an adult's administrator.

29.19 The Commission also sought submissions on the following questions:<sup>1513</sup>

- 24-2 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Adult Guardian may charge an adult with impaired capacity for the services provided as:

<sup>1512</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 261.

<sup>1513</sup> Ibid.

- (a) a guardian appointed by the Tribunal; or
  - (b) an attorney appointed under the adult's enduring power of attorney or advance health directive?
- 24-3 If yes to Question 24-2:
- (a) how should an adult's liability to be charged for these services be assessed; and
  - (b) what fee structure should apply in relation to the guardianship services provided by the Adult Guardian?
- 24-4 Alternatively, should the Public Trustee be publicly funded to enable it to act in either of the following capacities without charging:
- (a) as an administrator appointed by the Tribunal; or
  - (b) an attorney appointed under the adult's enduring power of attorney?

## Submissions

### *The Adult Guardian*

29.20 Most of the submissions that addressed the issue of remuneration for guardianship services, including the submission of the Adult Guardian, were of the view that the *Guardianship and Administration Act 2000* (Qld) should not be amended to enable the Adult Guardian to charge for guardianship services.<sup>1514</sup>

29.21 The Adult Guardian referred in her submission to the protective nature of the role of guardian.<sup>1515</sup>

Fundamentally the role is about protection arising from personal decision making. The Adult Guardian does not have access to the adult's funds and it would be anathema to the role if an adult were denied the services of guardianship because they either had no funds or the Adult Guardian had to wait payment of fees before providing services. It is also difficult to see how this would operate in circumstances where the adult for whom we were appointed or their family opposed the appointment of the Adult Guardian. Non-payment of fees would become yet another mechanism to interfere with protection of the adult.

...

Within the child protection system, children are not required to pay for protection. Rather it is incidental to their value within our community that protective services are provided to them. Should adults with incapacity be treated any differently?

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<sup>1514</sup> Submissions 135, 160, 163, 164, 177.

<sup>1515</sup> Submission 164.

29.22 The former Acting Public Advocate also suggested that a distinction could be drawn between ‘the inherent commercial nature of the Public Trustee’s services and the personal nature of the decision-making conducted by the Adult Guardian’.<sup>1516</sup>

29.23 The Adult Guardian emphasised the fact that many of the Adult Guardian’s clients would not have the means to pay for the guardianship services provided.<sup>1517</sup>

If the Adult Guardian were to levy fees for this service, a system of assessment of hardship and waiver would have to be implemented. Most of the clients for whom we are appointed live on pensions and have meagre savings.

29.24 The Adult Guardian also queried how fees would be ‘garnered when the Adult Guardian acts as statutory health attorney’.

29.25 The former Acting Public Advocate also referred to the practical issues that would arise if the Adult Guardian were to charge for services provided:<sup>1518</sup>

If the Adult Guardian were to charge fees for its services, additional administrative arrangements for collection of fees would need to be introduced stretching the Adult Guardian’s already limited resources.

29.26 However, one respondent drew a distinction between the situation where the Adult Guardian is appointed as an adult’s guardian by the Tribunal (where there should be no charge) and the situation where the Adult Guardian is appointed as an adult’s attorney under an enduring power of attorney made by the adult (where the Adult Guardian should be able to charge):<sup>1519</sup>

There are two ... different principles involved here. Whenever there is an appointment by the ... Tribunal, all costs should be Government funded as it is fulfilling a community service. The person appointed by the Tribunal to the care of the Adult Guardian did not ask [for] or request that outcome. As such they should not be charged for a service for which they did not request and / or willing members of the family would be prepared to undertake at no additional cost.

There would be a valid case for the Adult Guardian to impose a charge whenever an adult appointed the Adult Guardian under an enduring power of attorney or advance health directive. This would need to be made clear at the time such as on a payment details advice attached to the power of attorney or advance health directive form so the adult will have full knowledge that the Adult Guardian will charge a fee if appointed. Knowing that a fee is involved could affect the decision of the person to appoint the Adult Guardian. For this reason if a decision is made to allow the Adult Guardian to charge fees under these circumstances then it should only apply to all future applications after it has been approved by Parliament and should not be backdated.

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1516 Submission 160.

1517 Submission 164.

1518 Submission 160.

1519 Submission 20B.

The different principle involved here is that the adult who fills out an enduring power of attorney or advance health directive is making the decision of his or her own free will. In contrast the adult who suffers from impaired decision making capacity has his / her future decided by the Tribunal. As he / she is unable to freely choose the guardian of choice, there should be no charge and all expenses should be government funded.

### **The Public Trustee**

29.27 Several respondents expressed the view that the Public Trustee should not charge for administering an adult's estate or at least some adults' estates.<sup>1520</sup>

29.28 Pave the Way suggested that the Public Trustee should not charge for administering the estates of adults whose assets fall below a specified threshold. It suggested that the Public Trustee should instead receive public funding to enable it to provide that service at no cost.<sup>1521</sup>

While we have no objection to the Public Trustee charging for the administration of medium sized and large estates, we believe that the Public Trustee should be provided with adequate public funds to cover the costs of this service when the size of an adult's estate is below an amount set by regulation and indexed annually. We suggest that this amount should be tied to the assets limit that applies to people receiving Centrelink pensions, so that, where someone for whom the Public Trustee is appointed administrator is eligible to receive the full pension, the Public Trustee should not be entitled to claim fees on administering their assets. The current Centrelink assets limit for someone receiving the full pension is \$307,000 for a single non-home owner, and \$178,000 for a single home owner. Both figures are indexed annually.

29.29 One respondent drew a distinction between the situation where the Public Trustee is appointed as an adult's administrator by the Tribunal (where there should be no charge) and the situation where the Public Trustee is appointed as an adult's attorney under an enduring power of attorney made by the adult (where the Public Trustee should be able to charge).<sup>1522</sup>

29.30 The Public Trustee observed that:<sup>1523</sup>

No doubt as a matter of principle all would prefer that services offered to the community generally and adults with an incapacity in this context were for free.

29.31 However, the Public Trustee noted that it is a self-funding organisation, that its fees and charges are required by statute to be reasonable,<sup>1524</sup> and that its fees and charges are the subject of subordinate legislation and are therefore

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1520 Submissions 135, 141, 177.

1521 Submission 135. Pave the Way is part of Mamre Association Inc, a community organisation in the Brisbane area that supports families who have a family member with a disability.

1522 Submission 20B.

1523 Submission 156A.

1524 See *Public Trustee Act 1978* (Qld) s 17(3)–(4).

subject to scrutiny by Parliament.<sup>1525</sup> The Public Trustee commented that it remains committed to 'targeted community service obligations where the most financially disadvantaged adults with incapacity receive the services of the Public Trustee for nothing or for little cost'. In this regard, the Public Trustee noted that:

81.9% of clients for whom the Public Trustee is appointed as administrator receive the services required and delivered by the Public Trustee at a reduced fee or no fee.

This position is reflective of a community service obligation directed by Government currently holding that an adult with impaired capacity's assets not be eroded by fees to an extent greater than 5% annually (that is fees lawfully chargeable pursuant to the Public Trustee's fees and charges notice may not exceed 5% of the assets which the adult has, excluding any principal place of residence).

Given that the majority of adults for whom the Public Trustee is appointed administrator have very modest assets this means that the fee charged ultimately is very modest. An adult for example with assets to a value of \$10,000 might only be charged pursuant to this policy \$500 in fees annually.

Consequently it might be said that whilst a fee is charged given the injunctive by Government by way of the community services obligations scheme that there is not a significant difference particularly for impecunious clients between the position of the Adult Guardian (who charges no fee) and the Public Trustee.

29.32 The Public Trustee also suggested as a reason for its continued entitlement to charge for its services that 'the nature and content of the work of the financial administrator is involved, necessarily requires financial planning, the preparation of taxation returns and other tolerably complex activities'.

29.33 The Public Trustee also noted that not all adults with impaired capacity are without resources and referred to the fact that trustee companies 'are appointed administrators for adults with not insignificant means'. He suggested that, because other professional administrators and trustee companies would continue to be remunerated, a change to the entitlement of the Public Trustee to be remunerated could have unintended consequences:

where the funds to be managed come from a damages award (this is particularly relevant to personal injuries matters) an amount is allowed for by way of administration fees. A mandate that the Public Trustee should not charge for fees then would release insurers from this impost. This goes to the issue of whether the State should accept responsibility or rather whether (as is currently the law) the person who caused the incapacity at law (a negligent driver of a motor vehicle for example) should bear that burden — through their insurance typically.

29.34 The Public Trustee suggested that the remuneration chargeable by the Public Trustee in acting as an administrator 'should be squarely a question for Government':

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1525

Submission 156A.

The current mechanism of the Public Trustee's fees and charges notices attract the scrutiny of Parliament and are reviewed (or at least new fees and charges progressed) historically on an annual basis. The mechanism in short for Government to appropriately balance the 'principles' at play in respect of the Public Trustee's fees and charges is one with necessary flexibility, which when coupled with the Public Trustee's community services obligations framework appropriately balances as far as the Public Trustee understands the need for incapacitated adults to have access to professional administration services at a cost which is affordable.

The current system then in the Public Trustee's view has great merit.

...

The Public Trust Office is a self-funding organisation, currently not drawing from consolidated revenue. Careful judgement is exercised in respect of the disposition of resources and expenditure of funds. It is ultimately a question for Government as to whether that system should be replaced with one of public funding but in general the question is not one which is being attended by great controversy of recent times and in the absence of good reason to alter the present position the Public Trustee sees little merit in a change.

29.35 The Public Trustee also commented that he is not aware of any other Australian jurisdiction where the services of a state agency in an analogous role of administrator do not attract a fee (subject to the overlay of the agency's community service obligations).

29.36 A number of respondents have suggested that the fees charged by the Public Trustee are high.<sup>1526</sup>

29.37 Queensland Aged and Disability Advocacy Inc ('QADA') commented that the fees charged by the Public Trustee for day-to-day financial management under the *Public Trustee (Fees and Charges Notice) (No 1) 2009*<sup>1527</sup> are higher than the fees charged in most other States and Territories.<sup>1528</sup> QADA also suggested that the 'personal financial administration fee', which varies according to the type of support provided to the adult,<sup>1529</sup> does not always reflect the nature and complexity of the service provided:<sup>1530</sup>

While we do not disagree that the Public Trustee, in general, performs its functions diligently, we would argue that many of the tasks it undertakes in relation to pensioners with impaired capacity are fairly simple and do not justify high fees. Pensioners without significant assets or complicated financial affairs may need, for example, assistance paying bills on time, which can be achieved by setting up direct debits in most cases, and may occasionally need assistance when dealing with Centrelink or their bank. QADA believes that this level of service does not justify the high level of fees charged.

1526 Submissions C35, C39, C116, C130, C150, 126.

1527 See [29.3] above.

1528 Submission 148.

1529 See [29.3] above.

1530 Submission 148.

### The Commission's view

29.38 The decisions made by the Adult Guardian when acting as a guardian, attorney or statutory health attorney, or when exercising power under sections 42 and 43 of the *Guardianship and Administration Act 2000* (Qld), are of an inherently personal nature, where the Adult Guardian is safeguarding the most fundamental interests of vulnerable adults. It would therefore be inappropriate for the Adult Guardian to charge for performing this role.

29.39 There are also significant practical difficulties that militate against making a change to the current position.

29.40 In many cases, the adults for whom the Adult Guardian is acting do not have assets against which guardianship fees could be charged. Further, even where the adults have assets, those assets are not under the control of the Adult Guardian, which could create difficulties in recovering fees. It is likely that a considerable proportion of fees charged would not be recovered.

29.41 It would also be difficult to determine an appropriate basis on which to charge for the range of different decisions that may be made by the Adult Guardian — for example, a decision to withhold or withdraw a life-sustaining measure or a decision to place an adult in a residential facility. While there are several different models for charging for administration services, short of charging an hourly rate, these other models would not be readily adapted to the guardianship context. Certainly, it would not be appropriate to charge for guardianship decisions on the basis of the value of the adult's assets.

29.42 However, the Commission is of the view that it is appropriate for the Public Trustee to continue to charge for the administration services provided as an administrator or attorney, or when acting as an attorney during the period of suspension of an enduring power of attorney in relation to financial matters.

29.43 While the Public Trustee is also safeguarding the interests of vulnerable adults when acting in these roles, the decisions themselves are of a less personal nature. Further, for the Public Trustee to be appointed as an adult's administrator the adult must at least have some assets in respect of which decisions need to be made. As noted above, this will not necessarily be the case where the Adult Guardian is appointed as an adult's guardian. The Commission also notes the community service obligations to which the Public Trustee is subject.

29.44 Further, if the Public Trustee's services were to be provided at no cost to the adult, it is likely that there would be a reduced demand for the services of trustee companies, given that they would still need to charge for their services. As a result, trustee companies might well withdraw from providing services in this area. While the number of appointments of trustee companies is relatively small, such a change would nevertheless reduce the Tribunal's choice in relation to potential administrators.

29.45 The Commission notes that a number of respondents have raised issues about the Public Trustee's fees. Generally, the Commission considers it appropriate that the Public Trustee's fees and charges are set by regulation. Given



the large number of adults for whom the Public Trustee is appointed as administrator,<sup>1531</sup> it would be impracticable to have the Tribunal authorise the fees that may be charged by the Public Trustee in each case where the Public Trustee is appointed as an adult's administrator.

29.46 However, the Commission is not in a position to express a view about the appropriateness of the quantum of the fees and charges that are charged by the Public Trustee. Moreover, the issue does not fall within the scope of the Commission's review.

## PROFESSIONAL ADMINISTRATORS (OTHER THAN THE PUBLIC TRUSTEE AND TRUSTEE COMPANIES)

29.47 Section 48 of the *Guardianship and Administration Act 2000* (Qld) deals with the Tribunal's power to order that a professional administrator be remunerated.<sup>1532</sup> It applies to the remuneration of an administrator for an adult who 'carries on a business of or including administrations' under the *Guardianship and Administration Act 2000* (Qld),<sup>1533</sup> such as a lawyer or an accountant.<sup>1534</sup> Such an administrator may be remunerated in respect of the administration only if the Tribunal so orders.<sup>1535</sup>

### Remuneration — pre-May 2010

29.48 Until it was amended in May 2010, section 48 of the *Guardianship and Administration Act 2000* (Qld) provided:<sup>1536</sup>

#### 48 Remuneration of professional administrators

- (1) If an administrator for an adult carries on a business of or including administrations under this Act, the administrator is entitled to remuneration from the adult if the tribunal so orders.
- (2) The remuneration may not be more than the commission payable to a trustee company under the *Trustee Companies Act 1968* if the trustee company were administrator for the adult.
- (3) Nothing in this section affects the right of the public trustee or a trustee company to remuneration or commission under another Act.

1531 See [25.7] above.

1532 Note, s 47 of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian or an administrator for an adult is entitled to reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator. That provision applies to all guardians and administrators.

1533 *Guardianship and Administration Act 2000* (Qld) s 48(1).

1534 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 337 (Mullins J).

1535 *Guardianship and Administration Act 2000* (Qld) s 48(1).

1536 *Guardianship and Administration Act 2000* (Qld) s 48 was amended by s 102 of the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld), which commenced on 6 May 2010.

29.49 Section 48(2) provided that the remuneration of a professional administrator could not exceed the commission payable to a trustee company under the *Trustee Companies Act 1968* (Qld) if the trustee company were administrator for the adult. The commission that could be charged by a trustee company was, until May 2010, regulated by section 41 of the *Trustee Companies Act 1968* (Qld).<sup>1537</sup> The effect of section 48(2) was to put ‘a ceiling on the remuneration that [could] be approved by the Tribunal’ for the administrator.<sup>1538</sup>

### Remuneration — from May 2010

29.50 As explained later in this chapter, the remuneration of trustee companies is now regulated by the *Corporations Act 2001* (Cth), rather than by section 41 of the *Trustee Companies Act 1968* (Qld).<sup>1539</sup> To ‘facilitate changes being made at the national level in relation to the Commonwealth regulation of trustee companies’,<sup>1540</sup> the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) made a number of amendments to the *Trustee Companies Act 1968* (Qld), including the repeal of section 41 of that Act.<sup>1541</sup>

29.51 The *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) also amended section 48 of the *Guardianship and Administration Act 2000* (Qld).<sup>1542</sup> That amendment was required because the reference in section 48(2) to the commission payable to a trustee company under the *Trustee Companies Act 1968* (Qld) was no longer applicable.<sup>1543</sup>

29.52 The amending provision replaced section 48(2) of the *Guardianship and Administration Act 2000* (Qld) and amended section 48(3). Section 48 now provides:

#### **48 Remuneration of professional administrators**

- (1) If an administrator for an adult carries on a business of or including administrations under this Act, the administrator is entitled to remuneration from the adult if the tribunal so orders.

<sup>1537</sup> *Trustee Companies Act 1968* (Qld) s 41 is discussed out at [29.64]–[29.66] below. Section 41 was repealed, with effect from 6 May 2010, by s 86 of the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) as part of amendments made to facilitate the transfer of the regulation of trustee companies to the Commonwealth.

<sup>1538</sup> *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 337 (Mullins J).

<sup>1539</sup> See the discussion commencing at [29.70] below.

<sup>1540</sup> See Explanatory Notes, *Fair Work (Commonwealth Powers) and Other Provisions Bill 2009* (Qld) 1.

<sup>1541</sup> See *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 86, which commenced on 6 May 2010.

<sup>1542</sup> See *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 102, which commenced on 6 May 2010.

<sup>1543</sup> See Explanatory Notes, *Fair Work (Commonwealth Powers) and Other Provisions Bill 2009* (Qld) 40.

- (2) The remuneration may not be more than the amount the tribunal considers fair and reasonable, having regard to—
  - (a) the nature and complexity of the service; and
  - (b) the care, skill and specialised knowledge required to provide the service; and
  - (c) the responsibility displayed in providing the service; and
  - (d) the time within which the service was provided; and
  - (e) the place where, and the circumstances in which, the service was provided.
- (3) Nothing in this section affects the right of the public trustee or a trustee company to remuneration or commission under another Act or the Corporations Act.

***Transitional provisions — professional administrators appointed before May 2010***

29.53 The *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) also inserted a new section 268 into the *Guardianship and Administration Act 2000* (Qld). Section 268 preserves the operation of repealed section 48(2) with respect to an order made by the Tribunal before the commencement of the new provisions that an administrator is entitled to remuneration, but only until the Tribunal makes another order:

**268 Remuneration of professional administrators**

- (1) This section applies if the tribunal orders, before the commencement, that an administrator for an adult as mentioned in section 48(1) is entitled to remuneration from the adult.
- (2) Repealed section 48(2) continues to apply, despite its repeal, in relation to the remuneration, until the tribunal makes a further order about the administrator's remuneration.
- (3) In this section—

***commencement*** means the commencement of this section.

***repealed section 48(2)*** means section 48(2) as it existed before its repeal by the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009*.

29.54 Accordingly, until the Tribunal makes a further order under section 48(1) about the remuneration of a professional administrator, the repealed section 41 of the *Trustee Companies Act 1986* (Qld) will continue to cap the fees that may be charged by a professional administrator (other than the Public Trustee or a trustee company) who was appointed and entitled to remuneration before the commencement of the new section 48(3).

## TRUSTEE COMPANIES

### The appointment of trustee companies as administrators

29.55 Trustee companies are eligible for appointment as administrators under the *Guardianship and Administration Act 2000* (Qld)<sup>1544</sup> and as attorneys under enduring powers of attorney made under the *Powers of Attorney Act 1998* (Qld).<sup>1545</sup>

29.56 Trustee companies are appointed as administrators in only a very small percentage of cases. For example, in 2008–09, of the 2116 adults for whom an administrator was appointed, the Public Trustee was appointed for 1655 adults (78.2 per cent) and family members were appointed for 415 adults (19.6 per cent). Of the remaining 46 adults (2.2 per cent), the Tribunal appointed someone other than a family member or the Public Trustee.<sup>1546</sup> The last of these statistics would include appointments of trustee companies.

29.57 Although trustee companies are not commonly appointed as administrators, they tend to be appointed where the value of the adult's estate exceeds \$500 000,<sup>1547</sup> usually as the result of an award in, or settlement of, a personal injuries action.

29.58 In *Willett v Fletcher*,<sup>1548</sup> the High Court held that, where a plaintiff must have an administrator appointed to manage his or her financial affairs and the plaintiff's incapacity to deal with those matters was caused by the defendant's negligence, the plaintiff is entitled to be awarded a lump sum to compensate the plaintiff for losses past, present and future, including the plaintiff's expenses of managing the damages awarded.<sup>1549</sup> The Court commented:<sup>1550</sup>

In a case, again like the present, where the plaintiff will never be able to manage his or her affairs and will never be able to work, the damages awarded will often include a significant allowance for future economic loss. The plaintiff can make no decision about the fund. An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The incurring of the expenses is a direct result of the defendant's negligence. The damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she would have been in had the tort not been committed. That requires comparison with the position the plaintiff would have been in without the award of a lump sum for damages.

1544 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

1545 *Powers of Attorney Act 1998* (Qld) s 29(1)(c).

1546 Guardianship and Administration Tribunal, *Annual Report 2008–2009* (2009) 42.

1547 Submission 156A.

1548 (2005) 221 CLR 627.

1549 *Ibid* 643 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

1550 *Ibid*.

29.59 The Court held that it would be necessary to consider the statutory limitations on the trustee company charges, but observed that evidence had not been led on how those limitations would apply:<sup>1551</sup>

Assessing what remuneration and expenses are properly charged or incurred by an administrator requires consideration of the relevant statutory limitations on those charges. It does not depend only upon identifying whether Perpetual's proposed fees and charges are less than those that the Public Trustee would be entitled to charge. As noted earlier, however, no reference was made to the relevant statutory provisions either at first instance or on appeal to the Court of Appeal and there is no evidence that would reveal how the relevant statutory limitations would apply.

29.60 The Court emphasised that the proceeding that was the subject of the appeal in *Willett v Futcher* was 'a contest between plaintiff and defendant about damages, not a contest about the amount to be charged against the trust fund'.<sup>1552</sup> In particular, the proceeding was not an application by the trustee company for an order allowing its remuneration or fixing the amount of the remuneration.<sup>1553</sup> The Court remitted the matter to the Queensland Court of Appeal to determine, on the evidence adduced in the original hearing, the amount of damages to be allowed.<sup>1554</sup>

### Remuneration — pre-May 2010

29.61 The effect of section 48 of the *Guardianship and Administration Act 2000* (Qld) on the remuneration of trustee companies was considered by the Supreme Court in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*.<sup>1555</sup> Perpetual Trustees Queensland Limited ('Perpetual') was appointed in 2001 as the administrator for an adult with impaired capacity to manage the settlement proceeds from her personal injuries action. In the course of reviewing Perpetual's appointment, the Tribunal identified several questions of law in relation to the construction of section 48 of the *Guardianship and Administration Act 2000* (Qld) and Perpetual's entitlement to remuneration as an administrator. The Tribunal referred those questions to the Supreme Court under section 105A of the Act.

29.62 Mullins J observed that section 48(3) of the *Guardianship and Administration Act 2000* (Qld) 'expressly recognises that the remuneration of a trustee company that acts as an administrator under the GAA is regulated by

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1551 Ibid.

1552 Ibid.

1553 Ibid 644. In fact, the trustee company was not a party to the proceeding and was not represented at the proceeding: at 629.

1554 Ibid 644. The Court observed (at 644) that, if the proceeding had been an application by the trustee company for an order allowing its remuneration, it 'may well then have been appropriate to remit the matter to the primary judge to receive further evidence about what remuneration, consistent with the relevant statutory limitations on the remuneration that might be charged, was properly to be allowed'.

1555 [2008] 2 Qd R 323.

another Act (which must be taken to be a reference to the *TCA*)'.<sup>1556</sup> Her Honour held that the effect of section 48(3) was to exclude the operation of section 48(1) and (2) when a trustee company or the Public Trustee has been appointed as an administrator under the *GAA*.<sup>1557</sup> Mullins J stated:<sup>1558</sup>

The proper construction of s 48 of the *GAA* is that it does not apply to the remuneration of the Public Trustee or a trustee company where such an entity is acting as an administrator of an adult under the *GAA*.

29.63 As a result, the remuneration to which Perpetual was entitled was regulated by the *Trustee Companies Act 1968* (Qld).

29.64 Under section 41(1) of the *Trustee Companies Act 1968* (Qld), a trustee company that was appointed as an adult's administrator was entitled to receive a commission at a rate to be fixed from time to time by the board of directors of the trustee company but not in any case exceeding, after discounting for any GST payable on any supply the commission relates to:<sup>1559</sup>

- \$5 for every \$100 of the capital value of the estate; and
- \$6 for every \$100 of the income received by the trustee company on account of the estate.

29.65 In certain circumstances, a trustee company was entitled to be remunerated on a different (and higher) basis. Section 41(7)(b) provided that:

(7) Nothing in this section shall prevent—

...

- (b) the payment of any commission or fee which has been agreed upon between the trustee company and the parties interested therein; either in addition to or in lieu of the commission provided for by this section.

29.66 In *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*,<sup>1560</sup> Mullins J held that the adult's brother, as her litigation guardian<sup>1561</sup> in the original personal injuries action, did not have the authority to enter into a binding agreement with Perpetual under section 41(7)(b) of the *Trustee*

<sup>1556</sup> Ibid 338.

<sup>1557</sup> Ibid.

<sup>1558</sup> Ibid.

<sup>1559</sup> In addition to the commission to which a trustee company was entitled under s 41 of the *Trustee Companies Act 1968* (Qld), a trustee company was also entitled under s 45(1) of that Act to charge a fee for carrying out specified services, including the arrangement of insurances and the preparation of income and land tax returns. That section has also been omitted from the Act: *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) s 86.

<sup>1560</sup> [2008] 2 Qd R 323.

<sup>1561</sup> A person who is under a legal disability may bring or defend legal proceedings only by a litigation guardian: *Uniform Civil Procedure Rules 1999* (Qld) r 93(1). This issue is considered in Chapter 28 of this Report.

*Companies Act 1968* (Qld) about the amount of the remuneration payable to Perpetual in its role as the adult's administrator:<sup>1562</sup>

The issue is whether a person who is the litigation guardian of another person who was under a legal incapacity pursuant to r 95 of the *UCPR* has authority by virtue of the role of litigation guardian to enter into a binding agreement under s 41(7)(b) of the *TCA* on behalf of an incapacitated adult with a trustee company about the amount of remuneration payable to the trustee company in its role as administrator for the adult.

Perpetual submits that agreement as to an administrator's fees is so closely connected with the disposition of an incapacitated plaintiff's damages from the litigation that it is within the scope of the authority of the litigation guardian to enter into that agreement on behalf of the plaintiff.

The extent of the authority of a litigation guardian is found in r 93(2) of the *UCPR*. Subject to what else is provided for in the rules, the litigation guardian is able to do 'anything in a proceeding (including a related enforcement proceeding) required or permitted by these rules to be done by a party'. Fees payable to an administrator are expended from the settlement sum after the proceeding has concluded. Even if the litigation guardian enters into the agreement for services with the proposed administrator before the sanction of the settlement, the agreement relates to services to be provided after the settlement has been sanctioned and the proceeding concluded.

29.67 Following the Supreme Court's decision in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*, the Tribunal resumed its hearing in relation to the review of Perpetual's appointment as the adult's administrator.<sup>1563</sup> The Tribunal observed that its role was limited to monitoring the amount of the remuneration charged by a professional administrator:<sup>1564</sup>

Although the Tribunal cannot regulate or set the remuneration of trustee companies or of the Public Trustee when acting as an administrator under the Act, the Tribunal can monitor the remuneration being charged to ensure that the amount of remuneration charged against the funds of a person with impaired decision making capacity is lawful.

29.68 The Tribunal held that it had no jurisdiction to determine whether a trustee company acting as an administrator was entitled to charge fees in excess of the commission to which a trustee company was entitled under section 41 of the Act.<sup>1565</sup>

The fees properly charged by law by a trustee company are not a matter that can be regulated by this Tribunal. Only a court can determine whether Perpetual can lawfully charge fees in excess of the statutory fee scheme set down in section 41(7) of the *Trustee Companies Act 1968*.

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1562 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 338–9.

1563 See *Re TAD* [2008] QGAAT 76.

1564 *Ibid* [139].

1565 *Ibid* [148].

29.69 The Tribunal commented, however, that if the court were to determine that Perpetual could lawfully charge fees in excess of the statutory maximum in section 41(1) of the *Trustee Companies Act 1968* (Qld):<sup>1566</sup>

then this Tribunal would review its procedures and would no longer monitor ongoing fees charged by trustee companies by comparing the charged fees with the fees permitted in the statutory scheme. Until such a determination is made, the Tribunal considers it is necessary and appropriate to continue the comparison of charged fees to the level of fees allowed by the *Trustee Companies Act 1968*.

### Remuneration — from May 2010

29.70 When schedule 2 of the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth) commenced on 6 May 2010,<sup>1567</sup> it made significant changes to the regulation of trustee companies, including the regulation of their remuneration. The Act inserted a new Chapter 5D into the *Corporations Act 2001* (Cth), implementing the transfer of trustee company regulation from the States and Territories to the Commonwealth. The Explanatory Memorandum for the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) noted that there are ten licensed private trustee companies in Australia, the ‘majority of which are licensed and operate in multiple jurisdictions’.<sup>1568</sup> The purpose of the Act was described as being to create ‘a national licensing regime for trustee companies, thereby reducing the regulatory burden on those companies’.<sup>1569</sup>

29.71 The *Corporations Act 2001* (Cth), as amended by the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth), requires a licensed trustee company to ensure that an up-to-date schedule of the fees that it generally charges for the provision of ‘traditional trustee company services’:<sup>1570</sup>

- is published at all times on a website maintained by or on behalf of the trustee company; and
- is available free of charge at offices of the trustee company during the usual opening hours of those offices.

29.72 ‘Traditional trustee company services’ is defined to include ‘performing estate management functions’, which is further defined to include ‘acting as agent, attorney or nominee’ and ‘acting as manager or administrator (including in the

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<sup>1566</sup> Ibid.

<sup>1567</sup> See *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth) s 2(1).

<sup>1568</sup> Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 33.

<sup>1569</sup> Ibid.

<sup>1570</sup> *Corporations Act 2001* (Cth) s 601TAA.



capacity as guardian) of the estate of an individual'.<sup>1571</sup> Accordingly, Chapter 5D of the *Corporations Act 2001* (Cth) applies to the fees of a trustee company that is appointed by the Tribunal or the Supreme Court as the administrator of an adult with impaired capacity or by an adult as an attorney under an enduring power of attorney.

29.73 The general approach of the new provisions is to deregulate the fees charged for traditional trustee company services,<sup>1572</sup> subject to the requirement in section 601TCA that a licensed trustee company must not charge fees in excess of its published schedule of fees.

29.74 The key provisions that now apply to a trustee company that is the administrator or attorney of an adult with impaired capacity are:

#### **601TAB Disclosure to clients of changed fees**

- (1) If, while a licensed trustee company continues to provide a particular traditional trustee company service to a client or clients, the trustee company changes the fees that it will charge for the provision of the service, the trustee company must, within 21 days of the change of fees taking effect, comply with paragraph (a) or (b) in relation to the client or each client:
- (a) if the client has requested to be sent copies of changed fees—send the client a copy of the changed fees in accordance with subsection (2); or
  - (b) in any other case—directly notify the client, in writing, that the changed fees are available on the internet on a specified website maintained by or on behalf of the trustee company.

Note 1: Initial disclosure to a client of the fees that a trustee company will charge for the provision of a trustee company service will generally occur through the provision to the client of a Financial Services Guide under Part 7.7. However, this section is not limited just to situations where there has been an initial disclosure through a Financial Services Guide.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A copy of changed fees that is sent to a client under paragraph (1)(a) must be:
- (a) an electronic copy, if that is what the client has requested; or
  - (b) a hard copy, in any other case.
- (3) If a client to whom a traditional trustee company service is provided is under a legal disability, the following provisions have effect:

<sup>1571</sup> *Corporations Act 2001* (Cth) s 601RAC(1)(a), (2)(c), (e). Under *Corporations Regulations 2001* (Cth) reg 5D.1.02, traditional trustee company services do not include acting in the capacity of 'a person named in a power of attorney as an attorney when not actively providing a service or function'.

<sup>1572</sup> Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 49.

- (a) a copy of changed fees required by paragraph (1)(a), or a notice required by paragraph (1)(b), must instead be given to an agent of the client;
- (b) a request referred to in paragraph (1)(a) or (2)(a) may instead be made by an agent of the client.

**601TBA Charging of fees for the provision of traditional trustee company services**

- (1) Subject to this Part, a licensed trustee company may charge fees for the provision of traditional trustee company services.
- (2) If a provision of this Part limits the fees that a licensed trustee company may charge for the provision of a particular traditional trustee company service, the trustee company must not charge fees for that service in excess of that limit.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Excess fees may also be recovered under section 601XAA.

**601TBB Part does not prevent charging of fees as agreed etc.**

- (1) Nothing in this Part prevents a licensed trustee company from charging:
  - (a) any fees that a testator, in his or her will, has directed to be paid; or
  - (b) any fees that have been agreed on in accordance with subsection (2).
- (2) An agreement referred to in paragraph (1)(b) that relates to the fees that may be charged by a licensed trustee company for the provision of a particular traditional trustee company service must be between the trustee company and:
  - (a) subject to paragraph (b) of this subsection—a person or persons who have authority to deal with the trustee company on matters relating to the provision of the service; or
  - (b) if the regulations prescribe the person or persons with whom the agreement must be made—that person or those persons.

...

**601TCA Fees otherwise than for being the trustee or manager of a charitable trust**

- (1) This section applies to a particular provision of a traditional trustee company service by a licensed trustee company, unless:
  - (a) the service consists of being the trustee or manager of a charitable trust (see Division 4); or

- (b) the provision of the service started before the commencement of this section.<sup>1573</sup>
- (2) The trustee company must not charge fees that are in excess of its schedule of fees that was most recently published as required by section 601TAA before the trustee company started to provide the service.
- (3) This section does not limit anything in Division 2. (note added)

29.75 Under section 601TAB, if a licensed trustee company changes its fees, it is required, within 21 days, to give specified notices to its client. Subsection (3) deals with the notice requirements that apply if the client is under a legal disability. In that situation, the notices must be given to 'an agent of the client'. The Explanatory Memorandum for the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) stated, in relation to this requirement, that 'agent' is sufficiently broad to encompass a person's legal representative'.<sup>1574</sup>

29.76 In relation to guardianship matters, however, the need for a trustee company to give the relevant notices will arise only if the trustee company is the adult's administrator or attorney for financial matters. In that situation, it is not clear how the new provisions can safeguard the adult's interests.

29.77 Under the new provisions, the court has the power to review the fees charged by a licensed trustee company and to reduce the fees if it considers that the fees are excessive.<sup>1575</sup> However, that power does not apply to fees that are charged as permitted by section 601TBB.<sup>1576</sup> That section will apply to a person who made an enduring power of attorney appointing a trustee company as the attorney and agreed that the trustee company may charge fees at a higher rate than the trustee company's published rate.

### Transitional provisions — trustee companies with existing clients

29.78 Section 1496 of the *Corporations Act 2001* (Cth) provides that the regulations made under that Act may make 'transitional, application or saving' provisions in relation to the trustee company regulation amendments made by schedule 2 of the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth).

29.79 Sections 1493 and 1496 provide:

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<sup>1573</sup> If the provision of the service started before the commencement of s 601TCA of the *Corporations Act 2001* (Cth), see [29.80] below.

<sup>1574</sup> Explanatory Memorandum, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Cth) 51.

<sup>1575</sup> *Corporations Act 2001* (Cth) s 601TEA(1).

<sup>1576</sup> *Corporations Act 2001* (Cth) s 601TEA(2).

### 1493 Definitions

In this Division:

**amending Schedule** means Schedule 2 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*.

**commencement** means the commencement of the amending Schedule.

**modify** includes make additions, omissions and substitutions.

...

### 1496 General power for regulations to deal with transitional matters

- (1) The regulations may make provisions of a transitional, application or saving nature in relation to any of the following:
  - (a) the transition from the regime provided for by laws of the States and Territories (as in force before commencement) relating to trustee companies to the regime provided for by this Act as amended by the amending Schedule;
  - (b) the amendments and repeals made to this Act by the amending Schedule.
- (2) Without limiting subsection (1), regulations made for the purpose of that subsection may modify provisions of this Act.

29.80 Regulation 4 of the *Corporations Amendment Regulations 2010 (No 3)* (Cth) provides that, if a licensed trustee company had an existing client at the commencement of Chapter 5D of the Act, the fee the company was entitled to charge under the relevant State law for traditional trustee company services continues to apply, whether or not the State law has since been repealed:

#### 4 Transitional arrangements for charging of fees

- (1) For section 1496 of the Act, Part 5D.3 (other than Division 4) of the Act applies to a licensed trustee company as set out in this regulation.
- (2) If a licensed trustee company had an existing client at the commencement of Schedule 1 to these Regulations, the fee the company was entitled to charge under the relevant State law for traditional trustee company services to the client continues to apply to those services whether or not the relevant State law has since been repealed.
- (3) In this regulation, a **relevant State law** is a law of a State or Territory in force immediately before the commencement of Schedule 2 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* that regulates the fees that may be charged by companies for the provision of traditional trustee company services.

29.81 Accordingly, the repealed section 41 of the *Trustee Companies Act 1968* (Qld) continues to regulate the fees charged by a trustee company that was acting

as the administrator or attorney for an adult with impaired capacity before the commencement of the new provisions of the *Corporations Act 2001* (Cth).<sup>1577</sup>

### ***Interaction with State legislation***

29.82 Section 601RAE of the *Corporations Act 2001* (Cth) deals with the interaction between the trustee company provisions of that Act and State and Territory laws about trustee companies. It provides:

#### **601RAE Interaction between trustee company provisions and State and Territory laws**

- (1) The ***trustee company provisions*** are:
  - (a) the provisions of this Chapter, and regulations or other instruments made for the purposes of this Chapter; and
  - (b) the provisions of Chapter 7, and regulations or other instruments made for the purposes of Chapter 7, as they apply in relation to financial services that are traditional trustee company services.
- (2) Subject to subsections (3) and (4), the trustee company provisions are intended to apply to the exclusion of laws of a State or Territory of the following kinds:
  - (a) laws that authorise or license companies to provide traditional trustee company services generally (as opposed to laws that authorise or license companies to provide a particular traditional trustee company service);
  - (b) laws that regulate the fees that may be charged by companies for the provision of traditional trustee company services, and laws that require the disclosure of such fees;
  - (c) laws that deal with the provision of accounts by companies in relation to traditional trustee company services that they provide;
  - (d) laws that deal with the duties of officers or employees of companies that provide traditional trustee company services;
  - (e) laws that regulate the voting power that people may hold in companies that provide traditional trustee company services, or that otherwise impose restrictions on the ownership or control of companies that provide traditional trustee company services;
  - (f) laws (other than laws referred to in section 601WBC) that deal with what happens to assets and liabilities held by a company, in connection with the provision by the company of traditional trustee company services, if the company ceases to be licensed or authorised to provide such services.

<sup>1577</sup>

In addition, *Corporations Amendment Regulations 2010* (No. 3) (Cth) reg 5 provides that certain unlicensed trustee companies are exempt, until 30 April 2011, from s 601TAB of the Act.

- (3) Subject to subsection (4), the trustee company provisions are not intended to apply to the exclusion of laws of a State or Territory that require a company to have (or to have staff who have) particular qualifications or experience if the company is to provide traditional trustee company services of a particular kind.
- (4) The regulations may provide:
  - (a) that the trustee company provisions are intended to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws; or
  - (b) that the trustee company provisions are intended not to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws.
- (5) The provisions of this Chapter have effect subject to this section.
 

Note: For example, section 601SAC (which provides that the powers etc. conferred by or under this Chapter are in addition to other powers etc.) is to be interpreted subject to this section.
- (6) Part 1.1A does not apply in relation to the trustee company provisions. (emphasis added)

29.83 Section 601RAE(2)(b) provides that, subject to subsections (3) and (4), the trustee company provisions are intended to apply to the exclusion of specified laws of a State or Territory, including 'laws that regulate the fees that may be charged by companies for the provision of traditional trustee company services, and laws that require the disclosure of such fees'.

29.84 Significantly, section 601RAE(6) provides that Part 1.1A of the *Corporations Act 2001* (Cth) does not apply in relation to the trustee company provisions. This means that the State is not able to pass legislation that, under section 5F of the Act, would exclude the operation of all or part of the *Corporations Act 2001* (Cth).

29.85 Section 601RAE(4) gives the Commonwealth the option to provide by regulation whether or not the trustee company provisions in the Act are intended to apply to the exclusion of 'prescribed State or Territory laws'.

29.86 The *Corporations Regulations 2001* (Cth) include the following provision:<sup>1578</sup>

**5D.1.04 Interaction between trustee company provisions and State and Territory laws**

- (1) For paragraph 601RAE(4)(a) of the Act, the trustee company provisions are intended to apply to the exclusion of the provisions of State or Territory laws prescribed in Schedule 8AB.

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This provision was inserted by *Corporations Amendment Regulations 2010* (No. 3) (Cth) reg 3 sch 1 [1].

- (2) For paragraph 601RAE(4)(b) of the Act, the trustee company provisions are intended not to apply to the exclusion of the State or Territory laws, or the provisions of State or Territory laws, prescribed in Schedule 8AC, so far as those laws relate to an administrator of a person's estate.
- (3) For paragraph 601RAE(4)(b) of the Act, the trustee company provisions are intended not to apply to the exclusion of the State or Territory laws, or the provisions of State or Territory laws, prescribed in Schedule 8AD.

29.87 Schedule 8AB does not list any Queensland Acts. However, schedules 8AC and 8AD of the Regulations both refer to the *Guardianship and Administration Act 2000* (Qld). Schedule 8AD also refers to any regulations made under the *Guardianship and Administration Act 2000* (Qld).<sup>1579</sup>

29.88 The commentary accompanying the 2010 draft regulations indicates that it is intended that:<sup>1580</sup>

matters relating to the role of trustee companies as administrators of estates under the State and Territory guardianship legislation will remain subject to State and Territory laws and tribunals. In this role, trustee companies will however be supervised by ASIC in relation to their [Australian Financial Services Licence] conditions, their charging of fees and certain other matters.

29.89 Accordingly, the *Guardianship and Administration Act 2000* (Qld) still regulates matters such as the appointment of a trustee company and the duties of a trustee company as an adult's administrator. However, the remuneration of a trustee company that is appointed after the commencement of the trustee company provisions of the *Corporations Act 2001* (Cth) is regulated by that Act.

## Issues for consideration

29.90 As noted earlier, the Public Trustee's gazetted notice of fees and charges includes specific provisions in relation to its remuneration when acting as an administrator under the *Guardianship and Administration Act 2000* (Qld) or as an attorney under the *Powers of Attorney Act 1998* (Qld).<sup>1581</sup> In contrast, the commission to which a trustee company is now entitled is regulated by either Chapter 5D of the *Corporations Act 2001* (Cth) or, for services provided to an existing client at the commencement of Chapter 5D, section 41 of the *Trustee Companies Act 1968* (Qld). Neither the *Corporations Act 2001* (Cth) provisions nor the provisions of section 41 of the *Trustee Companies Act 1968* (Qld) are specific to a trustee company's role as an administrator or attorney under the guardianship legislation; rather, both Chapter 5D and section 41 apply when a trustee company is acting in any of the range of capacities covered by those statutes.

<sup>1579</sup> Neither schedule refers to the *Powers of Attorney Act 1998* (Qld).

<sup>1580</sup> Australian Government, *Exposure Draft of Amendments to the Corporations Regulations 2001 Relating to Trustee Companies, March 2010, Commentary* (2010) 1–2 <[http://www.treasury.gov.au/documents/1741/PDF/Corporations\\_Amendment\\_Regulations\\_2010\\_trustee\\_companies\\_Commentary\\_on\\_ED.pdf](http://www.treasury.gov.au/documents/1741/PDF/Corporations_Amendment_Regulations_2010_trustee_companies_Commentary_on_ED.pdf)> at 30 September 2010.

<sup>1581</sup> See [29.3]–[29.5] above.

29.91 During the consultation undertaken by the Commonwealth government in relation to the then proposed amendments to the *Corporations Act 2001* (Cth), the former Public Advocate commented generally on the effect of the legislation on adults with impaired capacity:<sup>1582</sup>

Deregulation of fees may be satisfactory when a client may decide to remove their business from the trustee company following what the person considers is an unreasonable rise in fees, but it cannot be appropriate in circumstances when work is undertaken for a client with impaired capacity.

29.92 She also referred to the effect of the then proposed amendments in relation to a trustee company that is appointed as an attorney under an enduring power of attorney:

In respect of enduring attorneys, it is acknowledged that a particular adult with capacity could appoint the trustee company in the knowledge that fees will inevitably change and may intend for the trustee company to act as attorney irrespective of how reasonable or unreasonable the fees from time to time may appear to a person who has capacity. However, it is unlikely that this would be universally so. Most persons appointing an enduring attorney are likely to have regard to the existing fees available at the time when deciding to make the appointment.

29.93 As mentioned earlier, provision has been made for a trustee company to notify a client of an intention to increase its fees.<sup>1583</sup> The former Public Advocate was critical of this provision:<sup>1584</sup>

section 601TAB(3) ... requires a trustee company to notify an 'agent' of the adult with impaired capacity regarding any changes to its fees. 'Agent' does not appear to be defined in the Bill or the current *Corporations Act 2001* (Cth), so it is uncertain who is intended to be an 'agent'. The trustee company providing the notice is effectively an agent, but presumably it was not intended that the trustee company give notice to itself.

This may be problematic where persons for whom the company is administrator or financial attorney do not have another 'agent' formally appointed. The trustee company as an agent may be placed in a conflict situation in Queensland under section 37 of the *Guardianship and Administration Act 2000* (Qld) or section 73 of the *Powers of Attorney Act 1998* (Qld) and it will be unable to independently assess the reasonableness of its fees.

29.94 The former Public Advocate also recommended that the *Powers of Attorney Act 1998* (Qld) should be included as one of the State laws prescribed for regulation 5D.1.04 of the *Corporations Regulations 2001* (Cth).<sup>1585</sup> As noted

<sup>1582</sup> Office of the Public Advocate (Qld), Submission, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (29 May 2009) 3 <[http://www.treasury.gov.au/documents/1562/PDF/Public\\_Advocate.pdf](http://www.treasury.gov.au/documents/1562/PDF/Public_Advocate.pdf)> at 30 September 2010.

<sup>1583</sup> See *Corporations Act 2001* (Cth) s 601TAB(3), which is set out at [29.74] above.

<sup>1584</sup> Office of the Public Advocate (Qld), Submission, Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 and the consultation draft for the Corporations Amendment Regulations 2009 (30 September 2009) 2 <[http://www.treasury.gov.au/documents/1630/PDF/Office\\_of\\_the\\_Public\\_Advocate\\_Queensland.pdf](http://www.treasury.gov.au/documents/1630/PDF/Office_of_the_Public_Advocate_Queensland.pdf)> at 30 September 2010.

<sup>1585</sup> Ibid 2.



above, schedule 8AC of the regulations refers to the *Guardianship and Administration Act 2000* (Qld) but not to the *Powers of Attorney Act 1998* (Qld).<sup>1586</sup>

29.95 To the extent to which it may become possible for Queensland legislation to regulate the fees charged by a trustee company that is performing a function under the guardianship legislation, the issue is how those fees should be regulated. Given that section 601RAE(6) of the *Corporations Act 2001* (Cth) excludes the operation of Part 1.1A of that Act,<sup>1587</sup> State regulation of trustee company fees for administrators and attorneys under the guardianship legislation will be possible only if section 601RAE is amended or if the Commonwealth government passes a further regulation to enable the State government to displace the provisions of the *Corporations Act 2001* (Cth) to the extent that those provisions regulate the fees of a trustee company that is acting as an administrator or attorney under the guardianship legislation.

## Discussion Paper

29.96 In the Discussion Paper, which was released before the amendment of section 48 of the *Guardianship and Administration Act 2000* (Qld) and the repeal of section 41 of the *Trustee Companies Act 1968* (Qld), the Commission considered two options for regulating the remuneration of a trustee company that is appointed as an administrator.

29.97 The first option was for the Tribunal to be given the power to authorise such remuneration to a trustee company as the Tribunal considers appropriate for the trustee company's services as an administrator. It was suggested that the exercise of this power could be assisted by the inclusion of a scale of remuneration for different matters undertaken by the trustee company.<sup>1588</sup>

29.98 The second option was for State legislation to place a cap on the fees that may be charged, as was previously the case under section 41 of the *Trustee Companies Act 1968* (Qld). The Commission noted, however, that a disadvantage of this approach was that, unless either the Tribunal or the court had the power to approve fees in excess of the cap, there was the possibility that, where the administration of an adult's finances was especially complex or time-consuming, it might not be possible for the trustee company to be adequately remunerated for its services. The Commission considered that this could have the effect of discouraging a trustee company from seeking appointment as an administrator.<sup>1589</sup>

29.99 The Commission observed that the mechanism for regulating the fees that may be charged by a trustee company when acting as an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld) was a more complex issue. It suggested that, if it were necessary for a trustee

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<sup>1586</sup> See [29.87] above

<sup>1587</sup> See [29.84] above.

<sup>1588</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, [24.50].

<sup>1589</sup> Ibid [24.51].

company to apply to the Tribunal for authorisation, that would entail an application in circumstances when a trustee company, as an attorney, would not normally need to have any contact with the Tribunal.<sup>1590</sup>

29.100 In the Discussion Paper, the Commission sought submissions on the following questions:<sup>1591</sup>

- 24-5 If it is possible for State legislation to continue to regulate the fees charged by a trustee company when performing a function as an administrator under the *Guardianship and Administration Act 2000* (Qld), should that Act be amended:
- (a) to provide that the Tribunal may make an order authorising such remuneration of a trustee company as the Tribunal considers appropriate for the trustee company's services as an administrator;
  - (b) to include a scale for the remuneration of professional administrators, including trustee companies; or
  - (c) some other model?
- 24-6 If it is possible for State legislation to continue to regulate the fees charged by a trustee company when performing a function as an attorney under an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld):
- (a) should State legislation regulate the fees that a trustee company may charge in those circumstances; and
  - (b) if so, what type of model would be appropriate to regulate the fees?

## Submissions

### ***Desirability of State regulation of trustee company remuneration***

29.101 The Trustee Corporations Association of Australia, which is the peak representative body for the trustee corporations industry in Australia,<sup>1592</sup> commented that the continued regulation of trustee company fees by State legislation was neither necessary nor appropriate. In its view:<sup>1593</sup>

The new Commonwealth legislation, which largely deregulates fees, is based on the recognition that trustee companies operate in competitive markets for the products and services they offer.

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1590 Ibid [24.52].

1591 Ibid 274.

1592 The Trustee Corporations Association of Australia represents 16 organisations, comprising all eight regional Public Trustees and most of the ten private statutory trustee companies: Submission 158.

1593 Submission 158.

The new regulatory regime imposes appropriate fee disclosure and dispute resolution requirements on trustee companies.

29.102 Caxton Legal Centre Inc also expressed the view, in relation to trustee companies, that ‘there can be no objection to competitive appointments at commercial rates’.<sup>1594</sup>

29.103 However, other respondents, including the Public Trustee, the Adult Guardian and the former Acting Public Advocate, were of the view that, to the extent that it is possible, State legislation should continue to regulate the remuneration of trustee companies.<sup>1595</sup>

29.104 The Public Trustee commented that the disclosure of fees and the operation of market forces would provide little benefit to adults with impaired capacity:<sup>1596</sup>

Adults with impaired capacity number amongst the most vulnerable members of the community. The Financial Services Modernisation Bill 2009 discussed by the Commission represents a significant if not profound change for private trustee companies. To the extent that scope is afforded the State’s regulation of fees ought continue.

...

The difficulty in respect of the guardianship regime is that the disclosure of fees and the operation of market forces in the context of deregulation (in the absence of any oversight) are of little benefit to adults with incapacities who by definition do not have the capacity to understand the disclosures and make considered choices in the market as to the administrator [who] acts for them in managing their financial affairs — in the case of administration.

It might be that one of the consequences of the passage of the Commonwealth legislation and possible repeal of the *Trustee Companies Act 1968* will be that adults with impaired capacity may be charged whatever fees are published on the internet by trustee companies and which fees may be varied, likely increased from time to time. The concern is even more pointed when not only do the adults concerned not have the capacity to make reasoned choices about service providers (here administrators) but that the oversight as to the reasonability of fees in this regard largely has been excluded by virtue of a proper interpretation of the GAA (see *Guardianship and Administration Tribunal v Perpetual Trustees Qld Ltd* [2008] QSC 49).<sup>1597</sup> (note added)

1594 Submission 174. This view appeared to assume that the Tribunal has the power to review (and not merely to monitor) the trustee company’s remuneration. See, however, the discussion at [29.67]–[29.68] above.

1595 Submissions 156A, 160, 164, 177.

1596 Submission 156A.

1597 See the discussion of *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* [2008] 2 Qd R 323 at [29.61]–[29.66] above.

### **State regulation of the remuneration of a trustee company administrator**

#### *A statutory power to authorise a trustee company's remuneration*

29.105 The Adult Guardian favoured amending the *Guardianship and Administration Act 2000* (Qld) to enable the Tribunal to make an order authorising such remuneration of a trustee company as the Tribunal considers appropriate for the trustee company's services as an administrator. This was considered to be the most flexible approach.<sup>1598</sup>

29.106 A respondent who is a long-term Tribunal member also favoured this approach. He commented that the authorisation of a trustee company's remuneration would not be a difficult exercise for the Tribunal, although trustee companies would need to justify their fees. He also observed that, where trustee companies are appointed, their management fees have usually been part of a damages award in favour of the adult.<sup>1599</sup>

29.107 The parents of an adult with impaired capacity also supported this approach as it would allow the Tribunal to protect the vulnerable.<sup>1600</sup>

29.108 The Perpetual Group of Companies generally favoured an approach under which a trustee company would be entitled, in the absence of an order to the contrary, to charge at its published rates at the time when each service provided in the course of the administration is performed. This respondent was also of the view that the legislation should provide that:<sup>1601</sup>

the tribunal (and the court when appointing an administrator)<sup>1602</sup> may on the application of an interested person make an order authorising such remuneration of a trustee company as the tribunal considers appropriate for all or any of the services provided or intended to be provided by the administrator (note added)

29.109 However, where a trustee company is appointed as an adult's administrator by the court when sanctioning the settlement of an action brought by the adult,<sup>1603</sup> the Perpetual Group of Companies anticipated difficulties if only the Tribunal could authorise the trustee company's remuneration. It noted that it might be some months before the remuneration was authorised. It also noted that, when

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1598 Submission 164.

1599 Submission 179. This issue is discussed at [29.58]–[29.60] above.

1600 Submission 177.

1601 Submission 155.

1602 *Guardianship and Administration Act 2000* (Qld) s 245(2) enables the Supreme Court and the District Court, in specified circumstances, to exercise the powers of the Tribunal under ch 3 of the Act, which includes the appointment of an administrator. Section 245 is considered in Chapter 28 of this Report.

1603 See *Guardianship and Administration Act 2000* (Qld) s 245.

the Tribunal ultimately authorised the remuneration, it might not be at a level that was satisfactory to the trustee company:<sup>1604</sup>

A difficulty with this solution is that the administrator might ... be appointed by the court several months before its remuneration can be ratified or rejected by the tribunal. If rejected, the question would then arise whether the appointment should continue, given the trustee company had not consented to be appointed except in exchange for that remuneration. Replacing an administrator creates some difficulties and expenses, including potentially capital gains tax ramifications, and is not done lightly.

It would also make it difficult for the court or the parties to assess what damages the plaintiff should be allowed for administration costs.

29.110 The Perpetual Group of Companies suggested that these problems could be avoided by conferring on the court the power to fix the remuneration of an administrator:<sup>1605</sup>

It would overcome these problems if the legislation gave the court appointing the administrator the power to fix its remuneration at the same time, on the application of the person seeking its appointment. It would be appropriate to give the trustee company the right to be heard on the question, even if that meant it had to be made a respondent to the application.

29.111 The Perpetual Group of Companies suggested that it would not be an appropriate solution to these problems for the court to require the trustee company at the time of its appointment 'to indicate that it would not seek to be removed if its remuneration were set at a level below that to which it consented'. It also suggested that such an approach would not ultimately be in the interests of adults with impaired capacity:

If the fees recoverable for the services supplied are not profitable, trustee companies will not accept appointments. That is already apparent from the fact that it is becoming increasingly rare for them to accept appointments to administer smaller awards.

Perpetual cannot speak for other trustee companies, but for itself would not give such an undertaking, and [would] decline appointment.

There seems to be broad consensus that it is in the interests of adults with impaired capacity to have access to the services of trustee companies as one of the possible administrators.

29.112 The Perpetual Group of Companies also raised an issue concerning the remuneration of trustee companies that have existing appointments as administrators:

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<sup>1604</sup> Submission 155.

<sup>1605</sup> Ibid. Although the High Court has suggested that s 245 of the *Guardianship and Administration Act 2000* (Qld) enabled the court to fix an administrator's remuneration under s 48, it appears to have been under the misapprehension that s 48 appeared in ch 3 of the Act: *Willett v Fletcher* (2005) 221 CLR 627, 636 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

At present an issue exists for [Perpetual Trustees Queensland Limited] because it offered itself for appointment as administrator for various adults in exchange for remuneration based on Perpetual's published rates, was appointed on that basis by the court, and some years later is faced with the assertion that it cannot lawfully charge those rates because of the provisions of s 48 of the *Guardianship and Administration Act 2000* (Qld) and s 41 of the *Trustee Companies Act 1968* (Qld) as interpreted in light of recent decisions noted by the [Commission].

...

It appears that fees for appointments made prior to the 'national trustee companies legislation' may remain subject to the *Trustee Companies Act 1968* (Qld).<sup>1606</sup> (note added)

29.113 It suggested that the Tribunal should have the power to authorise a trustee company to charge the fees that were presented to the court when it was originally appointed:

The simplest solution to the present issues in existing appointments might be if the tribunal were able to authorise [Perpetual Trustees Queensland Limited] to charge fees at the rates it presented to the court which appointed it, irrespective of whether these corresponded with fees and rates of fees set out in the *Trustee Companies Act 1968* (Qld).

This would be consistent with the fact that in many cases the defendant to the damages claim has agreed, or been ordered, to pay additional damages based on those calculations.

#### *A scale for the remuneration of trustee companies*

29.114 The former Acting Public Advocate supported a prescribed scale of maximum fees, which could be based on an hourly rate. He suggested, however, that, if a scale of fees were introduced, the Tribunal should be empowered to authorise remuneration in excess of the scale where a trustee company is administering a complex estate.<sup>1607</sup> The parents of an adult with impaired capacity also supported a scale of fees as it would allow the Tribunal to protect the vulnerable.<sup>1608</sup>

29.115 However, the introduction of a prescribed scale of fees was opposed by the Perpetual Group of Companies, as was remuneration based on commission. This respondent considered that these types of remuneration fail to address the diverse services that are provided by different trustee companies:<sup>1609</sup>

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<sup>1606</sup> See the discussion of the transitional provisions commencing at [29.78] above.

<sup>1607</sup> Submission 160.

<sup>1608</sup> Submission 177.

<sup>1609</sup> Submission 155.

Section 41 of the TCA demonstrates the limitations of attempting to legislate even a particular cap in a world where the demands on administrators, the range of services offered as a result and the ways of delivering services are constantly reviewed and expanded while legislation lags behind.

In practice there is a lot of competition to offer the most attractive combination of services and fees, and the market appears to limit effectively the amount which trustee companies can charge.

Different trustee companies, and the Public Trustee, charge in quite different ways depending on the range of services they can provide, and the level of service. For example Perpetual includes a full range of financial planning, investment research, investment advice and investment management services within one 'all up' price, whereas other companies (and the Public Trustee) offer their services as an alternate decision maker for an administrator's fee and separate or outsourced services charged separately. Perpetual's advisers who deal with clients on a daily basis are in Queensland, whereas some trustee companies service those clients from interstate. It may be that it is in the interests of a particular adult to provide a 'premium' range of services such as investment services, justifying a higher level of fees, whereas another adult's interests may be better served by a more utilitarian model.

This is best judged at the time the administrator is selected. If the relevant carers and/or the court or tribunal consider that Perpetual's level of service is not justified, [Perpetual Trustees Queensland Limited] will not be appointed.

In Western Australia the [State Administrative Tribunal] does not appear to be limited by any prescribed rates in fixing the remuneration of an administrator.

The services provided by trustee companies are much more diverse and complex than in the past. They will undoubtedly evolve further over time in ways we cannot yet foresee. Any provision should allow the possibility for fees to be calculated other than by way of commission.

29.116 The Perpetual Group of Companies was also of the view that the introduction of a scale of remuneration for professional administrators could have negative consequences for consumers:

Including in legislation a scale for the remuneration of professional administrators ignores the fact that different administrators are able to, and in fact do, provide different services and different levels of service. As described above, including a uniform scale might force some trustee companies to charge separate fees for different services. We submit that it is more transparent for a company to be able to charge one or two fees covering everything than for a client to have to be in the position of total confusion consumers are in with power providers or telecommunication companies.

*A power to review the remuneration of an administrator*

29.117 The Public Trustee suggested that there was 'a need for an appropriate body to provide approval and oversight of fees charged to adults with an impaired

capacity and moreover that there be some legislative basis upon which that oversight might be exercised'.<sup>1610</sup> He noted that:

The Commonwealth legislative scheme holding as it does that greater deregulation in the area of fees and charges of trustee companies has merit cannot be reasonably contended for adults with an incapacity.

Adults with an incapacity do not by definition have the capacity to participate in the 'market' of their own administration services — and as a consequence there is a very real need (given that discussed above) for there to be real and substantive oversight of the fees charged.

29.118 The Public Trustee suggested that the legislation could be amended to give the Tribunal oversight of the fees charged by trustee companies:

Section 48 of the [*Guardianship and Administration Act 2000* (Qld)] might conveniently be amended so that licensed trustee companies be the subject of a Tribunal order and oversight in respect of those fees.

...

The fees must at least be:

- reasonable having regard to the circumstances in which the service is provided;
- relevant to the type and complexity of the service performed; and
- reflect the degree of care, responsibilities, skills, special knowledge required to provide the services.

29.119 However, the Public Trustee also commented that:

There have been instances considered by the Tribunal where private trustee companies have charged in excess of that lawfully allowed.

The Tribunal is not positioned (does not have the fiat) to set what it considers to be appropriate or reasonable remuneration for private trustee companies and has shown a disinclination likely as a consequence of this legislative restraint from scrutinising private trustee companies fees and charges even in circumstances where they appear to have exceeded that legislatively mandated.

The Public Trustee holds the view that there should be some entity which has a capacity to set and oversight the charging of fees by private trustee companies.

There is no other person not otherwise conflicted currently who has ... the authority to accept this role.

### ***State regulation of the remuneration of a trustee company attorney***

29.120 The former Acting Public Advocate commented on the need to balance an adult's right to appoint an attorney of his or her choice with the need to provide a

<sup>1610</sup>

Submission 156A.



mechanism to safeguard the adult from unreasonable fees and potential abuses once he or she is incapacitated.<sup>1611</sup>

When a person appoints a trustee company under an Enduring Power of Attorney, it is unreasonable to expect the consumer can anticipate all possible future fee increases. Once an adult loses capacity, the trustee company's appointment will last indefinitely unless terminated by the death of the adult, or the trustee company is removed by the Tribunal or Supreme Court. In these circumstances the adult no longer has the capacity to query fee changes/increases, placing the adult in a vulnerable position.

It is recognised however that in appointing a trustee company as an attorney by way of Enduring Power of Attorney an adult is exercising his or her right to self-determination and autonomy, and in doing so may appoint a trustee company in the knowledge that fee increases may occur following the adult's loss of capacity. An appropriate balance therefore needs to be struck between the adult's right to elect an attorney of their choice and mechanisms to safeguard the adult from unreasonable fees and potential abuses once s/he is incapacitated.

29.121 The former Acting Public Advocate suggested that the introduction of a scale of fees was a reasonable approach in the case of the appointment of a trustee company as an attorney under the *Powers of Attorney Act 1998* (Qld). He also suggested that consideration could be given 'to empowering the Tribunal to consider applications for an increase in fees, to ensure the rights and interests of the adult are protected'.

29.122 The former Acting Public Advocate also suggested that, if it is decided that trustee companies should not be subject to a scale of fees:

there should be a requirement, or at the very least a notice on the Enduring Power of Attorney form urging adults to seek independent financial advice in relation to the appointment of trustee companies as attorneys, and information about potential fee increases which may occur once they lose capacity and the appointment takes effect.

29.123 The Perpetual Group of Companies commented that, when a principal makes an enduring power of attorney, he is she is making 'an informed decision about the fees to be paid, including a rational and reasonable decision to assume that competition will ensure that the trustee company's published rates at the time when the work is actually performed remain competitive'.<sup>1612</sup>

29.124 The Perpetual Group of Companies was therefore of the view that there generally was no justification for departing from the manner of regulation that was, at that time, found in section 41 of the *Trustee Companies Act 1968* (Qld), including section 41(7). The one qualification that was expressed was that section 41, as it then applied, should be amended to make it clear that the remuneration fixed by the board in accordance with section 41(1) may be in a form other than commission.

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1611 Submission 160.

1612 Submission 155.

## The Commission's view

### ***Desirability of State regulation of trustee company remuneration***

29.125 The Commission agrees with the submissions made by the former Public Advocate, the former Acting Public Advocate, the Adult Guardian and the Public Trustee that the amendments to the *Corporations Act 2001* (Cth) deregulating the fees that may be charged by trustee companies do not sufficiently safeguard the interests of adults who have a trustee company appointed as their administrator under the *Guardianship and Administration Act 2000* (Qld) or as their attorney by an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).<sup>1613</sup> For that reason, the Commission has made a number of recommendations relating to the remuneration of trustee companies that are appointed as an adult's administrator or attorney.

29.126 However, the implementation of these recommendations will be possible only if the Commonwealth government enables the State and Territory Governments to regulate the remuneration of trustee companies that are acting as an administrator or attorney for financial matters under the guardianship legislation.<sup>1614</sup>

### ***Remuneration of a trustee company appointed as an administrator***

29.127 The Commission considers that the remuneration previously authorised by section 41 of the *Trustee Companies Act 1968* (Qld) was too inflexible. In particular, where the management of the adult's property was complex and the property was managed over a long period of time, the rates of commission allowed by section 41 did not always enable the trustee company to be sufficiently remunerated for its services.

29.128 Accordingly, if it became possible for the State to regulate the remuneration of a trustee company that is appointed as an administrator for an adult, the most flexible approach would be for section 48 of the *Guardianship and Administration Act 2000* (Qld) to be amended to enable the Tribunal to order that a trustee company is entitled to such remuneration as the Tribunal considers fair and reasonable having regard to the matters mentioned in section 48(2).

29.129 Because it is recommended that a trustee company's remuneration as administrator should be regulated by the *Guardianship and Administration Act 2000* (Qld), rather than by the *Corporations Act 2001* (Cth), section 48(3) of the *Guardianship and Administration Act 2000* (Qld) should be replaced with a provision to the effect that:

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.

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<sup>1613</sup> See [29.91]–[29.93], [29.103]–[29.104] above.

<sup>1614</sup> See [29.95] above.

**Remuneration for future services provided by a trustee company that was appointed before the commencement of the new provisions**

29.130 Because section 41 of the *Trustee Companies Act 1968* (Qld) has not always provided sufficient remuneration for a trustee company that acts as an adult's administrator, the Tribunal's power under section 48 of the *Guardianship and Administration Act 2000* (Qld) to authorise a trustee company's remuneration should not be restricted to a trustee company that is appointed after the commencement of the provision conferring that power. Instead, the *Guardianship and Administration Act 2000* (Qld) should ensure that the Tribunal has a general power to authorise the remuneration of a trustee company, including for a trustee company that was appointed as an adult's administrator before the commencement of the provision amending section 48.

29.131 However, the new provision should be drafted so that it does not enable the Tribunal to authorise the remuneration of a trustee company for its past services as administrator. The remuneration for those services should continue to be regulated by the legislation that applied at the time the services were provided.

**Power of the Supreme Court and District Court to order remuneration when appointing a trustee company as an administrator**

29.132 In the past, a trustee company that was appointed as an adult's administrator was automatically entitled to be remunerated for its services according to the rates of commission found in section 41 of the *Trustee Companies Act 1968* (Qld). However, under the Commission's recommendations, the level of remuneration will be a discretionary matter that is decided on a case-by-case basis, having regard to the matters mentioned in section 48(2) of the *Guardianship and Administration Act 2000* (Qld).<sup>1615</sup>

29.133 Under the Commission's recommendations, the remuneration of a trustee company that is appointed as an administrator will require an order of the Tribunal; there will no longer be an automatic entitlement to remuneration in accordance with the provisions of the *Corporations Act 2001* (Cth) or, as was the case previously, in accordance with section 41 of the *Trustee Companies Act 1968* (Qld). As noted earlier,<sup>1616</sup> section 245 of the *Guardianship and Administration Act 2000* (Qld) enables the Supreme Court and the District Court, in specified circumstances, to exercise certain powers of the Tribunal, including the power to appoint an administrator. However, these powers do not extend to authorising the remuneration of an administrator that is appointed, as the remuneration of a trustee company has never required Tribunal authorisation.

29.134 The Commission agrees with the submission made by the Perpetual Group of Companies that there is a potential difficulty if a trustee company is appointed by the Supreme Court or the District Court under section 245 of the Act, but only the Tribunal may authorise its remuneration.<sup>1617</sup> That would mean that a

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<sup>1615</sup> *Guardianship and Administration Act 2000* (Qld) s 48 is set out at [29.52] above.

<sup>1616</sup> See n 1602 above.

<sup>1617</sup> See [29.109]–[29.111] above.

trustee company's remuneration could not be authorised at the time of its appointment even though the level of remuneration would be a matter that would obviously affect the decision of the trustee company to consent to its appointment. The Commission is therefore of the view that Supreme Court and the District Court should have the same power as the Tribunal to authorise the remuneration of a trustee company. Section 245(2) 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.

***Remuneration of a trustee company appointed as an attorney under an enduring power of attorney***

29.135 Where a trustee company is appointed as an adult's attorney under an enduring power of attorney, it would not be practicable for the trustee company to have to apply to the Tribunal for an order authorising its remuneration.

29.136 Accordingly, if it becomes possible for State legislation to regulate the remuneration of a trustee company that is acting as an attorney under an enduring power of attorney, the trustee company's remuneration should be regulated by a provision to the effect of the repealed section 41 of the *Trustee Companies Act 1968* (Qld). Although the Commission has expressed the view that the rates of commission in section 41(1) may not always have enabled a trustee company to be adequately remunerated when acting as an administrator, the difference for a trustee company that accepts an appointment as an attorney under an enduring power of attorney is that a provision to the effect of section 41(7) would enable the trustee company and the adult to agree on a different commission or fee.<sup>1618</sup>

***Oversight of fees charged by trustee companies***

29.137 Currently, section 601TEA of the *Corporations Act 2001* (Cth) gives the court the power to review the fees charged by a trustee company and to reduce the fees if the court is of the opinion that the fees charged are excessive.<sup>1619</sup> An application for such an order may be made by, or on behalf of, a person with 'a proper interest in the estate'.<sup>1620</sup>

29.138 Further, in Chapter 17 of this Report, the Commission has made a recommendation that will give the Supreme Court and the Tribunal additional powers where an administrator or attorney, in exercising power for a financial matter, has made a profit as a result of a failure to comply with the Act. The Commission has recommended that the Tribunal and the Supreme Court should have the power to order the administrator or attorney to disgorge the profit in favour

<sup>1618</sup> This is in contrast to the position of a trustee company that is appointed as an adult's administrator: see [29.65]–[29.66] above.

<sup>1619</sup> See [29.77] above.

<sup>1620</sup> *Corporations Act 2001* (Cth) s 601TEA(4). See s 601RAD(1)(e), (g) (Meaning of *person with a proper interest*).

of the adult.<sup>1621</sup> This recommendation will be relevant to the situation where a trustee company enters into a conflict transaction without authorisation and the conflict transaction has not been ratified. The definition of 'conflict transaction'<sup>1622</sup> in the legislation is wide enough to encompass the charging of fees that are not authorised by the *Corporations Act 2001* (Cth), including its transitional provisions, or any legislation that might in the future regulate the remuneration of trustee companies acting under the guardianship legislation.

## RECOMMENDATIONS

### *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

<sup>1621</sup> See Recommendation 17-17 of this Report.

<sup>1622</sup> See *Guardianship and Administration Act 2000* (Qld) s 37(2); *Powers of Attorney Act 1998* (Qld) s 73(2).

- (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

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## CONTRACTUAL CAPACITY

### Background

30.1 It is an established principle of common law that a person with a mental illness or an intellectual disability may enter into a valid and binding contract, deed or other transaction if he or she has the mental capacity to understand the nature and effect of the transaction.<sup>1623</sup> In *Gibbons v Wright*,<sup>1624</sup> the High Court set out the test of contractual capacity and explained that there is no fixed measure of contractual capacity that must be shown:<sup>1625</sup>

The law does not require any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. ... The mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of the transaction when it is explained. ... Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of the wider transaction which the instrument is a means of carrying out.

30.2 The common law presumes that a person who enters a contract has full legal capacity to do so and a person with impaired mental capacity is therefore not precluded from entering into an otherwise valid and binding contract.<sup>1626</sup> Such a contract is, however, voidable at the option of the incapacitated party, provided certain matters can be shown.<sup>1627</sup> In order to rescind a contract on the grounds of mental incapacity, the onus is on the incapacitated person, or the person's legal representative, to prove that:<sup>1628</sup>

<sup>1623</sup> *Gibbons v Wright* (1954) 91 CLR 423. If a person, because of mental illness or intellectual disability, is not aware that what he or she has entered into is a contract, the principle of *non est factum* may apply and, if proved, will render the transaction void: *Gailee v Lee* [1969] 2 Ch 17.

<sup>1624</sup> (1954) 91 CLR 423.

<sup>1625</sup> *Ibid* 437–8.

<sup>1626</sup> See generally H Beale, *Chitty on Contracts* (29th ed, 2004) vol I [8-001], [8.070].

<sup>1627</sup> *Hart v O'Connor* [1985] AC 1000; *Gibbons v Wright* (1954) 91 CLR 423, 449. There are some exceptions to this principle, the most notable relating to contracts for necessities which are binding on a person even if that person did not have legal capacity at the time of entering the contract: see [30.4] below. A contract may also be enforceable if it was entered into, or ratified by the incapacitated party, during a lucid interval: see S Graw, *An Introduction to the Law of Contract* (6th ed, 2008) [7.8.2], [7.8.4].

In appropriate cases, the equitable doctrines of unconscionable conduct and undue influence may also be applicable in relation to unfair contracts. For example, a transaction may be set aside by a court if one party has taken unfair advantage of another who is under a special disability because of illness or infirmity of body or mind: *The Commercial Bank of Australia v Amadio* (1983) CLR 447, 474. Alternatively, a contract may be set aside if the stronger party has unduly induced the weaker party to make a contract which the weaker party would not have otherwise made: *Blomley v Ryan* (1956) 99 CLR 362, 405.

<sup>1628</sup> *Imperial Loan Co v Stone* [1892] 1 QB 599, 602–3; *Gibbons v Wright* (1954) 91 CLR 423, 441. The election to avoid the transaction must be made within a reasonable time by the person, once he or she has recovered, or by the person's legal representative: *Imperial Loan Co v Stone* [1892] 1 QB 599, 602–3; *Gibbons v Wright* (1954) 91 CLR 423, 441.

- the person was unable due to mental incapacity to understand the contract at the time of formation; and
- the other party knew or ought to have known of the incapacity.

30.3 In adopting this approach, the common law has sought to balance two countervailing policy considerations: first, the duty to protect those who through lack of mental capacity are unable to protect their own interests and secondly, the desirability of upholding contracts in the interests of certainty where there has been no underhanded dealing in order to ensure that contracting parties are not prejudiced by the actions of a person whose lack of capacity is not apparent.<sup>1629</sup>

30.4 An exception to the general law governing contractual capacity applies in relation to contracts for necessary items. These contracts are binding on a person with impaired capacity even though the person may not have had the capacity to understand the nature of the transaction at the time of entering the contract.<sup>1630</sup> If 'necessaries'<sup>1631</sup> are sold and supplied to a person with impaired capacity, the person is bound to pay a reasonable price for them.<sup>1632</sup> The *Sale of Goods Act 1896* (Qld) provides that where necessaries are sold and delivered to a person who, by reason of mental incapacity, is incompetent to contract, the person must pay a reasonable price for them.<sup>1633</sup> A reasonable price will not necessarily be the contract price.

30.5 While a person who is legally incapacitated may enter into some binding transactions, once an appointment order (or its equivalent) has been made, the person can no longer validly enter into a transaction in relation to the property under administration, even during a period when he or she has capacity, unless the relevant legislation states otherwise. The courts have held that a transaction made by a person who is subject to an administration order is void.<sup>1634</sup> The rationale for this principle is not that the person necessarily lacks legal capacity, but rather that

1629 Law Reform Commission of Ireland, *Vulnerable Adults and the Law: Capacity*, Consultation Paper No 37 (2005) 110–11.

1630 In *McLaughlin v Freehill* (1908) 5 CLR 858, Griffiths CJ (at 863) described the principle that contracts for necessaries supplied to a person lacking legal capacity are binding as a quasi-contractual obligation to pay a reasonable sum for goods or services actually delivered. See also similar comments made by Isaacs J (at 864).

1631 Necessaries are goods suitable to the condition in life of the person concerned and to his or her actual requirements at the time of delivery. Examples of necessaries are food, clothing, rent or medical or legal services.

1632 *Re Rhodes* (1890) 44 Ch D 94; *McLaughlin v Freehill* (1908) 5 CLR 858.

1633 *Sale of Goods Act 1896* (Qld) s 5(2).

1634 *Re Walker* [1905] 1 Ch 160; *Re Marshall* [1920] 1 Ch 284; *Gibbons v Wright* (1954) 91 CLR 423, 439–40; *Re Barnes* [1983] 1 VR 605; *JNRD and Protected Estates Act* (1992) 28 NSWLR 728; *Bergmann v DAW* [2010] QCA 143. However, this approach has been criticised as being 'out of step with modern guardianship legislation, which recognises that a person should be treated as having capacity unless the contrary is established': JLR Davis (ed), *Contract: General Principles — The Laws of Australia* (2006) [7.3.620].

someone else, namely the appointed administrator, has the power to deal with that person's property,<sup>1635</sup>

### The law in Queensland

30.6 The *Guardianship and Administration Act 2000* (Qld) does not contain any express provision in respect of the power of an adult who is subject to an administration order to deal with property while the administration order is in force and for the consequences of an impermissible dealing by the adult.

30.7 However, the recent Queensland Court of Appeal decision in *Bergmann v DAW*<sup>1636</sup> affirms the principle that if an administrator has been appointed under section 12 of the *Guardianship and Administration Act 2000* (Qld) to exercise power for a financial matter for an adult, the adult cannot validly enter into any transactions in respect of that matter while the order is in force.

30.8 In that case, the adult signed an agency agreement, appointing an agent for the sale of the adult's land. The adult was subsequently involved in a motor vehicle accident in which he suffered head injuries and the Tribunal made an interim order appointing an administrator for the adult for all financial matters. The adult later entered into a contract for the sale of the land, which was subject to a condition that the adult notify the purchaser of the removal of the administrator. The adult then sought the removal of the administrator, a declaration that he had capacity to manage his own financial and personal decisions and an order for the Registrar of Titles to remove from the land title register any notice of appointment of the administrator in relation to the adult's land. The Tribunal revoked the appointment of the administrator. The sale of the land did not proceed and the agent commenced legal proceedings against the adult for the amount of commission payable under the agency agreement.

30.9 The primary judge dismissed the agent's claim on the basis that the making of the interim order 'took away from the [adult] his capacity to enter into a contract for the sale of the property for the duration of the order'.<sup>1637</sup> The consequence of that finding was that the agent had no entitlement to a commission under the agency agreement because that entitlement arose only if the contract for the sale of the land was valid and binding on the parties to the contract. The agent appealed to the Court of Appeal.

30.10 The Court of Appeal dismissed the appeal on the basis that the contract for the sale of the adult's land had no legal force or effect because the adult had no power to enter into it. It held that only the administrator had the power to deal with the land during the term of the appointment order.<sup>1638</sup>

<sup>1635</sup> *Re Walker* [1905] 1 Ch 160; *Gibbons v Wright* (1954) 91 CLR 423, 439–40; *Re Barnes* [1983] 1 VR 605; *JNRD and Protected Estates Act* (1992) 28 NSWLR 728; *Bergmann v DAW* [2010] QCA 143.

<sup>1636</sup> [2010] QCA 143 (McMurdo P, Muir and Holmes JJA).

<sup>1637</sup> *Ibid* [28].

<sup>1638</sup> *Ibid* [48].

30.11 McMurdo P observed that there are aspects of the Act which supported the appellant's argument that if an adult, who has an administrator appointed under section 12 of the Act but in fact has capacity when entering into a contract in the adult's name, is bound by the contract.<sup>1639</sup>

The facts of this case were unusual. It was conceded at first instance that, although subject to a s 12 order, the respondent in fact did have capacity to enter into the contract of sale of his property at Palm Cove, near Cairns, which is at the heart of this dispute. It was also conceded that, but for the s 12 order, the respondent would have no defence to the appellant's claim against him for commission. The appellant gave evidence that she knew the respondent was subject to a s 12 order when he signed the contract of sale. The purchaser was also aware of this as the contract of sale was conditional on the respondent removing the notation on the title referring to the administrator.

There are aspects of the Act which provide some support for the appellant's contentions. The long title of the Act includes a statement that it is to 'consolidate, amend and reform the law relating to the appointment of ... administrators to manage the ... financial affairs of adults with impaired capacity'. The Act acknowledges in s 5:

- '(a) An adult's right to make decisions is fundamental to the adult's inherent dignity;
- ...
- (c) The capacity of an adult with impaired capacity to make decisions may differ according to—
  - (i) the nature and extent of the impairment; and
  - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
  - (iii) the support available for members of the adult's existing support network;
- (d) The right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- ...'

The expressed purpose of the Act also lends some support to the appellant's contention. It is to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy and decision-making on the one hand, and the adult's right to adequate and appropriate support for decision-making on the other. An adult is presumed to have capacity.

An administrator, in exercising power under the Act, must apply the general principles stated in Sch 1 of the Act. ...

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1639

Ibid [2]–[9].

Chapter 11 of the Act 'Miscellaneous Provisions' includes s 240 which provides that the Act 'does not affect the court's inherent jurisdiction'.

As the appellant's counsel points out, all these matters in combination tend to support his construction of the Act: that if an adult subject to a s 12 order in fact has capacity when entering into a contract in the adult's name, the adult should be bound by the contract.

Further, the Act, which was passed into law in 2000, did not contain any specific provision setting out the restriction on powers of an adult subject to an administration order under s 12 when such provisions then existed in Guardianship and Administration Acts in other jurisdictions: see s 21(2A) *Guardianship Act 1987* (NSW); s 52 *Guardianship and Administration Act 1986* (Vic); s 77(1) *Guardianship and Administration Act 1990* (WA); and s 42 *Guardianship and Administration Act 1993* (SA). This omission from the Act also tends to support the appellant's contention. (note omitted)

30.12 Her Honour, noting that the Act itself is silent as to whether an administration order under section 12 of the Act deprives an adult, subject to that order but in fact with capacity, from the ability to deal with the adult's financial matters during the period of the order, referred to a range of extrinsic material to provide guidance in determining the intention of the Act:<sup>1640</sup>

The Act is silent as to whether an administration order under s 12 deprives an adult, subject to that order but in fact with capacity, from the ability to deal with the adult's financial matters during the period of the order. It is therefore appropriate in determining the legislative intention to refer to specified types of material extrinsic to the Act which may provide guidance, in this case the second reading speech, relevant explanatory notes and the Queensland Law Reform Commission Report (QLRC Report No 49, June 1996) on which the Act was based.

In the second reading speech, the Hon M J Foley, Attorney-General and Minister for Justice and Minister for the Arts, stated:

'People with disabilities share the same basic human rights common to us all. For too long, the legal system has failed to give effective recognition to those rights. This Bill establishes a tribunal and a Public Advocate to affirm the human rights of people with a decision-making disability and to empower such persons in the exercise of their rights.

...

For the first time in this State, Queensland will have a legislative system by which the most vulnerable members of our society will be able to be supported in achieving autonomy in their decision making and in their lives in general. ...

This Bill completes the process of implementation of the ground breaking recommendations of [the QLRC Report No 49]

... The previous Government failed to create a Guardianship and Administration Tribunal.

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1640

Ibid [9]–[12].

This tribunal will have the power to appoint guardians and administrators and review such appointments regularly.

... administrators will have power for financial matters.

This will mean, for example, that the family of a person with impaired capacity can look after the personal and financial affairs of that person without always having to depend on statutory bodies such as the public trustee.

Guardians and administrators will be bound by the principles underpinning the Bill in exercising powers for persons with impaired capacity and by specific responsibilities under the Bill to ensure that their powers are not abused. ...

*Committees of the person or estate appointed by the Supreme Court under section 201 of the Supreme Court Act 1995 will continue for twelve months allowing the appointed committee to apply to the tribunal for a guardianship or administration order. ... This scheme brings Queensland into line with the other States and Territories of Australia and introduces a more modern and comprehensive scheme of substituted decision-making. ...' (my emphasis).*

The explanatory notes included the following relevant statements:

*'The objective of the Bill is to establish a comprehensive regime for the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity in Queensland. ...*

*The Bill will implement those aspects of ... (QLRC Report 49) that were not implemented in the Powers of Attorney Act 1998 ... .'*

QLRC Report No 49 on which the Act was based is of limited assistance in revealing the legislative intent central to this case, but it included the following relevant statement:

*'Certain powers will be withdrawn from the person and granted to the decision-maker. This constitutes a serious intrusion into the person's right to individual autonomy.*

*Because of the potential gravity of the consequences of a decision-making order, it is essential to establish criteria for determining when an order should be made.'* (note omitted)

30.13 McMurdo P concluded that the legislature had intended to replace the existing scheme for the committees of the person or estate with a new and comprehensive scheme, which was broadly consistent with schemes in other States. Her Honour also observed that none of the schemes in other States allowed an adult who is subject to an administration order to contract personally while subject to the order. Her Honour further observed that if the legislature had intended the Act to amend the common law, in a way which had not been done in the other Australian jurisdictions, to allow an adult the subject of an administration

order under section 12 to retain the capacity to contract when in fact capable, it can be expected to have stated this in the Act in clear terms; which it did not do:<sup>1641</sup>

It is clear to me from the italicised passages I have quoted from the second reading speech and explanatory notes, that the legislature intended the Act to replace, after a transitional period, the committees of the person or estate, appointed under the *Supreme Court Act 1995* when adults lacked capacity to manage their financial affairs, with a new and comprehensive scheme broadly consistent with schemes in other states. None of those interstate schemes allowed an adult, who was subject to an administration order like that made under s 12 but who in fact retained capacity, to personally contract in relation to property while subject to the order.

Prior to the passing of the Act, the settled common law was (although not without controversy)<sup>1642</sup> that committees of a person or estate suspended the right of the protected person to deal with property, irrespective of the protected person's capacity: *David by Her Tutor the Protective Commissioner v David*,<sup>1643</sup> *Re Walker*. If the legislature intended the Act to reverse the common law position existing at the time the Act was passed, it is unlikely to have referred to the scheme it enacted as replacing the committees of the person. The Act differs from similar schemes in other states in that it does not expressly restrict the powers of an adult subject to an administration order, but the second reading speech expressed a legislative intent that the Act would bring Queensland into line with other states and territories by introducing a 'more modern and *comprehensive* scheme of substituted decision-making' (*my emphasis*). If the legislature intended the Act to amend the common law, in a way which had not been done in other Australian jurisdictions, to allow an adult the subject of an administration order under s 12 to retain the capacity to contract when in fact capable, it can be expected to have stated this in the Act in clear terms. It did not. (note added, note omitted)

30.14 *McMurdo P* held that an order for the appointment of an administrator for an adult, made under section 12 of the *Guardianship and Administration Act 2000* (Qld), suspends the right of the adult to deal with financial matters under the Act, even where the adult in fact has capacity, as long as the order is in force:<sup>1644</sup>

The legislative intent in the Act is certainly to presume an adult has factual and legal capacity and to involve an adult who is subject to an administration order as a valued member of society in the administrator's decision-making on behalf of the adult under s 12. But in my opinion it is not to set up a scheme which would allow both the administrator, and the adult the subject of the s 12 order

1641 Ibid [13]–[14].

1642 Her Honour referred in a note to Kirby P's 'persuasive' dissent in *David by Her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417. In that case, Kirby P held (at 432–3) that:

The mere fact that the estate of Mrs David was brought under the *Protected Estates Act 1983* (NSW) and Mrs David made a 'protected person' does not, as such, render her transfer and mortgage of her property void. This answer, whilst involving some inconvenience and apparent inconsistency, nonetheless avoids a result which would have its own disadvantages and which could, in particular transactions of particular protected persons with an undoubted residual measure of capability, work an unreasonable and inflexible oppression such as the common law has for centuries resisted.

1643 (1993) 30 NSWLR 417.

1644 [2010] QCA 143, [13]–[16].



who has capacity in fact, to simultaneously deal with the adult's financial matters under the Act.

The better view, in my opinion, is that an order under s 12 suspends the right of the adult subject to the order to deal with financial matters under the Act, even where the adult has capacity in fact, as long as the order is in force. The Act, of course, makes clear provision for changing or remaking an appointment order. If I am wrong as to the legislative intent in s 12, the legislature should amend the Act. (note omitted)

30.15 Muir JA (with whom McMurdo P and Holmes JA agreed) observed that it is necessarily implicit in the Act that an administrator for all financial matters appointed under the Act assumes the powers in respect of financial matters of the adult for whom the appointment is made, to the exclusion of the adult, except to the extent that the Tribunal orders otherwise.<sup>1645</sup>

It is necessarily implicit in ss 12 and 33 [of the *Guardianship and Administration Act 2000* (Qld)] that an administrator for all financial matters appointed under s 12 assumes the powers in respect of financial matters of the adult in respect of whom the appointment is made, to the exclusion of the adult, except to the extent that the Tribunal orders otherwise. If the Act did not operate to deprive the adult of the powers assumed by the administrator, the protection that s 12 is plainly intended to provide to a person of impaired capacity would be negated in whole or in part. There would be dual control over the adult's 'financial matters': surely a result which the Legislature could not have intended. The financial wellbeing of the impaired adult would be imperilled, for example, by the risk that the administrator and the adult could separately enter into transactions, such as separate contracts for the sale or purchase of the same property to different purchasers or from different vendors, which might expose the impaired adult to liability. Counsel for the appellant, who ably presented the appellant's case, argued that if the appellant's construction was accepted, the incapacitated person's capacity to contract could be resolved in the normal way by application of common law principles. In many circumstances that would mean that litigation would be necessary to obtain legal certainty as to the incapacitated person's capacity to deal with his or her property at the time of the relevant dealing. The administrator could be prevented from dealing with the property until the conclusion of the litigation. Where the incapacitated person's mental capacity was variable it may prove difficult for the administrator and third parties to determine whether the incapacitated person lacked relevant capacity at the critical time. This argument thus has little to recommend it.

It is implicit in ss 5 and 6 that an adult with impaired capacity may, nevertheless, retain some decision making capability, with or without support for decision making. This does not necessitate a conclusion contrary to the one just expressed. The Act contemplates that orders of the Tribunal will identify the extent of any interference with an impaired adult's decision making capacity and that such orders address, where appropriate, the question of decision making support. The words 'that the adult could have done if the adult had capacity for the matter when the power is exercised' in s 33(2) strongly imply that where an administrator is appointed in respect of an adult, the adult lacks capacity and, by inference, the power to make decisions in respect of financial matters.

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1645

Ibid [35]–[36].

30.16 Muir JA rejected the appellant's argument that, because the *Guardianship and Administration Act 2000* (Qld) did not contain express provisions that dealt with the consequences of an adult's dealing with his or her property while subject to the equivalent of an administration order (as in other Australian jurisdictions), the agent was entitled to rely on general common law principles relating to contractual capacity:<sup>1646</sup>

Also, it would be wrong to view this legislation as detracting from common law rights. Rather, the Act is remedial in nature and protective of the rights and property of incapacitated persons. As such, the legislation should be construed liberally. The fact that in other States the legislatures have chosen to make express provision for the power a protected person whose property is under the equivalent of administration has to deal with his or her property and for the consequences of an impermissible dealing provides scant support for the appellant's argument. Such provisions may well have been inserted out of an abundance of caution. In some cases they have been inserted so as to provide a more comprehensive and flexible framework for dealing with transactions by protected persons. Also, such legislation was enacted long after it had been established that a purported disposition of his or her property by an incapacitated person the control of whose property had passed to the Crown or a receiver appointed under a statute was void.

It is the case, as counsel for the appellant contends, that an instrument voidable by reason of the incapacity of a party is valid until avoided by a party or his or her representatives. That principle applies to contracts entered into by persons who are deficient in mental capacity. However, the difficulty for the appellant is that the respondent's lack of competence to enter into the Contract arose, not from any want of mental capacity on his part but from the fact that his powers in relation to 'financial matters' had passed to his administrator to the exclusion of himself. That rendered the Contract void for the reasons given by the Court in *Gibbons v Wright*.

'The law relating to persons who are lunatics so found must be put on one side at the outset. Such a person is held incompetent to dispose of his property, not because of any lack of understanding (indeed he remains incompetent even in a lucid interval), but because the control, custody and power of disposition of his property has passed to the Crown to the exclusion of himself. Accordingly his disposition is completely void: *Re Walker*. For a similar reason, the conveyance of a person in respect of whom, though he is not a lunatic so found, a receiver has been appointed under s 116 (1) (d) of the *Lunacy Act 1890* (Imp.) (53 and 54 Vict. c. 5), has been held to be void: *Re Marshall*.' (footnotes deleted)

*In Re Marshall*, Eve J, in holding that a document executed by the incapacitated person after a receiver had been appointed of his estate under the *Lunacy Act 1890* (U.K.) was null and void, said:

'A very similar point was considered in the Court of Appeal in *In re Walker*, but there the Court was dealing with a lunatic so found by inquisition. The Court refused to direct an inquiry whether the lunatic had a lucid interval at the time of the execution of the document impeached and decided that it was wholly void. The question is, does

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1646

Ibid [42]–[47].

the same result follow when the document is executed by a person not certified as a lunatic but respecting whom an order has been made under s 116, sub-s 1 (d)? I think it is impossible to read the judgments of the Court of Appeal in *In re Walker*, and particularly those passages where the Lords Justices relied on the provisions of s 120 of the *Lunacy Act, 1890*, equally applicable be it observed to lunatics not so found, without coming to the conclusion that their reasoning applies to these persons also. The way it is put is that the right of a person of unsound mind to manage his affairs is suspended by the order and that the sole management thereof in the meantime is committed to the committee or quasi-committee as the person appointed under s 116, sub-s 1 (d), is called in some of the judgments. If this were not so, this unsatisfactory result would follow, that the affairs of the person of unsound mind, although put under the control of one person, the receiver, would in fact be controlled by two persons — namely, the person of unsound mind and the receiver. That is a state of things which the Court ought not to recognize if it can be avoided and it follows that in my opinion the reasoning of *In re Walker* applies to a case like the present, and the decision ought to be treated as extending to persons in the position of the plaintiff. I think that the concluding words of Cozens-Hardy L.J.'s judgment apply equally to the case of a lunatic so found and a person in respect of whose affairs a receiver has been appointed. He says: 'It cannot be right that the Crown, or the committee who represents the Crown, should have the control and management of the lunatic's estate, and at the same time that she should have power to dispose of her estate as she thinks fit. In my opinion this deed ought to be treated as absolutely null and void'. (notes deleted)

30.17 The decision in *Bergmann v DAW* clarifies that, if an adult has an administrator appointed under section 12 of the *Guardianship and Administration Act 2000* (Qld) to exercise power for a financial matter, the adult cannot validly enter into any transactions in respect of that matter while the order is in force. If, as was the case in *Bergmann v DAW*, the adult has an administrator appointed for all financial matters, any transaction purportedly entered into by the adult while under administration will be void. If an adult has an administrator appointed for limited, rather than all, financial matters, the status of any particular transaction entered into by the adult while under administration will depend on whether the power to enter into such a transaction is held by the administrator or has been retained by the adult. Thus, if an adult does not have power to enter into a transaction (because the power to enter into that transaction is exercisable only by the administrator), the transaction will be void; if the adult retains the power to enter into a transaction (because the transaction does not come within the ambit of the administration order), the transaction will be dealt with under the common law principles relating to contractual capacity.

30.18 The absence of any provisions in the *Guardianship and Administration Act 2000* (Qld) which expressly deal with the power of an adult who is subject to an administration order to deal with property while the administration order is in force and for the consequences of an impermissible dealing by the adult, raises the issue of whether such provisions should be included in the *Guardianship and Administration Act 2000* (Qld). The other jurisdictions have adopted various legislative models to deal with these issues.

30.19 Section 146 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to declare whether a person with a decision-making disability had capacity for a matter:<sup>1647</sup>

**146 Declaration about capacity**

- (1) The tribunal may make a declaration about the capacity of an adult, guardian, administrator or attorney for a matter.
- (2) The tribunal may do this on its own initiative or on the application of the individual or another interested person.
- (3) In deciding whether an individual is capable of communicating decisions in some way, the tribunal must investigate the use of all reasonable ways of facilitating communication, including, for example, symbol boards or signing.

*Editor's note—*

See definition **capacity**—schedule 4 (Dictionary).

- (4) In this section—

**attorney** means—

- (a) an attorney under a power of attorney; or
- (b) an attorney under an advance health directive; or
- (c) a statutory health attorney.

**power of attorney** means—

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

30.20 Such a declaration may include a declaration about whether a person had capacity to enter a contract.

30.21 Section 147 provides that a declaration about whether a person had capacity to enter a contract is evidence about the person's capacity in any subsequent proceedings about the contract. It provides:

**147 Effect of declaration about capacity to enter contract**

A declaration about whether a person had capacity to enter a contract is, in a subsequent proceeding in which the validity of the contract is in issue, evidence about the person's capacity.

<sup>1647</sup>

*Guardianship and Administration Act 2000* (Qld) s 146.

## The law in other jurisdictions

### ***Restrictions on the adult's power to enter into a contract: Northern Territory, South Australia, Victoria and Western Australia***

30.22 In the Northern Territory, Victoria, and Western Australia, the guardianship legislation deems a person who is the subject of an administration order to be incapable of entering into any contract without the order of the Tribunal<sup>1648</sup> or the written consent of the administrator.<sup>1649</sup> The legislation in those jurisdictions further provides that any contracts made by a person whose property is being managed are void and of no effect and any money or property the subject of the transaction is recoverable by the administrator in any court of competent jurisdiction.<sup>1650</sup>

30.23 In South Australia, a contract entered into by a person under administration is voidable at the option of the administrator.<sup>1651</sup>

30.24 In the Northern Territory, South Australia, Victoria and Western Australia, the validity of any contract entered into by a person under administration is upheld if it is established that the other party acted in good faith and did not know or could not reasonably have known that the adult was the subject of an administration order.<sup>1652</sup> The legislation in the Northern Territory, Victorian and Western Australia also requires that the contract must have been made for adequate consideration.<sup>1653</sup>

30.25 In the Northern Territory and Western Australia, the legislation makes an exception for the purchase of necessaries for the incapacitated person.<sup>1654</sup>

30.26 By way of example, section 52 of the *Guardianship and Administration Act 1986* (Vic) provides:

**52 Restriction on powers of represented person to enter into contracts etc.**

- (1) Where the Tribunal has made an administration order the represented person whilst a represented person or until the Tribunal revokes that order is, to the extent that the represented person's estate is under the

<sup>1648</sup> *Aged and Infirm Persons' Property Act* (NT) s 20(1) (leave of the Supreme Court); *Guardianship and Administration Act 1986* (Vic) s 52(1); *Guardianship and Administration Act 1990* (WA) s 77(1)–(3).

<sup>1649</sup> *Guardianship and Administration Board Act 1986* (Vic) s 52(1); *Guardianship and Administration Act 1990* (WA) s 77(1)–(3).

<sup>1650</sup> *Aged and Infirm Persons' Property Act* (NT) s 20(2), (3); *Guardianship and Administration Act 1986* (Vic) s 52(2); *Guardianship and Administration Act 1990* (WA) s 77(1)–(3).

<sup>1651</sup> *Guardianship and Administration Act 1993* (SA) s 42.

<sup>1652</sup> *Aged and Infirm Persons' Property Act* (NT) s 20 (3); *Guardianship and Administration Act 1993* (SA) s 42(2); *Guardianship and Administration Act 1986* (Vic) s 52(3); *Guardianship and Administration Act 1990* (WA) s 77 (3)(a).

<sup>1653</sup> *Aged and Infirm Persons' Property Act* (NT) s 20 (3); *Guardianship and Administration Act 1986* (Vic) s 52(3); *Guardianship and Administration Act 1990* (WA) s 77(3)(a).

<sup>1654</sup> *Aged and Infirm Persons' Property Act* (NT) s 20(1)(a); *Guardianship and Administration Act 1990* (WA) s 77(3)(a).

control of the administrator, deemed incapable of dealing with, transferring, alienating or charging her or his money or property or any part thereof or becoming liable under any contract without the order of the Tribunal or the written consent of the administrator.

- (2) Every dealing, transfer, alienation or charge by any represented person in respect of any part of the estate which is under the control of the administrator is void and of no effect, and the money or property the subject of the dealing, transfer, alienation or charge is recoverable by the administrator in any court of competent jurisdiction.
- (3) This section does not render invalid any dealing, transfer, alienation or charge by any represented person made for adequate consideration with or to or in favour of any other person who proves that she or he acted in good faith and did not know or could not reasonably have known that the person was a represented person.
- (4) For the purpose of this section the acceptance of payment of the whole or any part of a debt is deemed to be a dealing with property.

30.27 These types of provisions modify the operation of the general rule that an adult who is subject to an administration order cannot validly enter into a transaction involving property under administration. They provide that an adult may enter into a binding contract in certain circumstances. The provisions also protect third parties who in good faith and without knowledge that the adult is subject to an administration order have dealt with the incapacitated person.<sup>1655</sup> Notably, this particular protection differs from the common law position to the extent that it shifts the onus of proof from the incapacitated adult to the other party to the transaction.

30.28 However, these types of provisions have been criticised on a number of bases. First, it may be difficult to prove that the person's incapacity was so evident that the other party knew or ought to have known of the incapacity.<sup>1656</sup> Secondly, it has been suggested that, in jurisdictions in which contracts for necessities are valid and binding, the provisions offer little certainty as to which transactions will be valid and which will not.<sup>1657</sup> Finally, it has been suggested that these types of provisions (and indeed the common law rules of contractual capacity) are inflexible

<sup>1655</sup> The legislation in the Northern Territory, Victorian and Western Australia also requires that the contract must have been made for adequate consideration: see n 1653 above.

<sup>1656</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) 445–8. The Commission made these general observations in the context of the existing law at that time (which was s 83 of the *Public Trustee Act 1978* (Qld)). That section has a number of general similarities to the provisions in South Australia and aspects of the provisions in the Northern Territory, Victoria and Western Australia.

<sup>1657</sup> Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989), [4.68]; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) 445–8. This point may be illustrated by the example of an incapacitated person who enters into a transaction to buy a compact disc player in a jurisdiction where contracts for necessities are valid and binding. In that case, the question is whether the compact disc player is a necessary. The answer to that question depends on a number of factors and on the case law. A seller dealing with the incapacitated person may find, if the goods are not necessities, that he or she has to bear a loss which in the circumstances is unfair to the seller.

because they offer 'all or nothing' solutions in terms of the losses that may occur and must be borne by someone.<sup>1658</sup>

***The power of the Tribunal or Court to set aside a transaction and adjust transactions: the ACT, New South Wales and Western Australia***

30.29 Section 71 of the *Guardianship and Management of Property Act 1991* (ACT) applies if a person has a manager appointed under the Act to manage his or her property. That section provides that, if a person for whose property a manager is appointed purports to enter into a transaction in relation to the property, the transaction is not void on the ground that the person was not legally competent to enter into the transaction. It empowers the ACT Civil and Administrative Tribunal ('ACAT'), the Supreme Court or a Magistrates Court, in certain circumstances, to confirm the transaction, declare the transaction void, or adjust the rights of the parties to the transaction, as is just:

**71 Power to adjust transactions**

- (1) If a person for whose property a manager is appointed purports to enter into a transaction in relation to the property, the transaction is, subject to subsection (2), not void on the ground that the person was not legally competent to enter into the transaction.
- (2) The ACAT, the Supreme Court or the Magistrates Court may, on an application made within 90 days after the date of the transaction by the guardian, the manager or some other person concerned in the transaction, by order—
  - (a) confirm the transaction; or
  - (b) declare the transaction void; or
  - (c) adjust the rights of the parties to the transaction;
 as is just.
- (3) The ACAT, the Supreme Court or the Magistrates Court may order an application made to it to be transferred to another of the ACAT, the Supreme Court or the Magistrates Court.
- (4) A transferred application must be dealt with as if it had been started in the ACAT or the relevant court and the ACAT or court may make any proper order for the further steps to be taken before it.
- (5) An order under this section has effect according to its tenor.

30.30 The New South Wales legislation empowers the Supreme Court to set aside a disposition of an interest in real or personal property by a patient while he

<sup>1658</sup>

Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.70]; Queensland Law Reform Commission, Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) 445–8.

or she is a managed person and may make any consequential orders the Court thinks fit.<sup>1659</sup>

30.31 In Western Australia, the legislation enables the Tribunal to set aside a transaction, which has been entered into by a person within a specified period before the person has been declared to be in need of an administrator. It may also make such consequential orders as it thinks fit for the purpose of adjusting the position or rights of the parties and other persons. Section 82 of the *Guardianship and Administration Act 1990* (WA) provides:

**82 Transactions may be set aside**

- (1) Subject to subsection (2), where a person within 2 months before being declared under section 64(1) to be a person in need of an administrator of his estate has entered into a disposition of any property (including a gift) or taken on lease, mortgaged, charged, or purchased any property, or agreed to do so, the State Administrative Tribunal may, on the application of the administrator of that person's estate and on notice to such persons as the Tribunal may direct, set aside the transaction and make such consequential orders as it thinks fit for the purpose of adjusting the position or rights of the parties and other persons.
- (2) The State Administrative Tribunal shall not set aside any transaction under this section where—
  - (a) the application is not brought within the period of 2 years commencing on the day of the completion of the transaction or, in the case of a lease taken, is not brought before the expiration of the lease; or
  - (b) the Tribunal is satisfied, in the case of a transaction that is not a gift, that —
    - (i) the other party acted in good faith and without notice of any incapacity to which the represented person was then subject; and
    - (ii) the consideration for the disposition was adequate or, in the case of a purchase, not excessive or, in the case of a lease taken, the rent is not excessive.
- (3) For the purposes of an application under this section, the represented person shall be deemed to have been a person who was in need of an administrator of his estate, at the time when he entered into the transaction or agreed to do so, until the contrary is shown.

***The Tribunal's power to restrain dealings entered into by an adult with impaired capacity: The ACT***

30.32 Section 72 of the *Guardianship and Management of Property Act 1991* (ACT) applies if a person with impaired capacity does not have a manager appointed under the Act to manage his or her property. It empowers the ACT Civil

<sup>1659</sup>

*NSW Trustee and Guardian Act 2009* (NSW) s 117.



and Administrative Tribunal ('ACAT') to restrain a person from entering into, completing, registering or otherwise giving effect to a property transaction with another person if the Tribunal is satisfied that there are grounds for the appointment of a manager for the property:

## **72 Injunctions to restrain dealings**

- (1) The ACAT may, on application, by order, restrain a person from entering into, completing or registering or otherwise giving effect to a transaction with someone else in relation to the property of the other person if satisfied that there are grounds for the appointment of a manager for the property.
- (2) An order remains in force for the period, not longer than 3 days, that is specified in the order but if, within the period, an application for the appointment of a manager is made to the ACAT, the ACAT may, by order, continue the first order until the application is decided.
- (3) A person who has notice of an order under this section must not act contrary to the order.

Maximum penalty (subsection (3)): 50 penalty units, imprisonment for 6 months or both.

## **Submissions**

### ***A statutory provision dealing with contracts entered into by an adult with impaired capacity***

30.33 The Commission's Discussion Paper, which was released prior to the Supreme Court decision in *Bergmann v DAW*, did not specifically address the issue of the contractual capacity of an adult with impaired capacity. However, two respondents to the Discussion Paper raised the issue in their submissions.<sup>1660</sup>

30.34 The Public Trustee expressed the view that, as a matter of general policy, an administrator ought have the capacity to avoid transactions entered into by an adult with impaired capacity.<sup>1661</sup> The Public Trustee explained that he is frequently engaged as administrator where an imprudent transaction has been entered into by an incapacitated adult and there is a strong suspicion that the transaction has been to the disadvantage of the adult. He also said that, in these circumstances:

Often however the commercial realities and available evidence may yield a conclusion that litigation in an attempt to avoid the improvident transaction ought not be taken.

30.35 By way of illustration, the Public Trustee gave the following example:

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1660 Submissions 155, 156A.

1661 Submission 156A.

A recent example (without disclosing the individuals concerned) which is not atypical involved the appointment of the Public Trustee as an administrator in circumstances where the incapacitated adult had signed a contract to sell her house.

The sale was at a manifest undervalue by some \$100,000 but that which needed to be shown in order to avoid the transaction by the Public Trustee as administrator was not only the fact of incapacity but also that the purchaser knew or ought to have known of that incapacity.

This involves a factual enquiry in circumstances where at best the person available to offer evidence that the transaction should be avoided had been determined by the Tribunal to lack capacity (against the evidence of the purchaser who said that he was not on any such notice).

Fortuitously having adopted a strident position the purchaser in that matter did not press for completion of the contract but in other matters the Public Trustee has not been so successful or was appointed at a time after the transaction was completed.

30.36 As a consequence, the Public Trustee proposed that the *Guardianship and Administration Act 2000* (Qld) should be amended to include a new provision modelled on section 83(1) and (4) of the *Public Trustee Act 1978* (Qld), as it applied prior to the enactment of the *Guardianship and Administration Act 2000* (Qld).<sup>1662</sup> That section applied in respect of an ‘incapacitated person’ — a person with a mental or intellectual disability whose estate was under the management of the Public Trustee.

30.37 Section 83 of the *Public Trustee Act 1978* (Qld), then provided:

**83 Limitation of contractual powers of incapacitated person**

- (1) No incapacitated person shall be capable, without the leave of the court, of making any transfer, lease, mortgage, or other disposition of the estate under management, or of any part thereof, or of entering into any contract (other than for necessities) affecting the same and every such transfer, lease, mortgage or other disposition or contract, made without such leave, shall be voidable by that incapacitated person or by the public trustee on the incapacitated person's behalf.
- (2) The court may by order give leave to an incapacitated person to make any transfer, lease, mortgage, or other disposition of the incapacitated person's property, or of any part thereof, or to enter into any contract, if the court is satisfied that such transfer, lease, mortgage, disposition, or contract is for the benefit of the incapacitated person and that the incapacitated person consents thereto with adequate understanding of the nature thereof.

<sup>1662</sup>

Prior to the enactment of the *Guardianship and Administration Act 2000* (Qld), the *Public Trustee Act 1978* (Qld) limited the contractual powers of an ‘incapacitated person’ (who was a person with a mental or intellectual disability whose estate was under the management of the Public Trustee). When the *Guardianship and Administration Act 2000* (Qld) was enacted, it consequentially amended the *Public Trustee Act 1978* (Qld) to limit the application of s 83 of the *Public Trustee Act 1978* (Qld) to minors: *Guardianship and Administration Act 2000* (Qld) s 236 sch 3. Section 83 therefore does not apply to adults who have an administrator appointed under the *Guardianship and Administration Act 2000* (Qld).

- (3) Nothing in this part shall affect the law relating to the validity of wills or other testamentary dispositions.
- (4) Nothing in this section shall invalidate any contract, transfer, lease, mortgage or other disposition entered into or made by any incapacitated person if the other party thereto proves that the other party acted in good faith and for adequate consideration and without knowledge that the incapacitated person was an incapacitated person.

...

30.38 Section 83 differed from the general law governing contractual capacity in several ways. Subject to the exception of contracts for necessities, section 83(1) imposed a form of statutory incapacity on a person whose property was subject to a management order. Section 83(4) also shifted the onus of proof to the other party to the transaction and introduced the additional requirement of adequate consideration.

30.39 The effect of the Public Trustee's proposed new provision would be that an administrator may avoid a transaction entered into by an adult with impaired capacity unless the other party to the transaction proves that that person acted in good faith and for adequate consideration and without knowledge that the adult was under a decision-making incapacity.

30.40 This proposed new provision sets a similar threshold for upholding the validity of the transaction to that in the Northern Territory, Victoria and Western Australia. In addition to the requirements that the other party to the transaction must prove that he or she acted in good faith and did not know and could not reasonably have known that the person had impaired capacity (as is the case in the Northern Territory, South Australia, Victoria and Western Australia), the Public Trustee's proposed new provision includes the requirement of adequate consideration.

30.41 The Public Trustee suggested that this approach, which focussed on the 'improvidence' of the transaction, was fairer to the adult:

On the most uncontentious of transactions — where the incapacitated adult enters into a transaction at an undervalue and there is an 'innocent' purchaser (without knowledge) the question which arises is who should ultimately benefit in respect of that contract? This approach is not dissimilar to the differing results yielded by application of *nemo dat quod non habet* and the Torrens System in respect of 'good title'.

The Public Trustee contends that the incapacitated adult through his or her administrator ought be able to avoid the transaction unless it can be shown that the transaction was for 'adequate consideration'.

The balance where there is something other than adequate consideration provided should favour the incapacitated adult.

This is for essentially two reasons; first the proposed change anticipates that the transaction is not fair, in the broadest sense (if it were adequate consideration would have been offered). Further in a contest between an incapacitated adult and an innocent counter-party, the balance should favour

the incapacitated adult because in the vast majority of cases the commercial or financial impact of an improvident transaction is keenly felt by the adult who generally has limited means to earn income and to acquire assets.

Of course this proposal is cast in the context of there being no concern as to the conduct of the counter party. The unfortunate reality is that in the many transactions the Public Trustee sees he has real concerns as to the conduct of the counter party.

The proposed power is not unlike that which existed as law until 2000 by virtue of the Public Trustee Act as it then existed — section 83 (1) and (4).

30.42 The Perpetual Group of Companies also suggested that consideration should be given to the idea of permitting administrators to avoid dispositions and contracts entered into by the adult during the administration:<sup>1663</sup>

It is common for [Perpetual Trustees Queensland Limited] to be appointed administrator for an adult for the limited purpose of administering the proceeds of a claim for damages ('the fund'). It is also common for such clients to incur debts and other obligations which can only be met from the fund, are not budgeted for, and which may ultimately affect the fund's ability to provide for the adult's needs for the whole of their anticipated life.

We acknowledge the need to balance the adult's needs for lifetime support against the rights of third parties who do not have actual or imputed knowledge of the adult's impaired capacity. However the idea of permitting administrators in some circumstances to avoid dispositions and contracts entered into by the adult during the administration deserves serious consideration.

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

30.43 As mentioned above, the Tribunal has jurisdiction under section 146 of the *Guardianship and Administration Act 2000* (Qld) to make a declaration about the capacity of an adult (including the capacity of an adult to enter into a contract). Section 147 of the Act provides that a declaration by the Tribunal about 'whether a person had capacity to enter a contract is, in a subsequent proceeding in which the validity of the contract is in issue, evidence about the person's capacity'.

30.44 In its submission to the Commission, the Queensland Public Interest Law Clearing House Inc ('QPILCH') raised a concern about the Tribunal's ability to make a declaration about an adult's capacity to enter into a contract under section 147 of the *Guardianship and Administration Act 2000* (Qld).<sup>1664</sup>

30.45 QPILCH referred to a case in which the Tribunal had refused to make such a declaration. In that case, the contract in question was the subject of proceedings in the Supreme Court, to which the adult was a defendant, that had not yet been heard and determined. The adult applied to the Tribunal for a

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1663 Submission 155.

1664 Submission 96A.

declaration about the adult's capacity at the time of the relevant transaction.<sup>1665</sup> The Tribunal suggested, however, that this was an issue for the Supreme Court and that, consequently, the Tribunal had no power to make the declaration unless the question was referred to it by the Supreme Court.

30.46 QPILCH submitted that it is preferable for the Tribunal to determine an adult's capacity, including in relation to contracts, given the Tribunal's particular expertise and developing jurisprudence.

30.47 The QPILCH submission raises two issues. First, under section 241(1) of the *Guardianship and Administration Act 2000* (Qld), the court may, if it considers it appropriate, transfer a proceeding within the Tribunal's jurisdiction to the Tribunal. It is not clear, however, whether 'a proceeding' includes a part of a proceeding, such as the issue of whether a person had capacity to enter into a contract. An issue for consideration is whether section 241 should be amended to clarify that the court has power, under section 241(1), to transfer part of a proceeding, including, but not limited to, the issue of whether a person had capacity to enter into a contract, to the Tribunal.

30.48 Secondly, when read literally, the effect of section 147 of the *Guardianship and Administration Act 2000* (Qld) appears to be that such a declaration is evidence about the person's capacity only in a 'subsequent proceeding' rather than in a proceeding that is already on foot. An issue is whether section 147 should be amended to clarify that it is not limited in its application to a subsequent proceeding.

## The Commission's view

### ***A statutory provision dealing with contracts entered into by an adult with impaired capacity***

30.49 The Commission considers that 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),<sup>1666</sup> to deal with the power of an adult who is subject to an administration order to deal with his or her property and the consequences of the entry into a transaction by the adult. The effect of such an amendment is to override the general rule in *Bergmann v DAW*, that an adult who has impaired capacity for a matter and who is subject to an administration order cannot validly enter into any transactions in respect of that matter while the order is in force, and to clarify that, generally, a transaction entered into under those circumstances is voidable rather than void.

30.50 The Commission also considers that the proposed new contractual capacity provision should apply not only to an adult with impaired capacity for a matter and has an administrator appointed for the matter, but also to other adults with impaired capacity. The effect of extending the scope of the provision to

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<sup>1665</sup> The adult applied at the same time for a declaration about the adult's present capacity to conduct the Supreme Court litigation, as a self-represented litigant.

<sup>1666</sup> See [30.37] above.

include these other adults is to modify the general law relating to contractual capacity in respect of adults with impaired capacity (for whom there is no administrator appointed). Under the general law, if a person with impaired capacity enters into a contract, the contract will be voidable by the person or the person's representative if either of them can prove that the person was unable due to his or her lack of capacity to understand the contract at the time of formation and the other party knew or ought to have known of the person's lack of capacity. There is no requirement, however, that the contract must be for an adequate consideration.

30.51 As the Public Trustee suggested in his submission, the application of the general law may cause considerable hardship where an adult with impaired capacity has entered into a disadvantageous contract. For this reason, the Commission considers that it is necessary to shift the onus of proof that ordinarily applies under the general law in favour of the adult and also to ensure that a contract between the adult and another person that is not made for adequate consideration may be avoided by the adult or by specified persons on behalf of the adult.

30.52 These particular changes may be effected by providing in the proposed new contractual capacity provision 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 the adult, by an administrator appointed for the adult or by 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.

30.53 In addition, the proposed new contractual capacity provision should provide that nothing in that provision 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.

30.54 Finally, the proposed new contractual capacity provision should provide that nothing in that provision affects any contract for necessities entered into by the adult. The legal rules about contracts for necessities provide a useful mechanism for fairly dividing rights and duties between the suppliers and consumers who lack decision-making capacity in relation to the purchase of goods and services. On the one hand, they encourage independent living by facilitating the purchase by an adult of items of an everyday nature, and ensuring that those items are paid for. However, these rules also safeguard the adult's interests because they limit the purchase of items to those that are necessary to the adult's actual requirements and limit the purchase price to a reasonable price.

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

30.55 The Commission considers that section 241(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that, for section 241(1),

a 'proceeding' includes part of a proceeding, and includes but is not limited to, an issue about whether a person had capacity to enter into a contract. This would remove any doubt that the court has express power to refer the issue of whether a person has capacity to enter into a contract to the Tribunal for a declaration. In chapter 28 of this Report, the Commission has similarly recommended the amendment of section 241 to clarify that, for section 241(1), 'proceeding' includes the issue of the capacity of a party to a proceeding before the court.

30.56 Because the issue of whether a person has capacity to enter into a contract may arise in any jurisdiction, section 241 should also be amended so that the court's power to transfer that issue to the Tribunal for a declaration may be exercised not only by the Supreme Court, but also by the District Court or a Magistrates Court. A similar recommendation is made in chapter 28, in relation to the court's power to transfer the issue of a party's capacity to a proceeding before the court.

30.57 In its current form, section 147 of the *Guardianship and Administration Act 2000* (Qld) refers to the Tribunal's declaration being admissible in a 'subsequent' proceeding. On one view, this wording may suggest that the effect of a declaration made under section 147 is evidence about the person's capacity only in a 'subsequent proceeding' rather than in another proceeding that is already on foot. The Commission considers that, for the sake of clarity, section 147 should be amended to refer to 'another' proceeding rather than a 'subsequent' proceeding.

## **SUBSTITUTE DECISION-MAKERS' RIGHT TO INFORMATION**

### **The law in Queensland**

#### ***Guardians and administrators***

30.58 Section 44 of the *Guardianship and Administration Act 2000* (Qld) deals with the right of a guardian or an administrator to information to which the adult would have been entitled if he or she had capacity. It gives a guardian or an administrator who has power for a matter a right to all the information that is necessary to make an informed exercise of the power — effectively, to make an informed decision.

30.59 Section 44 provides:

#### **44 Right of guardian or administrator to information**

- (1) A guardian or administrator who has power for a matter for an adult has a right to all the information the adult would have been entitled to if the adult had capacity and which is necessary to make an informed exercise of the power.
- (2) At the guardian's or administrator's request, a person who has custody or control of the information must give the information to the guardian or administrator, unless the person has a reasonable excuse.

- (3) If a person who has custody or control of the information does not comply with a request by a guardian or administrator to give information, the tribunal may, on application by the guardian or administrator, order the person to give the information to the guardian or administrator.
- (4) If the tribunal orders a person to give information to the guardian or administrator, the person must comply with the order, unless the person has a reasonable excuse.
- (5) It is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person.
- (6) Subject to subsection (5), this section overrides—
  - (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
  - (b) any claim of confidentiality or privilege, including a claim based on legal professional privilege.

30.60 A person who has custody or control of the information must, on request by the guardian or administrator, give the information to the guardian or administrator unless he or she has a reasonable excuse.<sup>1667</sup> If the person does not comply with the request, the Tribunal may, on the application of the guardian or administrator, order the person who has custody or control of the requested information to give the information to the guardian or administrator,<sup>1668</sup> and the person must comply with the Tribunal's order unless he or she has a reasonable excuse.<sup>1669</sup>

### ***Attorneys and statutory health attorneys***

30.61 Section 81 of the *Powers of Attorney Act 1998* (Qld) deals with the right of an attorney, including a statutory health attorney, to information to which the principal would have been entitled if he or she had capacity. Like section 44 of the *Guardianship and Administration Act 2000* (Qld), it gives an attorney or statutory health attorney for a principal the right to all the information that is necessary to make informed decisions about anything that the attorney is authorised to do.

30.62 Section 81 provides:

#### **81 Right of attorney to information**

- (1) An attorney<sup>1670</sup> has a right to all the information that the principal would have been entitled to if the principal had capacity and that is necessary

<sup>1667</sup> *Guardianship and Administration Act 2000* (Qld) s 44(2).

<sup>1668</sup> *Guardianship and Administration Act 2000* (Qld) s 44(3).

<sup>1669</sup> *Guardianship and Administration Act 2000* (Qld) s 44(5) expressly preserves the privilege against self-incrimination.

<sup>1670</sup> *Powers of Attorney Act 1998* (Qld) s 75 provides that, except where otherwise provided, ch 5, pt 2 of the Act, which includes s 81, applies to an attorney under an enduring document and a statutory health attorney.



to make, for the principal, informed decisions about anything the attorney is authorised to do.

- (2) A person who has custody or control of the information must disclose the information to the attorney on request.
- (3) This section overrides—
  - (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
  - (b) for an attorney under an enduring power of attorney—any claim of confidentiality or privilege, including a claim based on legal professional privilege; and
  - (c) for another attorney—any claim of confidentiality or privilege, excluding a claim based on legal professional privilege. (note added)

30.63 Although section 81 of the *Powers of Attorney Act 1998* (Qld) is similar to section 44 of the *Guardianship and Administration Act 2000* (Qld), section 81 does not make provision for an attorney or a statutory health attorney to apply to the Tribunal for an order that the person having custody or control of the information give the information to the attorney or statutory health attorney.

### ***Guardians, attorneys and statutory health attorneys: health information***

30.64 Section 76 of the *Guardianship and Administration Act 2000* (Qld) gives a right to certain health information to guardians, attorneys or statutory health attorneys<sup>1671</sup> who have power for a health matter for an adult.<sup>1672</sup> At the request of the guardian, attorney or statutory health attorney, the adult's health provider must give the information mentioned in section 76(4).

30.65 Section 76 provides:

#### **76 Health providers to give information**

- (1) The purpose of this section is to ensure—
  - (a) a guardian or attorney who has power for a health matter for an adult has all the information necessary to make an informed exercise of the power; and
  - (b) the tribunal, in deciding whether to consent to special health care for an adult with impaired capacity for a special health matter, has all the information necessary to make an informed decision.
- (2) At the guardian's or attorney's request, a health provider who is treating, or has treated, the adult must give information to the guardian or attorney unless the health provider has a reasonable excuse.

<sup>1671</sup> *Guardianship and Administration Act 2000* (Qld) s 76(10).

<sup>1672</sup> *Guardianship and Administration Act 2000* (Qld) s 76(1)(a), (10).

- (3) At the tribunal's request, a health provider who is treating, or has treated, the adult must give information to the tribunal unless the health provider has a reasonable excuse.
- (4) The information to be given by a health provider who is treating, or has treated, the adult includes information about—
  - (a) the nature of the adult's condition at the time of the treatment; and
  - (b) the particular form of health care being, or that was, carried out; and
  - (c) the reasons why the particular form of health care is being, or was, carried out; and
  - (d) the alternative forms of health care available for the condition at the time of the treatment; and
  - (e) the general nature and effect of each form of health care at the time of the treatment; and
  - (f) the nature and extent of short-term, or long-term, significant risks associated with each form of health care; and
  - (g) for a health provider who is treating the adult—the reasons why it is proposed a particular form of health care should be carried out.
- (5) If a health provider does not comply with a request by a guardian or attorney to give information, the tribunal may, on application by the guardian or attorney, order the health provider to give the information to the guardian or attorney.
- (6) If the tribunal orders a health provider to give information, the health provider must comply with the order, unless the health provider has a reasonable excuse.
- (7) It is a reasonable excuse for a health provider to fail to give information because giving the information might tend to incriminate the health provider.
- (8) Subject to subsection (7), this section overrides—
  - (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
  - (b) any claim of confidentiality or privilege.
- (9) This section does not limit—
  - (a) a guardian's right to information under section 44; or
  - (b) the tribunal's right to information under section 130; or
  - (c) an attorney's right to information under the *Powers of Attorney Act 1998*, section 81.

(10) In this section—

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

30.66 Section 76 has a similar structure to section 44 of the *Guardianship and Administration Act 2000* (Qld). Section 76(5) provides that, if a health provider does not comply with a request by a guardian, an attorney or a statutory health attorney, the Tribunal may, on application by the guardian, attorney or statutory health attorney, order the health provider to give the information. Further, section 76(6) provides that, if the Tribunal orders a health provider to give information, the health provider must comply with the order unless the health provider has a reasonable excuse.<sup>1673</sup>

30.67 Section 76 does not limit a guardian's right to information under section 44 of the Act or an attorney's or a statutory health attorney's right to information under section 81 of the *Powers of Attorney Act 1998* (Qld) but gives a right to information in addition to that given by those provisions.<sup>1674</sup>

### The law in other jurisdictions

30.68 The legislation in the other Australian jurisdictions deals with the right to information of substitute decision-makers in a much less comprehensive way than the Queensland provisions discussed above. Only three jurisdictions — the ACT, New South Wales and South Australia — have provisions which deal with this issue.

30.69 In the ACT, an attorney under an enduring power of attorney has a right to all information that the principal would have been entitled to if the principal had decision-making capacity,<sup>1675</sup> although there is not a similar right for a guardian or an administrator. Further, a health professional who is seeking a health attorney's consent to medical treatment for a protected person must give the health attorney certain information.<sup>1676</sup> However, that requirement is limited to the circumstance where consent is being sought and does not apply more generally.

30.70 In New South Wales, an enduring guardian (the equivalent of an attorney under an enduring power of attorney for personal matters) has, for the purpose of exercising a function that he or she is authorised to exercise, the same right of access to information about the appointor (that is, the principal) that the appointor has.<sup>1677</sup> Further, the legislation provides that nothing in the *Privacy and Personal Information Protection Act 1998* (NSW) prevents a public sector agency from disclosing information about an appointor to an enduring guardian if the agency is

<sup>1673</sup> Like s 44(5) of the *Guardianship and Administration Act 2000* (Qld), s 76(7) expressly preserves the privilege against self-incrimination.

<sup>1674</sup> *Guardianship and Administration Act 2000* (Qld) s 76(9).

<sup>1675</sup> *Powers of Attorney Act 2006* (ACT) s 45.

<sup>1676</sup> *Guardianship and Management of Property Act 1991* (ACT) s 32G.

<sup>1677</sup> *Guardianship Act 1987* (NSW) s 6E(2A).

satisfied that the disclosure of the information would assist the enduring guardian to exercise his or her functions as an enduring guardian.<sup>1678</sup> However, there is no provision about the right to information of a guardian or financial manager appointed by the Guardianship Tribunal.

30.71 In South Australia, the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) provides that the medical practitioner must explain certain matters to the patient or to the patient's representative.<sup>1679</sup> This may include an attorney under a medical power of attorney.

## Issues for consideration

### Background

30.72 In its 2007 report on confidentiality, the Commission noted concerns in submissions about substitute decision-makers' ability to obtain information to enable them to act for the adult.<sup>1680</sup> In particular, a submission from the Guardianship and Administration Reform Drivers ('GARD') expressed concern about the apparent lack of enforceability of the right to information.<sup>1681</sup>

30.73 In practice, much of the difficulty appears to have been the perceived conflict between the right of substitute decision-makers to information and federal privacy legislation. This issue was considered by the Australian Law Reform Commission ('ALRC') in its recently completed review of the *Privacy Act 1988* (Cth). The ALRC observed in its Report that the existing privacy legislation allows disclosure to formal substitute decision-makers in appropriate circumstances:<sup>1682</sup>

So long as the extent of the authorisation given by the instrument, appointment or relevant legislation covers matters that are related to the personal information in question, agencies and organisations operating under the *Privacy Act* should recognise these authorisations and allow the person to act as the substitute decision maker for the individual. The substitute decision maker 'stands in the shoes' of the individual, and therefore can provide consent or refuse to provide consent, and have access to information, as if he or she is the individual being represented.

30.74 The ALRC noted, however, that because of misunderstandings about the legislation, this was not always occurring in practice. It therefore recommended

<sup>1678</sup> *Guardianship Act 1987* (NSW) s 6E(2B).

<sup>1679</sup> *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 15.

<sup>1680</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, [8.530].

<sup>1681</sup> Submission C24. GARD is an informal alliance of community-based organisations and is comprised of the Caxton Legal Centre Inc, Queensland Advocacy Incorporated, Queensland Parents for People with Disability Inc, Speaking Up for You Inc, Carers Queensland and Queenslanders with Disability Network.

<sup>1682</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [70.55]. See also [70.60]. As to disclosure to *informal* representatives, see [70.84]–[70.86].

that the Office of the Privacy Commissioner develop and publish guidance on the issue.<sup>1683</sup>

The ALRC recommends that the Office of the Privacy Commissioner (OPC) should develop and publish guidance to assist agencies and organisations to understand the application to the *Privacy Act* of relevant guardianship and administration and power of attorney legislation. The ALRC also recommends that agencies and organisations, that regularly handle personal information about adults with an incapacity, ensure that relevant staff receive training on issues concerning capacity, and in recognising and verifying the authority of third party representatives.

30.75 In the Commission's view, such measures should help to lessen the reluctance of service providers and institutions to provide relevant information to an attorney.

### ***Sanctions for non-compliance with the statutory requirements to give information***

30.76 An issue for consideration is whether sections 44 and 76(2) of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) are sufficient in their present form or whether the inclusion of a specific penalty would increase compliance with the requirements in those provisions to give certain information.

30.77 The submission from GARD raised concerns about the lack of a penalty in section 44 of the *Guardianship and Administration Act 2000* (Qld), which deals with the right to information of guardians and administrators:<sup>1684</sup>

Under the Queensland Act it is not an offence for a person who has custody or control of the information not to give the information to the guardian or administrator. The only recourse a guardian or administrator has is to apply to the Tribunal for an order for the person to give the guardian or administrator the information. ... GARD considers that the lack of a penalty for non-compliance is a large contributor to the problem.

30.78 Although sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) do not include a specific penalty for a failure to provide the requested information, they nevertheless include a mechanism by which a person who has a right to information under either of those sections may apply to the Tribunal for an order that the person who has custody or control of the information, or the adult's health provider, give the information to the person who requested it. Both provisions also state that, if the Tribunal makes such an order, the person with the information or the health provider must comply with the order unless he or she has a reasonable excuse.

30.79 Section 213 of the QCAT Act, which deals with the contravention of Tribunal decisions, provides:

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<sup>1683</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [70.5]. See also [70.62].

<sup>1684</sup> Submission C24.

### 213 Contravening decision

- (1) A person must not, without reasonable excuse, contravene a decision of the tribunal.

*Note—*

See also section 218 (Contempt of tribunal).

Maximum penalty—100 penalty units.

- (2) Subsection (1) does not apply if or to the extent that the decision is a monetary decision.

30.80 Schedule 3 of the QCAT Act includes the following definition of ‘decision’:

**decision**, of the tribunal—

- (a) means—
- (i) an order made or direction given by the tribunal; or
  - (ii) the tribunal’s final decision in a proceeding; and
- (b) for chapter 7—see section 244.

30.81 A failure to comply with a Tribunal order to give information would therefore appear to be a breach section 213 of the QCAT Act, for which there is a maximum penalty of \$10 000.<sup>1685</sup>

30.82 However, as mentioned earlier, section 81 of the *Powers of Attorney Act 1998* (Qld) does not include a mechanism by which an attorney or a statutory health attorney may apply to the Tribunal for an order that the person with custody or control of the information give the information. In this respect, it would seem desirable for it to be consistent with sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld).

30.83 There may also be an argument that, in terms of securing compliance with the requirements of sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld), a penalty in the actual provision would be more effective than a penalty in a separate provision that deals generally with non-compliance with Tribunal orders.

### Education

30.84 Another issue to consider is whether the difficulties faced by substitute decision-makers in accessing information could be improved by education. For example, it may be appropriate for the approved form for making an enduring power of attorney to include a statement about the attorney’s legislative right to information. Seeing such a statement on the authorising instrument might

<sup>1685</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1); *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

encourage disclosure by persons who might not otherwise be aware of the attorney's right to information. A similar statement could be included on a Tribunal order appointing a guardian or an administrator.

## Discussion Paper

30.85 In the Discussion Paper, the Commission sought submissions on whether:<sup>1686</sup>

- section 81 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that:
  - if a person who has custody or control of information does not comply with a request by an attorney to give information, the Tribunal may, on application by the attorney, order the person to give the information to the attorney;
  - if the Tribunal orders a person to give information to the attorney, the person must comply with the order unless the person has a reasonable excuse; and
  - it is a reasonable excuse for a person to fail to give information because giving the information might tend to incriminate the person; and
- 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 be an offence against the particular Act.

30.86 The Commission also sought submissions on whether:<sup>1687</sup>

- the order appointing a guardian or an administrator should include a statement about the guardian's or administrator's right to information; or
- the approved form for making an enduring power of attorney should include a statement about the attorney's right to information.

## Submissions

30.87 The former Acting Public Advocate noted that substitute decision-makers sometimes face difficulties in obtaining information about the adult:<sup>1688</sup>

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<sup>1686</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 282–3.

<sup>1687</sup> Ibid 283.

<sup>1688</sup> Submission 160.

Difficulties may arise for substitute decision-makers in accessing health information necessary to inform a current health decision; dealing with government departments and agencies, including utilities suppliers; and having their authority to act recognised by financial institutions. Failure of the privacy regime to support guardianship regimes, which recognise both informal and formal decision-makers and their right to information, leads to adverse outcomes for vulnerable adults including limitations on their ability to participate in life, access services, diminished self-reliance, and discrimination.

The Public Advocate is aware anecdotally of systemic issues regarding the recognition afforded by banks and other financial institutions to substitute decision-makers, thereby inhibiting access to information. Common issues include:

- Difficulties with identification of an administrator or informal substitute decision-maker when they attempt to open a new bank account for an adult.
- Barriers to information when an adult attempts to access their own information and funds. Some banks have policies which preclude an adult accessing their bank account where an administrator is appointed. Such an approach may be restrictive of the adult's rights.
- Difficulties with recognition of enduring powers of attorney and guardianship orders.
- Staff lacking knowledge of the guardianship regime and legislation, and the powers given to substitute decision-makers under a guardianship order.
- Lack of policy regarding substitute decision-making arrangements for customers with impaired decision-making capacity, and inconsistent policies between branches of the same bank, and individual banks, further inhibits access to information.

...

Requesting health information also presents complex issues. Potentially, it covers any records, written or electronic, about the patient's history, diagnosis, and condition/s held by any doctor or health service. Medical records are not owned by the patient, but by the doctor or health service. Yet patients require access to their medical records.

...

Barriers to accessing information may also be encountered by substitute decision-makers when dealing with government agencies and third parties including, for example, government agencies such as Medicare, private health companies, and utility companies.

It is essential for the benefit of adults with impaired decision-making capacity that substitute decision-makers are able to access relevant information. The guardianship and privacy regimes should support and facilitate this aim, while providing suitable protection of information.



30.88 Several respondents, either attorneys under an enduring power of attorney or appointed guardians and administrators, noted significant problems in obtaining information from service providers.<sup>1689</sup> One respondent commented that ‘while many people in the community generally recognised enduring powers of attorney, some did not recognise or understand guardianship or administration’.<sup>1690</sup>

30.89 Queensland Aged and Disability Advocacy Inc, who stated they received many complaints relating to service providers and financial institutions failing to recognise enduring powers of attorneys, also highlighted general confusion in the community regarding the role of a statutory health attorney.<sup>1691</sup>

30.90 Pave the Way considered the main problem with the operation of the provisions was that ‘substitute decision-makers do not always know their rights to information. Similarly, service providers and health care providers do not always know their obligations or volunteer information’.<sup>1692</sup>

30.91 However, the Adult Guardian stated that she has not experienced any difficulties in obtaining information under the provisions of the *Guardianship and Administration Act 2000* (Qld).<sup>1693</sup>

30.92 A number of submissions also supported the amendment of section 81 of the *Powers of Attorney Act 1998* (Qld) to provide that the Tribunal may order a person who has custody or control of information to provide that information to an attorney or a statutory health attorney, unless that person has a reasonable excuse.<sup>1694</sup>

30.93 Most respondents, except the Public Trustee,<sup>1695</sup> were of the view that self-incrimination was a reasonable excuse for a failure to give the information.<sup>1696</sup>

30.94 There was similar strong support for the proposal that a 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 be an offence under the relevant Act.<sup>1697</sup>

30.95 The former Acting Public Advocate noted that the inclusion of specific penalties for failure to provide information to a guardian, an administrator or an attorney, or in compliance with a Tribunal order, ‘would be beneficial in potentially

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1689 Submissions C10A, C107, 121, 135, 142, 148.

1690 Submission 121.

1691 Submission 148.

1692 Submission 135.

1693 Submission 164.

1694 Submissions 135, 160, 164, 177.

1695 Submission 156A.

1696 Submissions 135, 160, 164, 177.

1697 Submissions C107, 135, 160, 164, 177.

improving compliance with [the Acts] without the need for substitute decision-makers to seek an order from the Tribunal'.<sup>1698</sup> She also suggested that, 'for maximum deterrent effect, however, more substantial monetary penalties should exist for corporations or entities which fail to comply, with smaller penalties for individuals'.

30.96 One respondent, who identified problems with accessing information from Queensland Health, believed that the Tribunal must also have powers to sanction government departments who sometimes apply narrow interpretations of other legislation to deny a substitute decision-maker access to information.<sup>1699</sup>

30.97 Most respondents also favoured the inclusion of a statement about the right to information of appointed guardians, administrators and attorneys to be included on either the order of the Tribunal or on the approved form for making an enduring power of attorney.<sup>1700</sup> However, a few respondents considered there was no need for such a statement to be included on an order of the Tribunal.<sup>1701</sup>

30.98 The Public Trustee commented:<sup>1702</sup>

A statement about a legislative right to obtain information may assist upon an attorney accepting appointment or upon the appointment of a guardian or administrator.

30.99 The former Acting Public Advocate also suggested:<sup>1703</sup>

when a person has been formally appointed as a substitute decision-maker, presentation of a certified copy of the document or order and a statutory declaration confirming that the appointee is not aware of any subsequent appointment should be sufficient evidence to enable the decision-maker to access relevant information and provide decisions which are to be accepted by a department or organisation.

### The Commission's view

30.100 In the Commission's view, section 81 of the *Powers of Attorney Act 1998* (Qld), should be amended as follows to provide for an attorney or a statutory health attorney to apply to the Tribunal for an order that a person having custody or control of the information give the information to the attorney or the statutory health attorney:

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1698 Submission 160.

1699 Submission C107.

1700 Submissions 94I, 135, 160, 164, 177.

1701 Submissions 94I, 179.

1702 Submission 156A.

1703 Submission 160.

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

30.101 Section 81(3) provides that that section overrides any statutory or common law restriction about the disclosure or confidentiality of information, and, for an attorney, any claim of confidentiality or privilege including legal professional privilege. As presently drafted, section 81(3) potentially gives an attorney, who is acting on behalf of an adult, a greater right than the adult to confidential or privileged information. The Commission is of the view that section 81(3) should be redrafted to remedy this anomaly so 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.

30.102 The Commission does not consider that 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 be an offence against the relevant Act.

30.103 The Commission also notes that the *Information Privacy Act 2009* (Qld) requires an agency, other than the Health Department, to comply with the Information Privacy Principles ('IPPs') set out in the Act, and requires the Health Department to comply with the National Privacy Principles ('NPPs') set out in the Act.<sup>1704</sup> IPP 11 and NPP 2 place limits on the disclosure, or on the use and disclosure, by an agency of personal information about an individual except for certain specified purposes. IPP 11(1)(d) does not prohibit disclosure if 'the disclosure is authorised or required under a law'.<sup>1705</sup> NPP 2(1)(f) does not prohibit use or disclosure if 'the use or disclosure is authorised or required by or under a law'. This means that there is no impediment to the disclosure of personal information by an agency if the personal information<sup>1706</sup> is required under a law.

30.104 Sections 44(6) and 76(8) of the *Guardianship and Administration Act 2000* (Qld) and section 81(3) of the *Powers of Attorney Act 1998* (Qld) each provide that

1704 *Information Privacy Act 2009* (Qld) ss 27, 31.

1705 *Information Privacy Act 2009* (Qld) sch 3, IPP 11(1)(d).

1706 *Information Privacy Act 2009* (Qld) s 12 defines personal information:

**12 Meaning of personal information**

Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

that particular section overrides 'any restriction, in an Act or the common law, about the disclosure or confidentiality of information. The right to information conferred on a relevant substitute decision-maker under sections 44(1) and 76 of the *Guardianship and Administration Act 2000* (Qld) and under section 81(1) of the *Powers of Attorney Act 1998* (Qld) is expressed in broad terms, but does not expressly refer to personal information about an individual. As a result, there may be some doubt about whether the right to information conferred under those sections is sufficient to permit the disclosure of information to be made under IPP 11(1)(d) or NPP 2(1)(f).

30.105 To remove any doubt about this issue, 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.

30.106 The Commission is also of the view that the order appointing a guardian or an administrator should include a statement about the guardian's or 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. Such a statement might encourage disclosure by persons who might not otherwise be aware of the substitute decision-maker's right to information.

## **INFORMAL DECISION-MAKERS' ACCESS TO INFORMATION**

### **Introduction**

30.107 Although sections 44 and 76 of the *Guardianship and Administration Act 2000* (Qld) and section 81 of the *Powers of Attorney Act 1998* (Qld) give particular rights to information to guardians, administrators, attorneys and statutory health attorneys, the guardianship legislation does not give a right to information to informal decision-makers.

30.108 In some circumstances, an informal decision-maker for an adult may be denied access to information necessary for making a decision about the adult because the informal decision-maker has no formal standing. In such a case, the informal decision-maker may need to apply to the Tribunal for formal appointment as the adult's guardian or administrator.

30.109 The conferral of a right to receive information may assist an informal decision-maker for an adult to make informed and appropriate decisions for the adult. On the other hand, it may be difficult for a third party to determine whether an informal decision-maker is entitled to receive information. Access to and disclosure of information and, in particular, health or financial information, by third parties may also be limited by privacy, confidentiality and other legal constraints.

## Discussion Paper

30.110 In the Discussion Paper, the Commission referred to a number of submissions that had been made during the course of this review that had expressed concern about the difficulties faced by informal decision-makers in gaining access to information to assist them in performing their role.<sup>1707</sup> It referred, in particular, to the submission from GARD, which raised a concern that, in some circumstances, informal decision-makers who require access to information about an adult may have little option but to apply for guardianship or administration for an adult.<sup>1708</sup>

There are many instances where informal decision-makers do not require guardianship to assist a person with incapacity but simply require access to information. In the current regime they are forced to bring guardianship applications simply to obtain documentation. A simpler process for establishing entitlement to documents needs to be established.

30.111 GARD suggested that 'section 44 of the *Guardianship and Administration Act 2000* (Qld) should be expanded to provide for entitlements to information for informal decision-makers upon application to the Tribunal'.<sup>1709</sup>

30.112 The Commission suggested that, if the legislation required a third party to give information to an informal decision-maker if the Tribunal made an order to that effect, but did not otherwise confer a right to information on an informal decision-maker, that might create more certainty for third parties. It would also ensure that the adult's privacy was not unnecessarily eroded.<sup>1710</sup>

30.113 Accordingly, the Commission sought submissions on whether:<sup>1711</sup>

- in practice, informal decision-makers have difficulties in gaining access to information to assist them in performing their role; and
- 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.

## Submissions

30.114 Several submissions made the observation that informal decision-makers sometimes face difficulties in gaining access to information to assist them in performing their role.<sup>1712</sup>

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<sup>1707</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 284.

<sup>1708</sup> Ibid referring to Submission C24.

<sup>1709</sup> Ibid.

<sup>1710</sup> Ibid.

<sup>1711</sup> Ibid.

30.115 One respondent, who had experienced difficulties with both financial institutions and health providers, stated:<sup>1713</sup>

[they] use privacy laws to prevent people from having access to information. They are not recognising informal decision-making and say that privacy laws prevent the disclosure of information.

30.116 Another respondent stated:<sup>1714</sup>

Informal Guardians are not recognised within the Community, within Commerce, within Government Departments. Try using the term with Banks, Medicare, Centrelink.

30.117 The Endeavour Foundation considered that the problem arose as a result of a general lack of recognition of the role of the family in an adult's life:<sup>1715</sup>

there is a lack of recognition by various State and Commonwealth departments and private industry of the role of the parent/family around decision making when their family member has impaired decision making capacity. This is especially so when the families do not have formal guardianship and are acting as informal substitute decision makers. Agencies and institutions mentioned in particular include Queensland Police; Queensland Health Services; DSQ; the Public Trustee; private banking services and Medicare and Centrelink agencies.

30.118 Some respondents observed that the denial of access to information as an informal decision-maker resulted in more applications to the tribunal for formal appointments of guardianship and administration.<sup>1716</sup>

30.119 To assist informal decision-makers in performing their role, a number of submissions supported the amendment of the *Guardianship and Administration Act 2000* (Qld) to provide that informal decision-makers may apply to the Tribunal for an order that a person with the custody or control of information give that information to an adult's informal decision-maker.<sup>1717</sup>

30.120 The former Acting Public Advocate considered:<sup>1718</sup>

this approach would provide a safeguard for the adult, would clarify for information providers who the informal decision-maker is and their entitlement to the information, and would overcome privacy issues. It may also protect the adult from abuse or exploitation and protect an adult's privacy to a greater extent by ensuring Tribunal consideration and recognition of the informal

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<sup>1712</sup> Submissions 134, 142, 160, 163, 179. A number of the respondents to stage one of this review also referred to similar difficulties: Submissions C52, C130, C120, Forums C1, C2.

<sup>1713</sup> Submission C130.

<sup>1714</sup> Submission 142.

<sup>1715</sup> Submission 163.

<sup>1716</sup> Submissions C130, 135.

<sup>1717</sup> Submissions 94I, 160, 164, 177, 179.

<sup>1718</sup> Submission 160.

decision-maker, and preventing release of information to any member of an adult's family.

30.121 However, *Pave the Way*, whilst agreeing generally with the need for easier access to information by informal decision-makers, proposed a different approach:<sup>1719</sup>

the primary onus should be on the person or agency refusing information to apply to the Tribunal under the Guardianship and Administration Act for an order allowing them to refuse access. Thus, the amendment should be that a person or agency must provide information to informal decision-makers and if they wish to refuse, they need to apply to the Tribunal. If they refuse to apply to the Tribunal, the informal decision-maker should have the right to apply to the Tribunal to seek the release of information.

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

30.122 The guardianship legislation recognises that decisions may be made for an adult informally by the adult's support network. Informal decision-making arrangements, by their nature, provide an approach to decision-making that is least restrictive of an adult's autonomy. However, as noted in the submissions, the effectiveness of informal decision-making may be hampered if an informal decision-maker for an adult is unable to obtain information from a third party about the adult that is relevant and necessary to make an informed decision about the matter. In such circumstances, an informal decision-maker may have no option but to apply for a guardianship or an administration order in order to obtain the requisite authority.

30.123 The Commission is of the view that it is desirable and appropriate to provide a legislative mechanism to assist informal decision-makers in these circumstances. Accordingly, 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.

30.124 The proposed new provision should be modelled on section 44(3)–(6) of the Act, 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. Such a mechanism not only provides a safeguard against the release of information in inappropriate circumstances in the form of Tribunal oversight, but also ensures a generally consistent approach under the guardianship legislation about the release of an adult's information to substitute decision-makers.

30.125 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).

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Submission 135.

30.126 The Commission also notes that the amendment of the *Guardianship and Administration Act 2000* (Qld) to include a provision in respect of informal decision-making in similar terms to section 44(3)–(6) of the Act raises issues about the extent of a substitute decision-maker’s right to confidential or privileged information and the right to require the disclosure by an agency of personal information about an adult, which are similar to those raised earlier in this chapter in relation to the rights of guardians, administrators and attorneys to information.<sup>1720</sup> Accordingly, the proposed new provision dealing with an informal decision-maker’s right to information should address these issues in a similar way.

## USE OF CONFIDENTIAL INFORMATION: INFORMAL DECISION-MAKERS AND OTHER PERSONS

### Background

30.127 Both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) prohibit the disclosure, except for specified purposes, of confidential information that certain persons gain through their involvement with the guardianship system.

30.128 Section 249A of the *Guardianship and Administration Act 2000* (Qld) provides that a ‘relevant person’ must not use confidential information gained because of being a relevant person, or because of an opportunity given by being a relevant person, other than as provided under section 249, unless the person has a reasonable excuse. Section 249A provides for a maximum penalty of 200 penalty units — that is, \$20 000.

30.129 Section 249(2) permits a relevant person who gains confidential information because of being a relevant person to use the information for the purposes of the Act or as provided under section 249(3). Section 249(3) provides:

- (3) Confidential information may be used—
  - (a) if authorised or required under a regulation or another law; or
  - (b) for a proceeding arising out of or in connection with this Act; or
  - (c) if authorised by the person to whom the information relates; or
  - (d) if authorised by the court or the tribunal in the interests of justice; or
  - (e) if necessary to prevent a serious risk to a person’s life, health or safety; or
  - (f) for the purpose of obtaining legal or financial advice; or
  - (g) if reasonably necessary to obtain counselling, advice or other treatment; or

<sup>1720</sup>

See [30.101], [30.103]–[30.104] above.



- (h) in reporting a suspected offence to a police officer or assisting a police officer in the investigation of a suspected offence; or
- (i) in assisting the adult guardian, the public advocate or a public service officer in the performance of functions under this Act or the *Powers of Attorney Act 1998*; or
- (j) for the substituted decision-making review.

30.130 Sections 249 and 249A apply to a ‘relevant person’. That term is defined in section 246 of the Act:

**relevant person** means—

- (a) a relevant tribunal person; or
- (b) the adult guardian or a member of the adult guardian’s staff; or
- (c) a professional consulted or employed by the adult guardian for an investigation; or
- (d) the public advocate or a member of the public advocate’s staff; or
- (e) a guardian or administrator; or
- (f) a community visitor or a public service officer involved in the administration of a program called the community visitor program; or
- (g) a member of the commission or its staff, or a consultant, involved in the substituted decision-making review.

30.131 Sections 74 and 74A of the *Powers of Attorney Act 1998* (Qld) mirror sections 249 and 249A of the *Guardianship and Administration Act 2000* (Qld) except that they apply to attorneys and statutory health attorneys.

30.132 The effect of these provisions is that, where guardians, administrators, attorneys and statutory health attorneys (among others) gain confidential information because of their specific appointment or statutory role, their use of the confidential information is limited to the purposes mentioned in section 249(2)–(3) of the *Guardianship and Administration Act 2000* (Qld) and section 74(3)–(4) of the *Powers of Attorney Act 1998* (Qld).

### Informal decision-makers

30.133 In this chapter, the Commission has recommended that the *Guardianship and Administration Act 2000* (Qld) be amended to provide that an informal decision-maker may apply to the Tribunal for an order that a person with the custody or control of information give that information to the informal decision-maker.<sup>1721</sup> A Tribunal order made in accordance with that recommendation will give an informal decision-maker a similar right to information to that conferred on a guardian or an administrator by section 44 of the *Guardianship and Administration Act 2000* (Qld)

<sup>1721</sup> See Recommendations 30-13 to 30-17 below.

and on an attorney or a statutory health attorney by section 81 of the *Powers of Attorney Act 1998* (Qld).

30.134 This raises the issue of whether the definition of ‘relevant person’ in section 246 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an adult’s informal decision-maker if the Tribunal has made an order under the section of the Act that gives effect to Recommendations 30-13 to 30-17 of this chapter.

### **Persons who receive a community visitor report**

30.135 A similar issue also arises as a result of the Commission’s recommendations in Chapter 26 to widen the categories of persons who are entitled to receive a copy of a community visitor report.

30.136 The Commission has recommended that section 230(3) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if a community visitor report has been prepared in relation to a visit that was requested by certain specified persons (which includes an interested person for the consumer and an advocacy organisation), the chief executive must give a copy of the report to the person or organisation that requested the visit.<sup>1722</sup>

30.137 The Commission has also recommended that section 230(4) of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the chief executive must, on request by certain specified persons (including an interested person for the consumer), give a copy of the report to the person.<sup>1723</sup>

30.138 As a result of these recommendations, an interested person and an advocacy organisation will, in some circumstances, have an entitlement to be given a copy of a community visitor report. Neither an interested person nor an advocacy organisation is a relevant person for the purposes of sections 249 and 249A of the *Guardianship and Administration Act 2000* (Qld) or sections 74 and 74A of the *Powers of Attorney Act 1998* (Qld).

### **The Commission’s view**

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

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1722 See Recommendation 26-5 of this Report.

1723 See Recommendation 26-6 of this Report. This recommendation is relevant where the community visitor report has not been prepared in relation to a community visit that was requested.

30.140 Accordingly, the definition of ‘relevant person’ in section 246 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include:

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

30.141 Further, 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.

30.142 The Commission considers it appropriate for an advocacy organisation to be able to use confidential information contained in a community visitor report for the purposes currently mentioned in section 249(3). The Commission does not consider it necessary to amend section 249(3) in order to allow an advocacy organisation to use any confidential information in a way that is not currently provided for by section 249(3).

## THE DEFINITION OF ‘SUPPORT NETWORK’ FOR AN ADULT

30.143 An issue that was not specifically dealt with in the Commission’s Discussion Paper<sup>1724</sup> concerns the scope of the definition of ‘support network’ for an adult in the *Guardianship and Administration Act 2000* (Qld). The Act recognises that informal decision-making for an adult may be carried out by members of the adult’s support network.<sup>1725</sup>

30.144 ‘Support network’ for an adult is defined in the Act as consisting of the following people:<sup>1726</sup>

- members of the adult’s family;
- close friends of the adult; and
- other people the Tribunal decides provide support to the adult.

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1724 Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Discussion Paper, WP No 68 (2009).

1725 *Guardianship and Administration Act 2000* (Qld) ss 7(d), 9(2), 154(5)(a).

1726 *Guardianship and Administration Act 2000* (Qld) sch 4.

30.145 Although the Act deals primarily with formal substitute decision-making, a decision or proposed decision of an informal decision-maker may be ratified or approved by the Tribunal under section 154 of the *Guardianship and Administration Act 2000* (Qld):

**154 Ratification or approval of exercise of power by informal decision maker**

- (1) The tribunal may, by order, ratify an exercise of power, or approve a proposed exercise of power, for a matter by an informal decision maker for an adult with impaired capacity for the matter.
- (2) The tribunal may only approve or ratify the exercise of power for a matter if—
  - (a) it considers the informal decision maker proposes to act, or has acted, honestly and with reasonable diligence; and
  - (b) the matter is not a special personal matter, a health matter or a special health matter.
- (3) The tribunal may make the order on its own initiative or on the application of the adult or informal decision maker.
- (4) If the tribunal approves or ratifies the exercise of power for an adult for a matter—
  - (a) the exercise of power is as effective as if the power were exercised by the adult and the adult had capacity for the matter when the power is or was exercised; and
  - (b) the informal decision maker does not incur any liability, either to the adult or anyone else, for the exercise of power.
- (5) In this section—

***informal decision maker***, for a matter for an adult, means a person who is—

- (a) a member of the adult's support network; and
- (b) not an attorney under an enduring document, administrator or guardian for the adult for the matter.

30.146 For the purposes of section 154, a person is defined as an 'informal decision-maker' if the person is a member of the adult's support network but not a guardian, an administrator or an attorney for the adult.

## Submissions

30.147 The former Acting Public Advocate has commented that the breadth of the current definition of 'support network' may cause uncertainty in its application.<sup>1727</sup>

<sup>1727</sup>

Submission 160. See also the comments of Queensland Advocacy Incorporated at [4.301] above.

In particular, he considered that the definition should capture only those family members who have a close and continuing personal relationship with the adult and a personal interest in the adult's welfare:

At present the definition of support network is sufficiently broad to capture any person to whom the adult is related, whether by blood or marriage. It may also include persons to whom the adult is related regardless of whether they are in a supportive relationship with the adult or not, and have ongoing/continuing contact with the adult. Under the current definition, a person who is an adult's relative who has very little or no contact with an adult likely meets the definition of a family member, and could therefore exercise informal decision-making power on behalf of an adult under section 9 of the GAA. It may not be appropriate for that person to exercise decision-making power in circumstances where they have had limited contact with the adult, and do not have an ongoing close personal relationship, as they are unlikely to know the adult well enough to apply the general principles, know the adult's views and wishes previously expressed, and make appropriate decisions on the adult's behalf.

Accordingly, it is submitted that the definition should be narrowed through introducing a requirement for members of an adult's family to have a close and continuing personal relationship with the adult, and a personal interest in the adult's welfare in order to constitute part of their support network. Other considerations might include the extent of the family member's previous and current involvement in the life of the adult, and the nature of the support they provide to the adult.

30.148 The former Acting Public Advocate also expressed concern that, under the current definition of 'support network', a paid carer may be considered part of an adult's support network. He therefore proposed that the Act should be amended to specifically exclude a 'paid carer' from the definition of 'support network':

Under the GAA a paid carer is excluded from appointment as a guardian or administrator of the adult. However, there is no express prohibition on a paid carer, such as a disability service provider, being a member of an adult's support network. Accordingly, it is open for the Tribunal in matters before it to determine that a paid carer, through provision of support to an adult, may constitute a member of the adult's support network and accordingly may make decisions informally on behalf of an adult. It would be fundamentally inconsistent with the intent of the guardianship regime for a paid carer to be considered part of an adult's informal support network due to the inherent conflict of interest between a paid carer's role in providing paid support, in exchange for remuneration, to an adult, and decision-making on an adult's behalf. Accordingly, legislative amendment is urged in order to prohibit a paid carer from constituting part of an adult's support network, and consequently from being empowered to make decisions for the adult on an informal basis. This would also create consistency with the prohibition on paid carers being appointed formal substitute decision-makers.

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

30.149 The *Guardianship and Administration Act 2000* (Qld) seeks to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and the adult's right to adequate and appropriate support for decision-making. One of the ways in which the Act seeks to achieve that purpose is to encourage the involvement of the

members of an adult's existing support network in decision-making for the adult.<sup>1728</sup> In particular, the Act provides a mechanism for the Tribunal to ratify a decision or to approve a proposed decision by an informal decision-maker.

30.150 The Tribunal has jurisdiction to exercise this power only in relation to an 'informal decision-maker' — in effect, a person who is a member of the adult's 'support network' but is not a formally appointed decision-maker for the adult. Therefore, the definition of an adult's 'support network' sets the parameters of who may apply to the Tribunal under those provisions.

30.151 It is important that the definition of 'support network' is sufficiently flexible to capture a diverse range of family relationships. In some circumstances, it may be difficult for a member of the adult's family, who is supportive of the adult, to establish that he or she is in a close and continuing relationship with the adult. This can occur, for example, in situations where an adult has a mental illness which causes the adult to disengage or become hostile to those persons who provide him or her with support.

30.152 The Commission therefore considers that paragraph (a) of the definition of 'support network', for an adult in the *Guardianship and Administration Act 2000* (Qld), which refers to 'members of the adult's family' should not be amended to limit its application to 'only those family members who have a close and continuing personal relationship with the adult and a personal interest in the adult's welfare', as suggested by the former Acting Public Advocate.

30.153 The Commission also considers that the definition of 'support network' should not be amended to exclude a person who is paid carer for the adult. There are circumstances in which an adult, who does not have a formal decision-maker appointed, may not have any family members or close friends to provide him or her with decision-making support. In some instances, that support may be provided by the adult's paid carer.

## TRAINING AND SUPPORT FOR SUBSTITUTE DECISION-MAKERS

### Introduction

30.154 Guardians and administrators are required to satisfy certain requirements under the *Guardianship and Administration Act 2000* (Qld) when exercising power for a matter for an adult. For example, a guardian or an administrator must exercise his or her power honestly and diligently,<sup>1729</sup> must apply the General Principles contained in the legislation (and the Health Care Principle, if appropriate),<sup>1730</sup> and, if he or she is an administrator, must submit a management

<sup>1728</sup> *Guardianship and Administration Act 2000* (Qld) s 7(d).

<sup>1729</sup> *Guardianship and Administration Act 2000* (Qld) s 35.

<sup>1730</sup> *Guardianship and Administration Act 2000* (Qld) s 34. The General Principles are discussed in Chapter 4 of this Report. The Health Care Principle is discussed in Chapter 5 of this Report.

plan<sup>1731</sup> and avoid conflict transactions.<sup>1732</sup> Failure to satisfy the statutory requirements may have significant consequences for both the adult and the person appointed to make decisions on his or her behalf. In some circumstances, it may compromise the adult's basic human rights, personal well-being and financial position.<sup>1733</sup> If a guardian or an administrator breaches a relevant duty, he or she may be liable to a monetary penalty<sup>1734</sup> or a claim for compensation.<sup>1735</sup> The Tribunal is also empowered to remove a guardian or an administrator if he or she does not comply with the statutory requirements.<sup>1736</sup>

30.155 Attorneys appointed under enduring documents are also subject to similar requirements. An attorney must exercise his or her power honestly and with reasonable diligence,<sup>1737</sup> must avoid conflict transactions,<sup>1738</sup> and must apply the General Principles and, for a health matter, the Health Care Principle.<sup>1739</sup>

### Issue for consideration

30.156 In order to promote and safeguard the interests of the adult and to assist guardians, administrators and attorneys in carrying out their functions properly, it is important to ensure that they are given sufficient training and support about their respective roles and responsibilities under the Act.

30.157 The Adult Guardian has a statutory function to provide education, general information and advice to the community about the operation of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).<sup>1740</sup> The aim of community education, amongst other things, is to increase understanding of the laws on substitute decision-making.<sup>1741</sup>

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1731 *Guardianship and Administration Act 2000* (Qld) s 20.

1732 'Conflict transactions' are transactions in which there may be conflict, or which result in conflict, between the person's duty towards the adult and either the interests of the person or other specified persons or another duty of the person: *Guardianship and Administration Act 2000* (Qld) s 37(1). For other functions and powers of administrators, see also *Guardianship and Administration Act 2000* (Qld) ch 4 pt 2.

1733 A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' 8(1) (2006) *The Journal of Adult Protection* 20, 25.

1734 *Guardianship and Administration Act 2000* (Qld) ss 35 (Act honestly with reasonable diligence), 36 (Act as required by terms of tribunal order), 49 (Keep records), 50 (Keep property separate).

1735 *Guardianship and Administration Act 2000* (Qld) s 59.

1736 *Guardianship and Administration Act 2000* (Qld) s 31.

1737 *Powers of Attorney Act 1998* (Qld) s 66(1).

1738 'Conflict transactions' are transactions in which there may be conflict, or which result in conflict, between the person's duty towards the adult and either the interests of the person or other specified persons or another duty of the person: *Powers of Attorney Act 1998* (Qld) s 73(1).

1739 *Powers of Attorney Act 1998* (Qld) s 76.

1740 *Guardianship and Administration Act 2000* (Qld) s 174(2)(h).

1741 During the 2008–09 financial year, the Office of the Adult Guardian conducted 89 presentations in metropolitan and regional areas in Queensland, with a total of 2350 people attending. These presentations included presentations to hospital staff, aged care facility staff, service providers, and carer and community groups: Office of the Adult Guardian, *Adult Guardian Annual Report 07–08* (2008) 78.

30.158 The Adult Guardian, Community Visitor Program, Public Advocate and the Tribunal, together with the Public Trustee, regularly present free forums to explain their individual roles and functions under the guardianship system. These individual agencies also conduct separate public information sessions for the community.<sup>1742</sup>

30.159 The Tribunal also provides information about the roles, powers and duties of guardians and administrators to proposed and existing appointees. In particular, it publishes various documents that set out both general and specific information about guardianship and administration, including the roles, powers and duties of an appointee. These documents are available on its website and in hard copy.<sup>1743</sup>

30.160 The Adult Guardian also conducts a guardianship information service, which provides information and support to individuals who are appointed by the Tribunal as guardian for an adult.

30.161 For attorneys appointed under enduring powers of attorney, both the Short Form and Long Form enduring powers of attorney include information about the duties of an attorney, including:

- the duty to act honestly and with reasonable care;
- the requirement to apply the General Principles and the Health Care Principle;
- the requirement to consult with any other attorneys who are appointed; and
- a number of specific duties imposed by the *Powers of Attorney Act 1998* (Qld) — for example, the duty to keep records, the duty to keep property separate, and the duty to avoid transactions that involve a conflict of interest.

## Discussion Paper

30.162 In the Discussion Paper, the Commission sought submissions about the adequacy of information and support given to proposed and appointed guardians

<sup>1742</sup> During the 2007–08 financial year, registry staff and Tribunal members provided information sessions and talks on various aspects of the Tribunal on approximately 42 occasions including talks to community organisations, mental health organisations, disability organisations, aged care organisations, and on-site information sessions for proposed and appointed administrators: Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 52.

<sup>1743</sup> See, for example, Queensland Civil and Administrative Tribunal, Administration for adults matters: Information Sessions, <<http://www.qcat.qld.gov.au/information-sessions>> at 27 September 2010; Queensland Civil and Administrative Tribunal, Administration for adults matters: Financial management plan guidelines <<http://www.qcat.qld.gov.au/financial-management-plan-guidelines.htm>> at 27 September 2010; Queensland Civil and Administrative Tribunal, Guardianship for adults matters: Guardian powers <<http://www.qcat.qld.gov.au/guardian-powers.htm>> at 27 September 2010; Queensland Civil and Administrative Tribunal, Guardianship for adults matters: Guardian duties, <<http://www.qcat.qld.gov.au/guardian-duties.htm>> at 27 September 2010.



and administrators and attorneys in relation to their roles and responsibilities under the Queensland guardianship system.<sup>1744</sup>

## Submissions

30.163 The submissions that addressed this issue emphasised the importance of proposed and appointed guardians and administrators and attorneys being given adequate information and support in relation to their roles and responsibilities.<sup>1745</sup>

30.164 The former Acting Public Advocate observed:<sup>1746</sup>

many decision-makers, through lack of knowledge and understanding, or relevant and necessary skills, do not carry out their role adequately or appropriately. This may result in inadvertent or unintentional abuse or exploitation of an adult in relation to personal and/or financial matters. Education and support to raise awareness of the functions and role of decision-makers, improve knowledge and understanding, and provide practical assistance for substitute decision-making is vital in improving services and outcomes for vulnerable adults.

...

At present there is a lack of support available for lay substitute decision-makers, and no agency dedicated to the provision of information and practical assistance to them. Information provision is often carried out by staff of entities under the guardianship regime. Legal practitioners and medical professionals often do not possess the requisite knowledge about the guardianship legislation or regime to be of assistance. Accordingly, there is a gap in the delivery of services and support to substitute decision-makers, which may result in adverse outcomes, poor decisions and disadvantage for adults with impaired decision-making capacity.

30.165 Several respondents suggested ways in which substitute decision-makers may be trained or supported in their roles. One respondent suggested that an organisation like Carers Queensland should provide independent advice to proposed guardians or administrators.<sup>1747</sup>

30.166 Carers Queensland proposed the establishment of a support unit, similar to the Private Guardian Support Unit (PGSU) in the Office of the Guardian in New South Wales, which provides information and support to potential and existing family guardians.<sup>1748</sup>

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1744 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 287.

1745 Submissions 94I, 146, 156A, 160.

1746 Submission 160.

1747 Submission 94I.

1748 Submission 146. The Adult Guardian also conducts a guardianship information service which provides information and support to appointed guardians. The service commenced in August 2010.

30.167 The former Acting Public Advocate proposed that the functions of education, information provision and support for substitute decision-makers be given to an individual agency with the sole purpose of providing that support:<sup>1749</sup>

An independent agency could be given clear responsibility (and resources) for guardianship capacity building within the community and providing significant support and assistance to lay decision-makers. It could also be a resource to members of the public, and government and non-government agencies seeking to understand their responsibilities under the guardianship regime to people who seek their services. The introduction of a separate agency to support substitute decision-makers and the guardianship regime would be expected to have significant financial implications. There are many thousands of people acting as substitute decision-makers who may seek assistance from time to time. Given the potential for much greater engagement of the community generally with the guardianship regime as the population ages and the public interact with it increasingly, this would be expected to have long term benefits.

30.168 The former Acting Public Advocate considered that, if the establishment of an independent agency was rejected, at the very least additional resources for education and training of substitute decision-makers should be allocated to the Adult Guardian to provide greater capacity for it to educate decision-makers and the community.

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

30.169 As mentioned above, substitute decision-makers are conferred with a range of powers and are subject to specific duties and obligations. If a substitute decision-maker misunderstands, or is unaware of, his or her statutory powers and duties, his or her ability to perform that role will be compromised; an outcome that may cause harm to the adult and lead to the removal of the person as the adult's substitute decision-maker. The provision of adequate training and support to substitute decision-makers is therefore of vital importance in ensuring that they perform their roles effectively and in accordance with the legislative requirements imposed on them.

30.170 The guardianship agencies have developed a range of educational programs and resources to assist and support members of the public who are appointed as substitute decision-makers for an adult. In particular, given that the Commission has made recommendations in this Report to redraft the General Principles and the Health Care Principle, it is important that substitute decision-makers be given information about the nature and content of these Principles (including their emphasis on the adult's human rights) and about making decisions in accordance with them.

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1749

Submission 160.

## PROFESSIONAL DEVELOPMENT AND TRAINING

### Introduction

30.171 The provision of professional development and training for Tribunal members and staff of the guardianship agencies is important in ensuring that they have current knowledge of new developments in relevant disciplines, are aware of emerging issues, and maintain the skill levels necessary to perform their roles.

30.172 Section 173 of the QCAT Act gives the President of the Tribunal wide powers to require Tribunal members to participate in professional development and continuing education or training. It provides:

#### **173 Directions for president's function about training**

- (1) The president may direct all members or adjudicators, a class of members or adjudicators, or a particular member or adjudicator, to participate in—
  - (a) particular professional development; or
  - (b) particular continuing education or training activity.
- (2) The direction must be in writing.
- (3) A person to whom a direction is given under subsection (1) must comply with the direction unless the person has a reasonable excuse.

#### *Notes—*

- 1 Under section 188, a senior or ordinary member may be removed from office if the member contravenes this subsection.
- 2 Under section 203, an adjudicator may be removed from office if the adjudicator contravenes this subsection.

30.173 The 2008–09 Annual Report for the Office of the Adult Guardian also notes that, during the reporting period, training was provided to staff on a broad range of topics,<sup>1750</sup> as does the 2008–09 Annual Report for the Public Trustee.<sup>1751</sup>

### Issue for consideration

30.174 In its submission, GARD commented that there 'is a clear need for staff within the guardianship regime to have a significant consciousness of how their personal values and assumptions influence the way they understand, appreciate and relate to people with disability'.<sup>1752</sup> It therefore recommended that:

<sup>1750</sup> Office of the Adult Guardian, *Adult Guardian Annual Report 2008–09* (2009) 87–8.

<sup>1751</sup> The Public Trustee of Queensland, *Annual Report 2008–2009* (2008) 66–7.

<sup>1752</sup> Submission C24.

All staff and members employed to make decisions within the guardianship regime (such as staff in the Office of the Adult Guardian, the Tribunal and the Public Trustee) should be required to undertake regular training and awareness programs to improve their knowledge of the various models of disability and heighten their awareness of the real impacts of these models on the lives of people with disability.

30.175 Although GARD regarded it as commendable that members of the Guardianship and Administration Tribunal undertook training, it considered that Tribunal members sometimes lacked an appreciation of matters such as:

- the stress that carers are placed under;
- the intrusion that service providers can place on family life;
- the requirements of procedural fairness;
- the effect that separation of and isolation from family can have on an impaired adult; and
- the risk of gratuitous concurrence when the Tribunal is dealing with an adult with impaired capacity.

30.176 GARD recommended that Tribunal members should receive comprehensive training in relation to these issues and 'specifically in relation to the impact of a decision-making disability on a person'.<sup>1753</sup>

30.177 GARD also recommended that staff of the Adult Guardian and the Tribunal should receive regular training about 'domestic and family violence legislation and risk issues'. It considered that this was essential to increase the safety of people with impaired capacity in their family and informal care relationships.<sup>1754</sup>

## Discussion Paper

30.178 In the Discussion Paper, the Commission sought submissions on whether there are particular matters in relation to which:<sup>1755</sup>

- Tribunal members;
- staff of the Office of the Adult Guardian; or
- staff of the Public Trust Office

should receive professional development and training.

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1753 *Ibid.*

1754 *Ibid.*

1755 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Discussion Paper, WP No 68 (2009) vol 2, 289.

## Submissions

30.179 A number of respondents commented generally on the need to ensure comprehensive and continual training and professional development of all persons working within the guardianship system.<sup>1756</sup> In particular, it was viewed as imperative that members and staff of the Tribunal and the offices of the Adult Guardian and Public Trustee were provided with adequate and comprehensive training.

30.180 For example, the former Acting Public Advocate observed:<sup>1757</sup>

It is agreed that the provision of appropriate and relevant professional development and training for Tribunal members, and staff of the Office of the Adult Guardian and Public Trust Office is essential in order to ensure and improve awareness and understanding of issues affecting adults with impaired decision-making capacity and substitute decision-makers.

Professional development and training is imperative in equipping Tribunal members and staff of the OAG and Public Trust Office with the expertise and skills necessary to properly perform their functions and to ensure that the rights and interests of adults with impaired decision-making capacity are protected to the greatest extent possible.

It is submitted that training should apply not only to Tribunal members, but also Tribunal staff, who often have frequent contact with adults with impaired decision-making capacity and other active/interested parties in the course of their duties. It is also considered that such training and education for staff of the Department of Communities — Disability Services, as the leading provider of disability services and support to adults with impaired decision-making capacity, should be compulsory.

30.181 Some of the areas which the submissions identified as relevant for professional development and training included:<sup>1758</sup>

- extensive training about the guardianship regime and legislative provisions, including the General Principles and their application, the functional test of decision-making capacity, the process of decision-making, and the practical application of the Act;
- the provisions of and rights guaranteed for people with disability by the United Nations *Convention on the Rights of Persons with Disabilities*;
- disability issues and models of disability, including education in relation to intellectual disability, mental illness or psychiatric disability, acquired brain injury, and dementia, both from a medical perspective as well as consideration of the impact of the disability on the lives of people;
- challenging behaviour and restrictive practices;

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1756 See eg Submissions C24, 94I, 143, 160, 162; Forum C13.

1757 Submission 160.

1758 See eg Submissions 160, 162.

- the mental health system, and support for people with a mental illness;
- dealing with adults with impaired decision-making capacity and their support networks, including in times of crisis and stressful situations, and appropriate responses; and
- communication and client service skills.

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

30.182 The Commission considers that professional development and training for Tribunal members and staff of the guardianship agencies is important in ensuring that they have current knowledge of new developments in relevant disciplines, are aware of emerging issues, and maintain the skill levels necessary to perform their roles.

30.183 In this regard, the Commission notes that the Tribunal members and staff of the guardianship agencies have regularly undertaken training in a range of areas relevant to their respective roles and functions. It is especially important that these professional development and training programs cover a diverse range of legal and social issues that are relevant to guardianship, including those matters listed in [30.181] above.

## **COMMUNITY EDUCATION AND AWARENESS**

30.184 The provision of community education is an important aspect of ensuring the effective operation of the guardianship system. If members of the community do not understand the various substitute decision-making mechanisms available under the guardianship legislation, these mechanisms will not be utilised to the extent that they could be. Further, substitute decision-makers may face difficulties in performing their role if their rights are not recognised by other members of the community.

### **Submissions**

30.185 The former Public Advocate commented that:<sup>1759</sup>

This Office understands that while there have been some improvements in the willingness of third parties to deal with guardians and administrators, problems persist. For example, administrators continue to experience issues when dealing with some banking institutions or branches of banks. Recent information suggests that administrators experience difficulty opening bank accounts in the name of the adult (as opposed to 'trustee' bank accounts; bank accounts in the name of the administrator as administrator for the adult; or accounts in joint names of the administrator and the adult).

It is understood that enduring attorneys experience many on-going difficulties in having their authority recognised. This includes difficulties after obtaining

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1759

Submission 91.

recognition of the enduring document in another state under reciprocal recognition arrangements.

The extent to which these difficulties may relate to the manner in which the third parties apply the presumption of capacity is unknown. It is likely that other considerations also inform the practices of third parties, including for financial institutions, concerns about liability in the event that fraud is facilitated through allowing [a substitute decision-maker] access to accounts. More generally, there will still be many third parties, who simply are not aware of how the guardianship regime operates. Some will be unaware of the presumption of capacity.

Informal decision-makers frequently encounter issues in having third parties recognise that they have any role in decision-making, especially in the context of financial institutions. This is understandable since those institutions would likely find themselves liable if they facilitated/allowed fraud to be committed. It is understood that privacy is often raised as a basis for third parties to refuse to deal with informal decision-makers in other contexts, since they can produce nothing to confirm their authority. Some third parties, are less inclined to listen to the views of informal decision-makers or involve them in decisions concerning the adults life for similar reasons. Again, the extent to which the presumption of capacity is a factor, and how it is applied is unknown.

### The Commission's view

30.186 One of the main obstacles to effective decision-making under the guardianship system is a lack of awareness amongst the general community about the fundamental aspects of the guardianship system and how the system operates. Therefore, it is important to ensure that the general community is aware of these matters. Community education is particularly significant in the context of informing members of the general community about the range of decision-making options that are available under the guardianship system, including the use of advance planning mechanisms for persons who have capacity. It is also important in informing people in the general community, who deal with adults and their substitute decision-makers, about the role, rights and responsibilities of those decision-makers. Community education is also essential in informing the general community, which is encouraged under the *Guardianship and Administration Act 2000* (Qld) to apply and promote the General Principles,<sup>1760</sup> about the nature and content of the General Principles and their focus on the adult's human rights. The Commission also considers it important that any community education undertaken in relation to the guardianship legislation emphasises the proposed new requirement that a person who exercises power for a matter for an adult on an informal basis must apply the General Principles.<sup>1761</sup>

30.187 In light of these matters, it is essential that publicly-funded and comprehensive education programs about key aspects of the guardianship system are 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 (for example, government agencies,

<sup>1760</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

<sup>1761</sup> See Recommendation 4-2 of this Report.

financial institutions and aged care facilities) in the general community. The State-wide public forums recently conducted by the guardianship agencies on the advance planning mechanisms which are available under the guardianship legislation are examples of the types of programs that may be developed to achieve these objectives.<sup>1762</sup>

## RECOMMENDATIONS

### ***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),<sup>1763</sup> 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.

<sup>1762</sup> Department of Justice and Attorney-General, Planning for Life forums <<http://www.justice.qld.gov.au/justice-services/guardianship/adult-guardian/planning-for-life-forums>> at 29 September 2010.

<sup>1763</sup> See [30.37] above.



**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.

# Appendix 1

## Terms of reference

A review of the law in relation to the General Principles, the scope of substituted-decision-making, the role of the support network, adequacy of investigative powers, health and special health matters, and other miscellaneous matters, under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.

The terms of reference require the Queensland Law Reform Commission to have regard to—

- the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity;
- the need to ensure that the powers of guardians, administrators and other officers or bodies established by the legislation are sufficiently extensive to protect the interests of an adult with impaired capacity;
- the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts;
- the need to ensure that adults are not deprived of necessary health care because they have impaired capacity;
- the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or wellbeing, or that is in their best interests;
- the need to ensure that the confidentiality provisions that apply to the proceedings and decisions of the Guardianship and Administration Tribunal and other decisions under the Guardianship and Administration Act strike the appropriate balance between protecting the privacy of persons affected by the Tribunal's proceedings and decisions and promoting accountability of the Tribunal;
- the fact that some parents of a person with impaired capacity (whether or not an adult), may wish to make a binding direction, appointing a guardian or administrator for a matter for the adult, that applies if the parents are no longer alive or are no longer capable of exercising a power for a relevant matter for the adult;

and refer to the Commission for review pursuant to section 10 of the *Law Reform Commission Act 1968*—

- (a) the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* including but not limited to:

- the General Principles;
  - the scope of personal matters and financial matters and of the powers of guardians and administrators;
  - the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
  - the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework; **but not including consideration of who should exercise the systemic advocacy function and powers contained in Chapter 9 of the *Guardianship and Administration Act 2000*, these being matters already dealt with in the Government Response to recommendation 133 of the Part B Report of the Queensland Government Boards, Committees and Statutory Authorities tabled in the Legislative Assembly on 22 April 2009,**<sup>1764</sup>
  - the processes for review of decisions;
  - consent to special medical research or experimental health care; and
  - the law relating to advance health directives and enduring powers of attorney; and
  - the scope of the decision-making power of statutory health attorneys; and
  - the ability of an adult with impaired capacity to object to receiving medical treatment; and
  - the law relating to the withholding and withdrawal of life-sustaining measures;
- (b) the confidentiality provisions of the *Guardianship and Administration Act 2000*;
- (c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity;
- (d) whether there are circumstances in which the *Guardianship and Administration Act 2000* should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

The Commission is to provide a report to the Attorney-General and Minister for Justice on the confidentiality provisions by June 2007, and a report on all other matters by the 31 December 2009.

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The terms of reference were amended on 20 January 2010 to add the words in bold.

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

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

## **Appendix 2**

### **Reference Group**

The Reference Group was chaired by the Honourable Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission. The membership of the Reference Group as at November 2009 was:

Ms Pam Bridges, Residential Care Manager, Aged Care Queensland Inc

Ms Lisa Bridle, President, Queensland Parents for People with a Disability Inc

Ms Janelle Klein, Acting Manager, Community Visitor Program

Mr Jeff Cheverton, Executive Director, Queensland Alliance

Dr Wendy Corfield, Principal Advisor, Clinical Policy Unit, Queensland Health

Ms Debra Cottrell, Executive Director, Carers Queensland

Mr Mark Crofton, Official Solicitor to the Public Trustee of Queensland

Ms Jennifer Cullen, Chief Executive Officer, Brain Injury Association of Queensland

Dr Chris Davis, Director, Geriatric Medicine and Rehabilitation, The Prince Charles Hospital (nominee of Australian Medical Association (Queensland))

Ms Margaret Deane, Chief Executive Officer, Queensland Aged and Disability Advocacy Inc

Ms Susan Gardiner, President, Guardianship and Administration Tribunal

Ms Marianne Gevers, President, Alzheimer's Australia (Qld) Inc

Ms Michelle Howard, Public Advocate

Ms Susan Masotti, Senior Legal Officer, Strategic Policy, Department of Justice and Attorney-General

Ms Glenda Newick, Director, Legal Policy, Policy and Performance, Disability HACC Community Mental Health, Department of Communities

Ms Dianne Pendergast, Adult Guardian

Mr Richard Rutkin, Queensland Health

Ms Vera Somerwil, National Seniors

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Mr Ken Wade, Systems Legal Advocacy, Queensland Advocacy Incorporated

Professor Lindy Willmott, Faculty of Law, QUT

Ms Alison Wolff, Manager, Community Advocacy and Support Unit, Endeavour Foundation (nominee of ACROD)

A representative, Queensland Civil and Administrative Tribunal