Queensland
Law Reform Commission

A Review of Queensland's Guardianship Laws

Discussion Paper
Volume 1

WP No 68
October 2009

Queensland
Law Reform Commission

A Review of Queensland's Guardianship Laws

Discussion Paper

Volume 1

WP No 68
October 2009

The short citation for this Issues Paper is QLRC WP 68
Published by the Queensland Law Reform Commission, October 2009.

ISBN: 978 0 9805799 1 8

COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and questions in this Discussion Paper.

Written comments and submissions should be sent to:

Email: **qlrcguardianship@justice.qld.gov.au**

Facsimile: (07) 3247 9045

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop Qld 4003

An appointment to make an oral submission may be made by telephoning:
(07) 3247 4544

Closing date: 11 December 2009

It would be helpful if comments and submissions addressed specific issues or questions in the Discussion Paper.

PRIVACY

Any personal information you provide in a submission is collected only for the purpose of undertaking this review under the *Law Reform Commission Act 1968* (Qld).

Unless you indicate otherwise, the Commission may refer to and disclose details of some or all of your submission in future publications for this review. Further, those publications may include an appendix listing the names of those people who have made submissions.

Please indicate clearly if one or more of the following apply:

- you do not want your submission or part of your submission to be referred to in a future publication;
- you do not want to be identified by name if your submission is referred to in a future publication;
- you do not want your name to be included in an appendix in a future publication.

COMMISSION MEMBERS

Chairperson:	**The Hon Justice R G Atkinson**
Full-time member:	**Mr I P Davis**
Part-time members:	**Mr J K Bond SC** **Mr B J Herd** **Ms R M Treston** **Assoc Prof B P White**

SECRETARIAT

Director:	**Ms C E Riethmuller**
Assistant Director:	**Mrs C A Green**
Commission Secretary:	**Mrs S Pickett** **Mrs J A Manthey**
Legal Officers:	**Ms K Clark** **Ms M T Collier** **Ms P L Rogers**
Administrative Officers:	**Ms K Giles** **Mrs A Lathouras**

Address:	7th Floor, 50 Ann Street, Brisbane, Qld 4000
Postal address:	PO Box 13312, George Street Post Shop, Qld 4003
Telephone:	(07) 3247 4544
Facsimile:	(07) 3247 9045
Email:	LawReform.Commission@justice.qld.gov.au
Website:	http://www.qlrc.qld.gov.au

Table of contents

Chapter 1

Introduction

INTRODUCTION

1.1 The Attorney-General has asked the Queensland Law Reform Commission to review aspects of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). These two Acts regulate decision-making by and for adults with impaired decision-making capacity.

1.2 The Commission's terms of reference require it to conduct this review in two stages.[1]

STAGE ONE OF THE REVIEW

1.3 In stage one of the review, the Commission examined the confidentiality provisions of the guardianship legislation. The Commission completed stage one in mid-2007 with the production of its final report on confidentiality in the guardianship system.[2]

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

---

1 The Commission's terms of reference are set out in Appendix 1.

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

nature of the decision being made by the Guardianship and Administration Tribunal ('the Tribunal').[3]

1.5 The Commission's recommendations were implemented, with minor modification, by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld), which commenced on 1 January 2009.[4]

STAGE TWO OF THE REVIEW

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

(a) the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including but not limited to:

- the General Principles;
- the scope of personal matters and financial matters and of the powers of guardians and administrators;
- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
- the processes for review of decisions;
- consent to special medical research or experimental health care;
- the law relating to advance health directives and enduring powers of attorney;

---

3 The four types of limitation orders recommended by the Commission were adult evidence orders, closure orders, non-publication orders and confidentiality orders.

4 See Queensland Government, *Response to the Queensland Law Reform Commission Report 'Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System'* (May 2008) <http://www.justice.qld.gov.au/files/Guardianship/QG_Response_to_the_QLRC_Report_-_Public_Justice_Private_Lives.pdf> at 28 September 2009. The Government indicated that it would implement 67 of the Commission's recommendations in full and a further 14 'with minor or technical amendment'. It also indicated it would substantially depart from recommendation 4-19 of the Report. That recommendation proposed that, in an application for a limitation order (other than an adult evidence order), the Public Advocate act in a role similar to that of a 'contradictor' to provide submissions to the Tribunal and to act as a safeguard to ensure that the Tribunal makes limitation orders only in accordance with the recommended confidentiality provisions: at 5.

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

…

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

(d) whether there are circumstances in which the *Guardianship and Administration Act 2000* (Qld) should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

1.7 In October 2008, the Commission published the first Discussion Paper for stage two of the review.[5] That paper examined the threshold issues of:

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

1.8 Following the release of the first Discussion Paper and the accompanying Companion Paper,[6] the Commission held a series of community forums in Brisbane, Bundaberg, Cairns, Rockhampton and Townsville, and on the Gold and Sunshine Coasts. The Commission also held a number of focus group meetings with health professionals and allied health professionals, as well as with adults with impaired capacity.

THIS DISCUSSION PAPER

1.9 This Discussion Paper is the second consultation paper published for stage two of the review. It examines all the other substantive legal issues arising under the terms of reference, as well as addressing a number of procedural and other issues that have been raised with the Commission during the course of this review.

---

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

6 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: A Companion Paper*, WP No 65 (2008).

Methodology

1.10 In examining the scope of the current Queensland provisions, the Commission has included information about comparative legislative provisions that operate in other Australian States and Territories. The Discussion Paper also refers to comparative provisions in the legislation of jurisdictions outside Australia where those provisions are innovative, unique or may represent best practice.

1.11 In stage one of its review, the Commission established an informal Reference Group, whose members represent a cross-section of people who are affected by, administer, or are otherwise interested in, the guardianship legislation (that is, the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld)). The purpose of forming the Reference Group was to have access to the expertise and experience of the members in relation to their broad range of different interests.[7] The Reference Group met three times during stage one of the review. It also met in August 2008 to provide input into the first Discussion Paper for this stage of the review. The Commission will meet with the Reference Group again in relation to this stage of the review.

1.12 The Commission acknowledges the valuable contribution made to the review by the members of the Reference Group.

Terminology

1.13 Throughout this Discussion Paper, the following terminology has been used:

- A reference to 'the adult' means the adult with impaired decision-making capacity.
- The term 'guardianship legislation' is used to refer to both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).
- Generally, the term 'Tribunal' is used to refer to the Guardianship and Administration Tribunal of Queensland[8] and, unless otherwise expressed, to those bodies in other jurisdictions that exercise jurisdiction

---

7 The current membership of the Reference Group is set out in Appendix 2.

8 Note, however, that in some contexts 'Tribunal' may be used to refer to the Queensland Civil and Administrative Tribunal, which will exercise jurisdiction in guardianship matters when the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) and the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commence.

in relation to guardianship matters in accordance with the guardianship legislation of those jurisdictions.[9]

- The term 'Adult Guardian' is used to refer to the Adult Guardian of Queensland and, unless otherwise expressed, the equivalent positions in other Australian jurisdictions.[10] In the ACT, South Australia, Victoria and Western Australia, the equivalent of the Adult Guardian is the Public Advocate. In New South Wales, the Northern Territory and Tasmania, the equivalent is the Public Guardian.

- The term 'enduring document' refers to an advance health directive or an enduring power of attorney made under the *Powers of Attorney Act 1998* (Qld).[11]

- A reference to the Commission's 2007 report on confidentiality is a reference to the final report published in stage one of this review.[12]

- A reference to the Commission's original 1996 report is a reference to the final report published by this Commission in relation to the review it conducted in the 1990s in relation to substitute decision-making by and for adults with a decision-making disability.[13] The recommendations made by the Commission in that report were implemented, with some modifications, by the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).[14]

- A reference to the 'United Nations Convention' means the *Convention on the Rights of Persons with Disabilities* adopted by the United Nations General Assembly in 2006 and ratified by Australia on 17 July 2008. The Convention sets out the fundamental human rights of people with a disability, including people with a mental or intellectual disability.

---

9 In New South Wales, the relevant body is the Guardianship Tribunal; in South Australia and Tasmania, the relevant bodies are, respectively, the Guardianship Board and the Guardianship and Administration Board. In the Northern Territory, guardianship proceedings are heard by the Local Court. The ACT, Victoria and Western Australia do not have separate guardianship tribunals. Instead, each of these jurisdictions has a generalist tribunal with jurisdiction for a range of matters including guardianship — namely, the ACT Civil and Administrative Tribunal, the Victorian Civil and Administrative Tribunal and the State Administrative Tribunal.

10 The functions and powers of the Adult Guardian equivalents vary from jurisdiction to jurisdiction. For a discussion of these functions and powers, see Chapter 18 of this Discussion Paper.

11 *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) sch 4.

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

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

14 Note, however, that the Commission did not recommend implementation in two stages.

THE CONSULTATION PROCESS

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

1.15 This Discussion Paper is available on the Commission's guardianship website.[15] People can also request a copy of this publication by contacting the Commission.

1.16 The Commission is holding a number of community forums to promote widespread participation in its review. Details of the dates, venues and times for the community forums have been posted on the Commission's guardianship website[16] and have been advertised in local newspapers.

CALL FOR SUBMISSIONS

1.17 The Commission invites submissions on the issues raised in this Discussion Paper. Submissions may relate to the issues generally or to the specific questions posed in each chapter.

1.18 Details on how to make a submission are set out at the front of this Discussion Paper.[17] The closing date for submissions is **11 December 2009**.

1.19 Submissions will be taken into consideration when the Commission is formulating its recommendations. At the conclusion of the review, the Commission will publish its recommendations in its final report, which will be presented to the Attorney-General for tabling in Parliament. The Commission is required to give the Attorney-General its final report on stage two of the review by 31 December 2009.

---

15 <http://www.qlrc.qld.gov.au/guardianship>.

16 <http://www.qlrc.qld.gov.au/guardianship/docs/Forum%20venues%202009%20website.pdf>.

17 Information about how the Commission will treat submissions is also included at the front of this Discussion Paper.

Chapter 2

The scope of this review

INTRODUCTION

2.1 This chapter outlines the Commission's approach in relation to two issues that are relevant to the scope of this review:

- the effect on this review of the imminent establishment of the Queensland Civil and Administrative Tribunal; and
- Chapter 5B of the *Guardianship and Administration Act 2000* (Qld), which deals with the use of restrictive practices in relation to certain adults who have an intellectual or cognitive disability.

ESTABLISHMENT OF THE QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

Background

2.2 On 1 December 2009,[18] the Guardianship and Administration Tribunal, along with seventeen other Tribunals and other bodies,[19] will be abolished and replaced by a single Tribunal — the Queensland Civil and Administrative Tribunal ('QCAT').[20] Because of the wide variety of matters with which QCAT

---

18 Queensland, Estimates Committee E Transcript, Legislative Assembly, 21 July 2009, 2 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

19 The other Tribunals or committees that are to be abolished are the Anti-Discrimination Tribunal, the Children Services Tribunal, the Commercial and Consumer Tribunal, the Teachers Disciplinary Committee, a panel of referees convened under s 104SC of the *Fire and Rescue Service Act 1990* (Qld), the Fisheries Tribunal, the Health Practitioners Tribunal, the Legal Practice Tribunal, an appeal tribunal formed under s 942 of the *Local Government Act 1993* (Qld), a misconduct tribunal established under s 11 of the *Misconduct Tribunals Act 1997* (Qld), the Nursing Tribunal, the Racing Appeals Tribunal, the Retail Shop Leases Tribunal, the Small Claims Tribunal, the Surveyors Disciplinary Committee, a committee appointed under s 50 of the *Valuers Registration Act 1992* (Qld) and the Veterinary Tribunal of Queensland.

20 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 244, 247(1), 248, sch 1.

will deal, it is intended that it will be organised into three divisions:[21]

- the Civil Division;
- the Administrative and Disciplinary Division; and
- the Human Rights Division.

2.3 When QCAT commences operation, the jurisdiction presently exercised by the Guardianship and Administration Tribunal will be conferred on QCAT,[22] where guardianship proceedings will be heard in the Human Rights Division.[23]

2.4 QCAT is established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the 'QCAT Act'). The Act provides for the appointment of a Supreme Court judge as President of QCAT and for the appointment of a District Court judge as Deputy President of QCAT.[24]

2.5 The QCAT Act sets out the Tribunal's functions, powers and procedures, which will generally apply to matters heard in all three divisions of QCAT. The QCAT Act includes generic provisions for dealing with the following matters:

- the commencement and conduct of proceedings;[25]
- dispute resolution (compulsory conferences, mediation, settlement);[26]
- the giving of decisions and reasons;[27]
- the processes for correcting mistakes and re-opening proceedings;[28] and

---

21 Queensland Government, Queensland Civil and Administrative Tribunal, *QCAT Bill consultation guide* 1 <http://www.tribunalsreview.qld.gov.au/QCAT_Bill_consultation_guide_090111.pdf> at 11 October 2009. The Guide notes (at 1) that these 'divisions will be established administratively and will not be specified in legislation to provide flexibility to respond to the changing needs of the tribunal'.

22 See eg *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1439, which will amend s 7(e) of the *Guardianship and Administration Act 2000* (Qld).

23 Queensland Government, Queensland Civil and Administrative Tribunal, *QCAT Bill consultation guide* 1 <http://www.tribunalsreview.qld.gov.au/QCAT_Bill_consultation_guide_090111.pdf> at 11 October 2009. In relation to those matters where the Supreme Court presently exercises concurrent jurisdiction with the Guardianship and Administration Tribunal, the Supreme Court will exercise concurrent jurisdiction with QCAT.

24 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 175(1), 176(1).

25 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2, pts 3, 6.

26 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2, pt 6, divs 2–4.

27 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2, pt 7, div 2.

28 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2, pt 7, divs 6–7.

- appeal processes for appeals to either the QCAT Appeal Tribunal or the Court of Appeal.[29]

2.6 The *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) (the 'QCAT Amendment Act') amends the *Guardianship and Administration Act 2000* (Qld) to confer jurisdiction on QCAT and to state the functions and jurisdiction of QCAT under the *Guardianship and Administration Act 2000* (Qld).[30] It also amends the *Powers of Attorney Act 1998* (Qld)[31] to confer jurisdiction on QCAT in relation to enduring documents. Acts that confer jurisdiction on QCAT are referred to in the QCAT Act as 'enabling Acts'.[32]

2.7 The QCAT Act deals with the effect of any inconsistency between the QCAT Act and an enabling Act in relation to:[33]

- QCAT's functions when exercising jurisdiction conferred by an enabling Act; or

- the conduct of proceedings, including QCAT's practices, procedures and powers, when exercising jurisdiction conferred by an enabling Act.

2.8 It provides that, to the extent of any inconsistency, the provisions of the enabling Act prevail over the provisions of the QCAT Act.[34]

2.9 Because the QCAT Act deals with many matters that are currently provided for by the *Guardianship and Administration Act 2000* (Qld), the QCAT Amendment Act omits a number of provisions of the *Guardianship and Administration Act 2000* (Qld) that relate to matters that are the subject of generic provisions in the QCAT Act. These include:

- the provisions of the *Guardianship and Administration Act 2000* (Qld) dealing with the making of applications;[35]

- Part 4A of the *Guardianship and Administration Act 2000* (Qld), which deals with dispute resolution;[36] and

---

29 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) pt 8, divs 1–2.

30 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) ss 1439, 1445.

31 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) ss 1569–1570 amend s 109A and sch 3 of the *Powers of Attorney Act 1998* (Qld).

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

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

34 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 7(2).

35 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1148, which will omit ss 116–117 of the *Guardianship and Administration Act 2000* (Qld).

36 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1462.

- most of the appeal provisions in Chapter 7 of the *Guardianship and Administration Act 2000* (Qld).

2.10 The QCAT Amendment Act also replaces Part 6 of the *Guardianship and Administration Act 2000* (Qld), which deals with decisions and reasons, effectively retaining, with some amendment, a limited number of provisions about making decisions, while omitting other provisions that are the subject of generic provisions in the QCAT Act.

The impact on this review of the establishment of QCAT

2.11 As explained earlier, QCAT will commence operation on 1 December 2009, almost a month before the Commission's reporting date for this review of 31 December 2009. Accordingly, in considering particular issues in this Discussion Paper, the Commission has examined both the existing law and, as far as possible, the changes that will be made when the relevant provisions of the QCAT Act and the QCAT Amendment Act commence. The issues that will be most affected by the commencement of QCAT are considered in Chapter 15 (The Tribunal's functions and powers), Chapter 16 (Tribunal proceedings) and Chapter 17 (Appeals and reviews).

2.12 However, one limitation on the Commission's examination of proceedings under the QCAT Act is that, although the Act provides for the making of rules[37] and practice directions,[38] no rules or practice directions have yet been made. Accordingly, the extent to which some issues considered in this Discussion Paper may be affected by the rules or practice directions of QCAT is not presently known.

RESTRICTIVE PRACTICES: CHAPTER 5B

The Carter Review

2.13 In July 2006, the Honourable W J Carter QC and his Co-Chairs (the Directors-General of Communities and Disability Services Queensland and of the Department of Housing) completed their review of the existing provisions for the care, support and accommodation of people with an intellectual or cognitive disability who represent a significant risk of harm to themselves or the

37 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 224(1) provides for the making of rules in relation to the practices and procedures of the Tribunal or its registry, including practices and procedures for jurisdiction conferred on the Tribunal by an enabling Act, as well as a matter mentioned in schedule 2 of the Act. Schedule 2 includes a wide range of matters, including establishing divisions of QCAT and lists within the divisions, the constitution of QCAT for particular classes of matters, applications to QCAT, documents or evidence to be filed or produced, the taking of evidence, compulsory conferences, mediation, reopening proceedings and appeals.

38 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 226(1).

community.[39] The terms of reference for the review required the review panel, among other matters, to 'identify where restrictive practices are currently used and the problems that these may pose'.[40] These included containment and seclusion, for example, by locking 'bedrooms, front doors or yard gates', and other restrictive practices, such as 'physical restraint techniques, restraint devices, or daily medication to alter behaviour'.[41]

2.14 The Carter Report recommended a legislative scheme to regulate the use of restrictive practices in relation to adults with an intellectual or cognitive disability.[42] A key feature of the recommended scheme was that the *Disability Services Act 2006* (Qld) be amended to provide legislative support for the use of any restrictive practice identified as part of the Positive Behaviour Support Plan for the individual in accordance with the following principles:[43]

1. The human rights and service delivery principles set out in part 2 Divisions 1 and 2 of the *Disability Services Act 2006* are to be applied expressly to the extent that the same are relevant to this issue.

2. Since the legislative focus is on the development of the individual person, and the services to be delivered have to be designed and implemented for the purpose of developing the individual and enhancing that person's opportunity for a quality life, restrictive practices can only be justified as part of a specific individualised positive behaviour and support plan which will be of benefit to the individual and which will assist in the achievement of that objective.

3. Any such plan for the care and support of the individual person must be developed by the appropriate specialists in association with the individual and where necessary his/her parent or guardian.

4. Approval for such a plan, if it contains provisions for the use of restrictive practices must be given by an independent body consisting of persons with the requisite skill, knowledge and/or experience and such approval shall operate only for a limited time, at which time it shall be reviewed and the continuance or otherwise of the restrictive practice considered anew in the light of the material to be provided to the independent body. That independent body should be the Guardianship and Administration Tribunal (GAAT).

5. Whilst the approval remains in operation, the use of the approved restrictive practice(s) shall be monitored by an independent person(s) who shall report to the independent body upon each review. This should be done as part of the Community Visitor Program.

---

39 The Hon WJ Carter QC, *Challenging Behaviour and Disability: A Targeted Response — Report to Honourable Warren Pitt MP Minister for Communities Disability Services and Seniors* (2006) 4 <http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf> at 31 October 2009. This will be referred to in this Discussion Paper as the 'Carter Report'.

40 Ibid 4.

41 Ibid 36.

42 Ibid 14.

43 Ibid 19–20.

6. That the use of restrictive practices be prohibited except as approved by GAAT in accordance with the above principles.

Legislation regulating restrictive practices

2.15 The recommendations made in the Carter Report were implemented by the *Disability Services and Other Legislation Amendment Act 2008* (Qld), which inserted Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld). The new provisions, which commenced on 1 July 2008, deal with the following restrictive practices:[44]

- containing or secluding an adult with an intellectual or cognitive disability; or
- using chemical, mechanical or physical restraint on an adult with an intellectual or cognitive disability; or
- restricting the access of an adult with an intellectual or cognitive disability to certain objects.

2.16 The combined effect of the provisions in the *Disability Services Act 2006* (Qld) and the *Guardianship and Administration Act 2000* (Qld) is to regulate the use of restrictive practices in relation to adults with an intellectual or cognitive disability who receive disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld).[45] Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) includes the mechanisms for approval of, or consent to, the use of restrictive practices in relation to these adults.

The Commission's approach to restrictive practices under Chapter 5B

2.17 As mentioned above, the enactment of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) occurred as a result of an independent review process. Chapter 5B has been in force for only a relatively short period of time, and is already subject to a statutory requirement for review. The *Disability Services Act 2006* (Qld) provides that the efficacy and efficiency of Chapter 5B must be reviewed as soon as practicable after 1 July 2011.[46]

2.18 In light of these matters, the Commission is not generally reviewing Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).

---

44 *Disability Services Act 2006* (Qld) s 123E.

45 *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. The definition of 'funded service provider' is set out at [7.12] below.

46 *Disability Services Act 2006* (Qld) ss 233–233A.

2.19 However, in Chapter 7 of this Discussion Paper, the Commission has examined a particular issue that has been raised with it about the scope of 'chemical restraint' under the restrictive practices scheme. Chapter 7 outlines the operation of Chapter 5B of the Act and also considers the use of restrictive practices in relation to adults to whom Chapter 5B does not apply.

Chapter 3

Overview of the guardianship system

INTRODUCTION

3.1 Everyday living involves decision-making on a wide range of issues that vary greatly in their scope and complexity. These include decisions about personal matters, health matters and financial matters. An adult's capacity to make decisions may be impaired as a result of an intellectual disability, dementia, an acquired brain injury, mental illness, or an inability to communicate (for example, when an adult is in a coma). An adult may have impaired capacity for some types of decisions, such as complex financial decisions, but may still be able to make everyday decisions, such as where to live or where to work. An adult's impaired capacity may also be temporary or subject to fluctuation.

3.2 If an adult is unable to make some or all of his or her own decisions, decisions may need to be made for the adult by someone else. Queensland's guardianship legislation establishes a mechanism for decision-making by and for adults with impaired decision-making capacity.

3.3 This chapter gives an overview of Queensland's guardianship system.

QUEENSLAND'S GUARDIANSHIP LEGISLATION

3.4 Queensland's guardianship legislation is comprised of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act*

1998 (Qld). The guardianship legislation is concerned with the following questions:

- when is an adult unable to make his or her own decisions;
- what decisions can be made for an adult with impaired capacity;
- who can make substitute decisions for an adult;
- how are substitute decisions to be made; and
- what agencies are involved in the guardianship system.

WHEN IS AN ADULT UNABLE TO MAKE HIS OR HER OWN DECISIONS FOR A MATTER?

3.5 An adult may be unable to make his or her own decisions if he or she has impaired decision-making capacity. Capacity has been described as 'a gatekeeper concept' in that it is 'a mechanism by which individuals either retain or lose authority over and responsibility for decisions that affect their lives'.[47]

3.6 Under the guardianship legislation, the concept of capacity is specific to decisions about an individual matter. An adult has 'capacity' for a matter if he or she is capable of:[48]

- understanding the nature and effect of decisions about the matter;
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way.

3.7 An adult who does not satisfy these requirements in relation to a matter is described as having 'impaired capacity' for that matter.[49] The *Guardianship and Administration Act 2000* (Qld) acknowledges that the capacity of an adult with impaired capacity to make decisions may differ according to 'the type of decision to be made, including, for example, the complexity of the decision to be made'.[50]

3.8 Because the concept of capacity is specific to decisions about an individual matter, an adult may have capacity to make decisions about some

---

47 P Bartlett and R Sandland, *Mental Health Law Policy and Practice* (2000) [10.5.1].

48 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity'); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'capacity').

49 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'impaired capacity'); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'impaired capacity').

50 *Guardianship and Administration Act 2000* (Qld) s 5(c)(ii).

matters but not about others.[51] For example, an adult with mild dementia may have capacity to make day-to-day shopping or lifestyle decisions but may not have capacity to make a decision about complex financial matters.[52]

3.9 The guardianship legislation includes a presumption that an adult has capacity for a matter.[53] The legislation also promotes the right of adults to make their own decisions to the extent that they are capable.[54] This includes the right to make decisions with which other people may not agree.[55]

3.10 The Tribunal has the power to make a declaration about an adult's capacity.[56]

WHAT DECISIONS CAN BE MADE FOR AN ADULT?

3.11 An adult with impaired capacity for a matter may need a substitute decision-maker to make decisions about that matter. The guardianship legislation makes provision for a wide range of personal and financial decisions to be made for an adult with impaired capacity. The legislation distinguishes between decisions concerning 'financial matters', which involve *administration*, and those concerning 'personal matters', which involve *guardianship*. Among personal matters, it also differentiates between 'health matters', 'special health matters', and 'special personal matters'.

3.12 The scope of these various types of matters is considered in Chapter 4 of this Discussion Paper.

WHO CAN MAKE SUBSTITUTE DECISIONS FOR AN ADULT?

3.13 The guardianship legislation provides for decisions for an adult to be made by several types of decision-makers, depending on the matter involved. The legislation recognises:[57]

- informal decision-makers;

---

51 See also *Guardianship and Administration Act 2000* (Qld) s 5(c)(ii).

52 See eg *Re FHW* [2005] QGAAT 50, [46] where the Tribunal held that the adult had 'capacity for simple and complex personal matters and simple financial matters but he has impaired capacity for complex financial matters'.

53 *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Powers of Attorney Act 1998* (Qld) sch 1 s 1. See also *Guardianship and Administration Act 2000* (Qld) s 7(a).

54 In particular, see *Guardianship and Administration Act 2000* (Qld) ss 5(d), 6(a).

55 *Guardianship and Administration Act 2000* (Qld) s 5(b).

56 *Guardianship and Administration Act 2000* (Qld) s 146. In exercising this power, the Tribunal has regard to the medical and other evidence. See eg *Re MV* [2005] QGAAT 46.

57 *Guardianship and Administration Act 2000* (Qld) s 9(2). That provision also refers to the Supreme Court as a decision-maker. However, that role is infrequently performed.

- attorneys appointed in advance by the adult under an enduring document;
- statutory health attorneys;
- guardians and administrators appointed by the Tribunal;
- in limited circumstances, the Tribunal.

3.14 In addition, the legislation provides that, by making an advance health directive, an adult who still has the requisite capacity may give directions about his or her future health care, including about 'special health matters'.[58]

Informal decision-making

3.15 The guardianship legislation recognises that decisions for an adult can be made informally by the adult's 'existing support network'[59] — that is, by members of the adult's family, close friends of the adult, and other people the Tribunal decides provide support to the adult.[60]

3.16 If there is doubt about the appropriateness of a decision, the Tribunal may ratify or approve a decision of an informal decision-maker.[61]

Formal decision-making

3.17 Sometimes situations can arise where the decision-making process for an adult needs to be formalised. This might be because:

- the person wishing to make a decision for the adult does not have the necessary authority to do so;
- the authority of the person making the decision is disputed;
- there is no appropriate person to make the decision;
- a decision being made for the adult is considered inappropriate; or
- a conflict occurs over the decision-making process.

3.18 The following decision-makers are part of the formal decision-making processes established by the guardianship legislation.

---

58 *Powers of Attorney Act 1998* (Qld) s 35(1).

59 *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

60 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'support network').

61 *Guardianship and Administration Act 2000* (Qld) s 154.

Attorneys appointed in advance by the adult

3.19 An adult may formalise future substitute decision-making for himself or herself by appointing a person (an attorney) to make particular decisions for the adult in the event that the adult subsequently loses capacity. There are two types of instruments that an adult (the principal) may use to appoint an attorney: an enduring power of attorney and an advance health directive.[62] An adult may make such a document only if he or she has sufficient capacity.[63]

3.20 By an enduring power of attorney, a principal may authorise one or more attorneys to do anything in relation to one or more financial matters or personal matters (including health matters) for the principal that the principal could lawfully do by an attorney if the principal had capacity for the matter when the power is exercised.[64] However, a principal cannot, by an enduring power of attorney, authorise an attorney to make decisions about 'special health matters' or 'special personal matters'.[65]

3.21 By an advance health directive, a principal may appoint one or more attorneys to exercise power for a health matter for the principal in the event that the directions in the advance health directive prove inadequate.[66] However, a principal cannot, by an advance health directive, authorise an attorney to make decisions about 'special health matters'.[67]

3.22 An attorney may exercise power for a personal matter only during a period when the principal has impaired capacity for the particular matter.[68] In contrast, a principal may specify in an enduring power of attorney a time when, or a circumstance in which, or an occasion on which, an attorney may exercise power for a financial matter for the principal. If the enduring power of attorney does not specify when power for a financial matter becomes exercisable, the attorney may exercise power for a financial matter when the enduring power of attorney is made.[69] If a principal specifies when power for a financial matter is to be exercisable, but the principal has impaired capacity before that time,

---

62 There are particular formal requirements for the execution of such instruments: *Powers of Attorney Act 1998* (Qld) s 44. An adult may also appoint an attorney for financial matters in a general power of attorney although this is revoked if the adult becomes a person who has impaired capacity: *Powers of Attorney Act 1998* (Qld) ss 8(a), 18(1).

63 *Powers of Attorney Act 1998* (Qld) ss 41, 42.

64 *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

65 *Powers of Attorney Act 1998* (Qld) s 32(1)(a), sch 2 ss 2, 4.

66 *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

67 *Powers of Attorney Act 1998* (Qld) s 35(1)(c), sch 2 s 4.

68 *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3).

69 *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

power for a financial matter is also exercisable during any period that the principal has impaired capacity.[70]

3.23 The legislation imposes a range of obligations on attorneys as to how they exercise their power. For example, attorneys must act honestly and diligently[71] and must comply with the General Principles set out in the legislation and, for decisions about health matters, the Health Care Principle.[72] Attorneys for financial matters are also required, for example, to avoid conflict transactions[73] and to keep their property separate from that of the adult.[74] Attorneys are also regarded as the agents of their principal and so are subject to the general law of agency to the extent that it is not inconsistent with the guardianship legislation.[75]

3.24 Enduring powers of attorney and advance health directives are considered in Chapters 9 and 11 of this Discussion Paper.

Statutory health attorneys

3.25 A statutory health attorney is a person in a specified relationship with the adult who is given the power by the legislation to make decisions about health matters for the adult. The legislation lists the relationships in an order of priority. The first of the following who is 'readily available and culturally appropriate' to make the decision will be an adult's statutory health attorney:[76]

- the adult's spouse,[77] if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer[78] of the adult; or

---

70 *Powers of Attorney Act 1998* (Qld) s 33(3).

71 *Powers of Attorney Act 1998* (Qld) s 66(1).

72 *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are discussed in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) chs 4, 5.

73 *Powers of Attorney Act 1998* (Qld) s 73. A conflict transaction is one in which there may be conflict, or which results in conflict, between the attorney's duty to the adult and either the interests of the attorney or a person in a close personal or business relationship with the attorney, or another duty of the attorney: *Powers of Attorney Act 1998* (Qld) s 73(2).

74 *Powers of Attorney Act 1998* (Qld) s 86.

75 S Fisher, *Agency Law* (2000) [12.2.1], [12.2.4], [12.2.5]; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 92.

76 *Powers of Attorney Act 1998* (Qld) s 63(1).

77 'Spouse' includes a person's de facto partner: *Acts Interpretation Act 1954* (Qld) s 36. A reference in an Act to a 'de facto partner' is a reference to one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family: *Acts Interpretation Act 1954* (Qld) s 32DA(1). The gender of the persons is not relevant for s 32DA(1): s 32DA(5)(a).

- a close friend or relation of the adult 18 years or older and who is not a paid carer[79] of the adult.

3.26 If no-one from that list is 'readily available and culturally appropriate', the Adult Guardian is the adult's statutory health attorney.[80]

3.27 A statutory health attorney may make any decision about an adult's health matter that the adult could have made if he or she had capacity for the matter,[81] but only during a period when the adult has impaired capacity for the matter.[82] A statutory health attorney must comply with the General Principles and the Health Care Principle set out in the legislation when exercising his or her power.[83]

3.28 Statutory health attorneys are considered in Chapter 10 of this Discussion Paper.

Guardians and administrators appointed by the Tribunal

3.29 In specified circumstances, the Tribunal may appoint a substitute decision-maker (that is, a guardian or an administrator) for particular matters for an adult.[84] The Tribunal may appoint a guardian for a personal matter, including a health matter (but not a special health matter)[85] and an administrator for a financial matter.[86]

3.30 A person may be appointed as a guardian or administrator for an adult only if that person is at least 18 years old, is not a health provider or a paid

---

78 A 'paid carer' for an adult is defined as someone who performs services for the adult's care and who receives remuneration for those services from any source other than a Commonwealth or State Government carer payment or benefit for the provision of home care, or remuneration based on damages that may be awarded for voluntary services for the adult's care: *Powers of Attorney Act 1998* (Qld) sch 3; *Guardianship and Administration Act 2000* (Qld) sch 4.

79 See n 78 above.

80 *Powers of Attorney Act 1998* (Qld) s 63(2). The Adult Guardian is an independent statutory official appointed under the *Guardianship and Administration Act 2000* (Qld): see [3.49]–[3.51] below.

81 *Powers of Attorney Act 1998* (Qld) s 62(1).

82 *Powers of Attorney Act 1998* (Qld) s 62(2).

83 *Powers of Attorney Act 1998* (Qld) s 76.

84 *Guardianship and Administration Act 2000* (Qld) s 12(1). But see ch 5B of the Act for the appointment of a guardian for a restrictive practice matter. Note also that the Tribunal and the Supreme Court have the power to remove an attorney under an enduring document and to appoint a new attorney: *Powers of Attorney Act 1998* (Qld) ss 109A, 116(a).

85 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2. In certain circumstances, a guardian has power to make decisions about health care that involve restrictive practices such as seclusion or restraint: *Re MLI* [2006] QGAAT 31; *Re WMC* [2005] QGAAT 26. The guardian's power is limited to the circumstances in which the restrictive practice is used to maintain or treat a mental condition and is carried out under the direction and supervision of a health provider.

86 *Guardianship and Administration Act 2000* (Qld) s 12(1).

carer for the adult, and the Tribunal considers that the person is appropriate for appointment.[87]

3.31 The Tribunal is required by the guardianship legislation to take into account several considerations in deciding whether a person is appropriate for appointment.[88] These include:[89]

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

3.32 A guardian or administrator is authorised, subject to the terms of his or her appointment, to do anything in relation to a personal or financial matter for which he or she is appointed that the adult could have done if the adult had capacity for that matter.[90]

3.33 Given the breadth of this power, the guardianship legislation imposes strict requirements on the exercise of power by a guardian or an administrator. Such a person must exercise his or her power honestly and diligently,[91] must apply the General Principles contained in the legislation (and the Health Care Principle, if exercising power for a health matter),[92] and, if he or she is an administrator, must submit a management plan[93] and avoid conflict transactions.[94] The requirements to act honestly and diligently and to avoid conflict transactions are reflective of those imposed in respect of the common

87 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i), (b)(i), (c). The Adult Guardian is eligible for appointment as an adult's guardian and the Public Trustee is eligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(ii), (b)(ii). A person who is bankrupt 'or taking advantage of the laws of bankruptcy as a debtor' is ineligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i) and see s 15(4)(c).

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

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

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

91 *Guardianship and Administration Act 2000* (Qld) s 35.

92 *Guardianship and Administration Act 2000* (Qld) s 34. The General Principles and the Health Care Principle are discussed at [3.37]–[3.42] below.

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

94 *Guardianship and Administration Act 2000* (Qld) s 37(1).

law of agency.[95]

3.34 The appointment of guardians and administrators and the powers and duties of guardians and administrators are considered in Chapters 5 and 6 of this Discussion Paper.

The Tribunal

3.35 The guardianship legislation provides that, in specified circumstances, the Tribunal may consent to certain types of 'special health care' (other than electroconvulsive therapy or psychosurgery)[96] for an adult.[97] If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal has power to give consent for the special health matter for the adult.[98]

3.36 The Tribunal also has a function of consenting to the withholding or withdrawal of a life-sustaining measure for an adult with impaired capacity (if the matter is not dealt with by a direction given in an advance health directive).[99]

HOW ARE SUBSTITUTE DECISIONS FOR AN ADULT TO BE MADE?

3.37 Queensland's guardianship legislation contains eleven General Principles, which apply to all decisions for adults, and an additional Health Care Principle, which applies only in relation to decisions about health matters.[100]

3.38 The General Principles and the Health Care Principle must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult, including a substitute decision-maker for the adult.[101] The guardianship legislation also makes specific provision for the application of these principles to the Tribunal,[102] the

95 See S Fisher, *Agency Law* (2000) [7.2.1]–[7.5.6].

96 Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

97 *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 69–72. The Tribunal's power to consent to an adult's participation in special medical research or experimental health care is considered in Chapter 13 of this Discussion Paper.

98 *Guardianship and Administration Act 2000* (Qld) ss 65, 68.

99 *Guardianship and Administration Act 2000* (Qld) ss 66(3), 82(1)(f).

100 For a detailed consideration of the General Principles and the Health Care Principle see Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) chs 4, 5.

101 *Powers of Attorney Act 1998* (Qld) s 76 (although note the different terminology of 'must be complied with' rather than 'must apply'): *Guardianship and Administration Act 2000* (Qld) s 11(1).

102 There is a specific requirement for the Tribunal to consider the General Principles (and Health Care Principle if appropriate) when deciding whether a person is appropriate for appointment as an adult's guardian or administrator: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a)–(b).

Adult Guardian,[103] and an adult's guardian or administrator.[104]

3.39 The legislation also states that the 'community is encouraged to apply and promote the general principles'.[105]

3.40 The General Principles include:[106]

- the presumption that an adult has capacity to make decisions;
- an adult's right to basic human rights and the importance of empowering an adult to exercise those rights;
- an adult's right to respect for his or her human worth and dignity;
- an adult's right to be a valued member of society and the importance of encouraging an adult to perform valued social roles;
- the importance of encouraging an adult to participate in community life;
- the importance of encouraging an adult to become as self-reliant as possible;
- an adult's right to participate in decision-making as far as possible and the importance of preserving wherever possible the adult's right to make his or her own decisions;
- the principle of substituted judgment and a requirement to exercise power in the way least restrictive of the adult's rights;
- the importance of maintaining an adult's existing supportive relationships;
- the importance of maintaining the adult's cultural, linguistic and religious environment; and
- an adult's right to confidentiality of information about himself or herself.

3.41 The Health Care Principle provides that power for a health matter or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power:[107]

---

103 *Guardianship and Administration Act 2000* (Qld) s 174(3).

104 *Guardianship and Administration Act 2000* (Qld) ss 34, 74(4).

105 *Guardianship and Administration Act 2000* (Qld) s 11(3).

106 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1; *Powers of Attorney Act 1998* (Qld) sch 1 pt 1. More than eleven issues are included in this list because some of the General Principles include a number of elements.

107 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1).

- is necessary and appropriate to maintain or promote the adult's health or well-being; or

- is, in all the circumstances, in the adult's best interests.

3.42 In deciding whether the exercise of a power is appropriate, the adult's views and wishes and information given by the adult's health provider are to be taken into account.[108] In addition, in deciding whether to consent to special health care, the Tribunal, which is the only potential decision-maker for such matters, must take into account the views of the adult's guardian, attorney or statutory health attorney.[109]

WHAT AGENCIES ARE INVOLVED IN THE GUARDIANSHIP SYSTEM?

3.43 Queensland's guardianship legislation confers responsibilities on several agencies and officials. These include the Tribunal, the Adult Guardian, the Public Trustee, the Public Advocate and community visitors.

The Tribunal

3.44 The Guardianship and Administration Tribunal is established by the *Guardianship and Administration Act 2000* (Qld).[110] The Tribunal has the following jurisdiction:[111]

- subject to section 245 of the Act, exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity for matters;[112]

- concurrent jurisdiction with the Supreme Court in relation to enduring documents and attorneys appointed under enduring documents;[113] and

- any other jurisdiction given to the Tribunal by the Act.

3.45 The Tribunal's functions include:[114]

- making declarations about an adult's capacity for a matter;

---

108 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(2); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(2).

109 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(5); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(5).

110 *Guardianship and Administration Act 2000* (Qld) s 81.

111 *Guardianship and Administration Act 2000* (Qld) s 84(1).

112 *Guardianship and Administration Act 2000* (Qld) s 245 is considered at [23.55]–[23.63] in vol 2 of this Discussion Paper.

113 *Guardianship and Administration Act 2000* (Qld) s 84(2).

114 *Guardianship and Administration Act 2000* (Qld) s 82(1).

- hearing applications for the appointment of guardians and administrators, appointing guardians and administrators if necessary, and reviewing their appointments;
- making declarations, orders or recommendations, or giving directions or advice in relation to guardians, administrators, attorneys, and enduring documents;
- ratifying or approving an exercise of power by an informal decision-maker for an adult;
- consenting to some types of special health care for an adult;
- consenting to the withholding or withdrawal of a life-sustaining measure for an adult; and
- giving approvals for the use by a relevant service provider of a restrictive practice in relation to an adult, and reviewing the approvals.

3.46 Proceedings before the Tribunal are to be conducted as simply and quickly as practicable.[115] The Tribunal may inform itself on a matter in any way it considers appropriate,[116] but it must observe the rules of procedural fairness.[117]

3.47 Tribunal orders are enforceable as if they were orders of a court.[118] A person may appeal against a Tribunal decision to the Supreme Court.[119]

3.48 The function and powers of the Tribunal and Tribunal proceedings are considered in Chapters 15 and 16 of this Discussion Paper.

The Adult Guardian

3.49 The Adult Guardian is an independent statutory official whose statutory role under the *Guardianship and Administration Act 2000* (Qld) is to protect the rights and interests of adults with impaired capacity.[120]

3.50 The legislation confers significant investigative and protective powers on the Adult Guardian. For example, the Adult Guardian may:

---

115 *Guardianship and Administration Act 2000* (Qld) s 107(1).

116 *Guardianship and Administration Act 2000* (Qld) s 107(2).

117 *Guardianship and Administration Act 2000* (Qld) s 108(1).

118 *Guardianship and Administration Act 2000* (Qld) s 172.

119 *Guardianship and Administration Act 2000* (Qld) s 164(1). Leave to appeal from the Supreme Court is required, except for appeals on questions of law only: s 164(2). Appeals are considered in Chapter 17 of this Discussion Paper.

120 *Guardianship and Administration Act 2000* (Qld) ss 173, 174(1), 176.

- temporarily suspend an attorney's powers if there are reasonable grounds to suspect that the attorney is not competent;
- apply to the courts to claim and recover possession of property that the Adult Guardian considers has wrongfully been held or detained;[121] and
- apply to the Tribunal for a warrant to remove an adult from a place if there are reasonable grounds to suspect that the adult is at immediate risk of harm due to neglect, exploitation or abuse.[122]

3.51 The role of the Adult Guardian is considered in Chapter 18 of this Discussion Paper.

The Public Trustee

3.52 The Public Trustee of Queensland is established under the *Public Trustee Act 1978* (Qld).[123] The Tribunal may appoint the Public Trustee as an adult's administrator.[124] If appointed as an administrator, the Public Trustee has the same duties as any other administrator appointed under the guardianship legislation.[125] The Public Trustee may also be appointed as an attorney under an enduring power of attorney[126] or an advance health directive.[127]

3.53 The role of the Public Trustee is considered in Chapter 19 of this Discussion Paper.

The Public Advocate

3.54 The Public Advocate is an independent statutory official whose statutory role under the *Guardianship and Administration Act 2000* (Qld) is generally to promote and protect the rights of adults with impaired capacity and to promote the protection of such adults from neglect, exploitation and abuse.[128]

3.55 The Public Advocate's functions are aimed at *systemic* advocacy rather than advocacy on behalf of individual adults. The Public Advocate seeks to identify issues in the systems that impact on adults, and works towards

---

121 *Guardianship and Administration Act 2000* (Qld) s 194.

122 *Guardianship and Administration Act 2000* (Qld) s 197.

123 *Public Trustee Act 1978* (Qld) ss 7–8.

124 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

125 However, unlike other administrators, the appointment of the Public Trustee (or a trustee company) as an administrator is not subject to periodic review: *Guardianship and Administration Act 2000* (Qld) s 28(1).

126 *Powers of Attorney Act 1998* (Qld) ss 29(1)(b), 32(1)(a).

127 *Powers of Attorney Act 1998* (Qld) ss 29(2)(b), 35(1)(c).

128 *Guardianship and Administration Act 2000* (Qld) ss 208, 209(a)–(b), 211.

influencing appropriate change. Those systems include policy, service and legislative systems, across the government and non-government sectors. Systemic advocacy strategies may include 'discussions, correspondence, committee representation, submissions, discussion and issues papers, forums and conferences'.[129]

3.56 The role of the Public Advocate is considered in Chapter 20 of this Discussion Paper.

Community visitors

3.57 Community visitors are appointed under the *Guardianship and Administration Act 2000* (Qld) to safeguard the interests of 'consumers' by regularly visiting 'visitable sites'.[130]

3.58 A 'consumer' means any person who lives or receives services at an authorised mental health service; or an adult with impaired capacity for a matter or with a mental or intellectual impairment and who lives or receives services at a visitable site.[131]

3.59 A 'visitable site' means a place where a consumer lives and receives services and is prescribed to be such a site under a regulation.[132] This includes residences and services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.[133]

3.60 The functions of community visitors include:[134]

- inquiring into and reporting on a range of matters about the visitable sites; and
- inquiring into and seeking to resolve complaints, and referring complaints to other entities for further investigation or resolution.

3.61 The role of community visitors is considered in Chapter 21 of this Discussion Paper.

---

129 Department of Justice and Attorney-General, *Public Advocate* <http://www.justice.qld.gov.au/473.htm> at 17 September 2009.

130 *Guardianship and Administration Act 2000* (Qld) s 223(1).

131 *Guardianship and Administration Act 2000* (Qld) s 222.

132 *Guardianship and Administration Act 2000* (Qld) s 222.

133 *Guardianship and Administration Regulation 2000* (Qld) s 8 sch 2.

134 *Guardianship and Administration Act 2000* (Qld) s 224(2).

Chapter 4

The scope of matters

INTRODUCTION

4.1 The Commission's terms of reference require it to review the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) including but not limited to 'the scope of personal matters and financial matters and of the powers of guardians and administrators'.[135]

4.2 This chapter deals with the scope of matters under the guardianship legislation. It considers the definitions of 'financial matters', 'personal matters', 'health matters', 'health care', 'special health matters', 'special health care', 'special personal matters' and 'legal matters'.

THE LAW IN QUEENSLAND

4.3 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) recognise different categories of 'matters' about which decisions may be made. Depending on the type of matter involved, these Acts authorise substitute decisions for an adult with impaired capacity for a matter to be made by a wide range of substitute decision-makers.

4.4 The Acts distinguish between decisions concerning 'financial matters' and those concerning 'personal matters'. They also differentiate between 'health matters', 'special health matters', and 'special personal matters'. Each of these terms is defined in the second schedule to the *Guardianship and*

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

Administration Act 2000 (Qld) and the *Powers of Attorney Act 1998* (Qld). The definitions are nearly identical under both Acts.[136]

4.5 These different types of matters are discussed below.

Financial matters

4.6 All matters relating to an adult's financial or property matters are categorised as 'financial matters' under the guardianship legislation. A 'financial matter' is defined as:[137]

> **1 Financial matter**
>
> A financial matter, for an adult, is a matter relating to the adult's financial or property matters, including, for example, a matter relating to 1 or more of the following—
>
> (a) paying maintenance and accommodation expenses for the adult and the adult's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the adult or a dependant of the adult;
>
> (b) paying the adult's debts, including any fees and expenses to which an administrator is entitled under a document made by the adult or under a law;
>
> (c) receiving and recovering money payable to the adult;
>
> (d) carrying on a trade or business of the adult;
>
> (e) performing contracts entered into by the adult;
>
> (f) discharging a mortgage over the adult's property;
>
> (g) paying rates, taxes, insurance premiums or other outgoings for the adult's property;
>
> (h) insuring the adult or the adult's property;
>
> (i) otherwise preserving or improving the adult's estate;
>
> (j) investing for the adult in authorised investments;
>
> (l) continuing investments of the adult, including taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult's existing shareholding;

---

136 The definition of 'personal matter' in the *Guardianship and Administration Act 2000* (Qld) includes a restrictive practice matter under ch 5B of the Act: *Guardianship and Administration Act 2000* (Qld) sch 2 s 2(j). The definition of 'personal matter' in the *Powers of Attorney Act 1998* (Qld) does not include that matter: *Powers of Attorney Act 1998* (Qld) sch 2 s 2. There are also some minor differences in the annotation style used in each Act. See, for example, the definition of 'special personal matter': *Guardianship and Administration Act 2000* (Qld) sch 2 s 3; *Powers of Attorney Act 1998* (Qld) sch 2 s 3.

137 *Guardianship and Administration Act 2000* (Qld) sch 2 s 1; *Powers of Attorney Act 1998* (Qld) sch 2 s 1.

(m) undertaking a real estate transaction for the adult;

(n) dealing with land for the adult under the *Land Act 1994* or *Land Title Act 1994*;

(o) undertaking a transaction for the adult involving the use of the adult's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the adult;

(p) a legal matter[138] relating to the adult's financial or property matters;

(q) withdrawing money from, or depositing money into, the adult's account with a financial institution. (note added)

4.7 Examples of financial matters included in the definition are matters relating to buying and selling property (including land); paying the adult's expenses, rates, insurance, taxes and debts; conducting a trade or business on the behalf of the adult; making financial investments; performing the adult's contracts; and all legal matters relating to the adult's financial or property matters.

4.8 Decisions about financial matters for an adult may be made on a formal basis by an administrator or an attorney acting under an enduring power of attorney.[139] The legislation also recognises that financial decisions may be made on an informal basis by members of the adult's support network.[140]

Personal matters

4.9 The guardianship legislation categorises all matters (other than 'special personal matters' and 'special health matters') relating to an adult's care or welfare as 'personal matters'. A 'personal matter' is defined as:[141]

2 Personal matter

A ***personal matter***, for an adult, is a matter, other than a special personal matter or special health matter, relating to the adult's care, including the adult's health care, or welfare, including, for example, a matter relating to 1 or more of the following—

(a) where the adult lives;

---

138 A 'legal matter' is defined in the *Powers of Attorney Act 1998* (Qld) sch 2 s 18 and the *Guardianship and Administration Act 2000* (Qld) sch 2 s 18. The definition is set out at [4.24] below.

139 An administrator may be appointed by the Tribunal to make decisions about financial matters for an adult *Guardianship and Administration Act 2000* (Qld) s 12. The powers of administrators are discussed in Chapter 6. In an enduring power of attorney, a principal can assign to his or her nominated attorney or attorneys decision-making power for some or all financial matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). The powers of an attorney appointed under an enduring power of attorney are discussed in Chapter 9 of this Discussion Paper.

140 *Guardianship and Administration Act 2000* (Qld) s 9(2).

141 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2; *Powers of Attorney Act 1998* (Qld) sch 2 s 2.

(b) with whom the adult lives;

(c) whether the adult works and, if so, the kind and place of work and the employer;

(d) what education or training the adult undertakes;

(e) whether the adult applies for a licence or permit;

(f) day-to-day issues, including, for example, diet and dress;

(g) health care of the adult;

(h) whether to consent to a forensic examination of the adult;

Editor's note—

See also section 248A (Protection for person carrying out forensic examination with consent).

(i) a legal matter not relating to the adult's financial or property matter;

(j) a restrictive practice matter under chapter 5B;

(k) seeking help and making representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval under chapter 5B.

4.10 The definition of 'personal matter' has been given a wide interpretation by the Tribunal. In *Re JD*, the Tribunal observed that:[142]

> The definition of personal matters is very wide … The essential words are the words care or welfare. … [A] guardian who is appointed to make decisions in relation to all personal matters can essentially make all the decisions in relation to a very broad range of matters and should not be read in a restricted or limited way.

4.11 Personal matters generally cover personal, health care, lifestyle and some legal decisions. Examples of personal matters specifically listed in the definition are matters relating to where and with whom the adult lives; the adult's employment, education and training; day-to-day issues such as the adult's diet and dress; the adult's health care[143] and legal matters that do not relate to the adult's financial or property matters.[144] A decision relating to contact with, or access visits to, the adult has also been categorised as a type of personal matter.[145]

---

142 [2003] QGAAT 14, [27].

143 See [4.15] below.

144 A 'legal matter' is defined in the *Powers of Attorney Act 1998* (Qld) sch 2 s 18 and the *Guardianship and Administration Act 2000* (Qld) sch 2 s 18. The definition is set out in [4.24] below.

145 See, eg, *VJC v NSC* [2005] QSC 68, [29]; *Re WAE* [2007] QGAAT 72; *Re CAA* [2009] QGAAT 7. See also *Omari v Omari, Omari and Guardianship and Management of Property Tribunal* [2009] ACTSC 28, [60].

4.12 Decisions about personal matters for an adult may be made on a formal basis by a guardian or an attorney acting under an enduring power of attorney.[146] The legislation also recognises that personal decisions (other than for health care) may be made on an informal basis by members of the adult's support network.[147] The authority of particular substitute decision-makers to consent to health care is specifically discussed below.[148]

4.13 The definition of 'personal matter' also includes 'a restrictive practice matter under chapter 5B'. Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) sets out special approval and consent procedures for the use of certain restrictive practices for managing the challenging behaviour of certain adults. These procedures apply only in relation to adults with an intellectual or cognitive disability who receive disability services from certain service providers.[149] Depending on the type of restrictive practice involved, only the Tribunal, the Adult Guardian, a guardian for a restrictive practice matter or an informal decision-maker may approve, or consent to, the use of a restrictive practice.[150] Although the Commission is not generally reviewing Chapter 5B of the *Guardianship and Administration Act 2000* (Qld), Chapter 7 of this Discussion Paper considers a number of specific issues that have been raised in relation to the use of restrictive practices.

Health matters

4.14 A 'health matter' is a type of personal matter. Health matters concern the 'health care, other than special health care, of the adult'. A 'health matter' is defined as:[151]

---

146 A guardian may be appointed by the Tribunal to make decisions about personal matters for an adult: *Guardianship and Administration Act 2000* (Qld) s 12. The powers of guardians are discussed in Chapter 6 of this Discussion Paper. In an enduring power of attorney, a principal can assign to his or her nominated attorney or attorneys decision-making power for some or all personal matters, including health matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). The powers of an attorney appointed under an enduring power of attorney are discussed in Chapter 9 of this Discussion Paper.

147 *Guardianship and Administration Act 2000* (Qld) s 9(2).

148 See [4.17] below.

149 Chapter 5B applies to an adult with an intellectual or cognitive disability who receives disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. Chapter 5B does not limit the extent to which a substitute decision-maker is authorised under a provision of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) to make a health care decision in relation to an adult to whom ch 5B does not apply: *Guardianship and Administration Act 2000* (Qld) s 80T.

150 The Tribunal may give approval for a relevant service provider to contain or seclude an adult and to review the approval: *Guardianship and Administration Act 2000* (Qld) ss 80V, 80W, 80ZA, 80ZB. If the Tribunal has given, or proposes to give, an approval to contain or seclude the adult, the Tribunal may also give approval for a relevant service provider to use restrictive practices other than containment or seclusion and to review the order: ss 80X, 80ZA, 80ZB. The Tribunal may also appoint a guardian for a restrictive practice matter for an adult: s 80ZD. The Adult Guardian may approve the use of particular restrictive practices on a short term basis: s 80ZH. Informal decision-makers may consent to the use of particular restrictive practices: s 80ZS.

151 *Guardianship and Administration Act 2000* (Qld) sch 2 s 4; *Powers of Attorney Act 1998* (Qld) sch 2 s 4.

4 Health matter

A health matter, for an adult, is a matter relating to health care, other than special health care, of the adult.

4.15 'Health care' is defined in the guardianship legislation as:[152]

5 Health care

(1) Health care, of an adult, is care or treatment of, or a service or a procedure for, the adult—

(a) to diagnose, maintain, or treat the adult's physical or mental condition; and

(b) carried out by, or under the direction or supervision of, a health provider.

(2) Health care, of an adult, includes withholding or withdrawal of a life-sustaining measure[153] for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

(3) Health care, of an adult, does not include—

(a) first aid treatment; or

(b) a non-intrusive examination made for diagnostic purposes; or

(c) the administration of a pharmaceutical drug if—

(i) a prescription is not needed to obtain the drug; and

(ii) the drug is normally self-administered; and

(iii) the administration is for a recommended purpose and at a recommended dosage level. (note added)

Example of paragraph (b)—

a visual examination of an adult's mouth, throat, nasal cavity, eyes or ears

4.16 Health care, of an adult, is care or treatment of, or a service or a procedure for, the adult to diagnose, maintain, or treat the adult's physical or mental condition and carried out by, or under the direction or supervision of, a health provider. It includes the withholding or withdrawal of a life-sustaining measure if the commencement or continuation of the measure would be

152 G*uardianship and Administration Act 2000* (Qld) sch 2 s 5; *Powers of Attorney Act 1998* (Qld) sch 2 s 5.

153 The definition of 'life sustaining measure' is set out at [12.67] below.

inconsistent with good medical practice.[154] It does not include first aid treatment, non-intrusive examinations made for diagnostic purposes and the administration of non-prescription medication which would normally be self-administered.[155]

4.17 Decisions about health care for an adult may be made on a formal basis by a guardian or an attorney acting under an enduring power of attorney.[156] The legislation also confers automatic authority on an adult's statutory health attorney to make decisions about health matters for the adult when there is no guardian or attorney with authority to do so.[157] In addition, an adult may give directions in an advance health directive about health matters, such as the treatment of a physical or mental condition.[158]

Special health matters

4.18 'Special health matters' are those relating to 'special health care'.[159] They involve decisions about very significant health issues. The guardianship legislation defines 'special health care' as:[160]

(a) removal of tissue from the adult while alive for donation to someone else;

(b) sterilisation of the adult;

(c) termination of a pregnancy of the adult;

---

154 The *Guardianship and Administration Act 2000* (Qld), in its original form, categorised the withholding and withdrawal of a special life-sustaining measure as special health care, which required the consent of the Tribunal. The Act was amended in 2001 to re-categorise the withholding and withdrawal of a life-sustaining measure as a health matter, rather than a special health matter: see *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 18, 19. The effect of that change was to enable a guardian, attorney or statutory health attorney for an adult to exercise power for the withholding and withdrawal of a life-sustaining measure for the adult.

155 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2)–(3); *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2)–(3).

156 A guardian may be appointed by the Tribunal to make decisions about personal matters for an adult: *Guardianship and Administration Act 2000* (Qld) s 12. The powers of guardians are discussed in Chapter 6 of this Discussion Paper. In an enduring power of attorney, a principal (the adult) can assign to his or her nominated attorney or attorneys decision-making power for some or all personal matters, including health matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). A principal cannot, however, give power to an attorney for 'special health matters' or 'special personal matters': s 32(1)(a). The powers of an attorney appointed under an enduring power of attorney are discussed in Chapter 9 of this Discussion Paper.

157 *Powers of Attorney Act 1998* (Qld) s 62; *Guardianship and Administration Act 2000* (Qld) s 66(5). The role of statutory health attorney is conferred on spouses, carers, close friends and relations of the adult and, as a last resort, the Adult Guardian: s 63. The powers of statutory health attorneys are discussed in Chapter 10 of this Discussion Paper.

158 *Powers of Attorney Act 1998* (Qld) s 35(1). A direction given in an advance health directive operates only while the principal (the adult) has impaired capacity for the matter covered by the direction, and is as effective as if the principal gave the direction, and had capacity for the matter, when decisions about the matter needed to be made: s 36(1). Advance health directives are discussed in Chapter 11 of this Discussion Paper.

159 *Guardianship and Administration Act 2000* (Qld) sch 2 s 6; *Powers of Attorney Act 1998* (Qld) sch 2 s 6.

160 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7; *Powers of Attorney Act 1998* (Qld) sch 2 s 7.

(d) participation by the adult in special medical research or experimental health care;

(e) electroconvulsive therapy or psychosurgery for the adult;

(f) prescribed special health care of the adult.

4.19 An adult may give directions in an advance health directive about special health matters, such as tissue donation or participation in experimental health care.[161] If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal may consent to the special health care.[162] The Tribunal, however, cannot consent to electroconvulsive therapy or psychosurgery.[163]

4.20 In its original 1996 report, the Commission explained the reason for requiring the Tribunal's consent for decisions about particular forms of medical treatment for the adult:[164]

> The reason for special consent requirements is that some forms of treatment are particularly invasive or have particularly serious consequences, so that the result of making a wrong decision may be particularly grave. There are also situations where the decision may involve a conflict of interest or where the emotional involvement of a family member may make it difficult for them to decide objectively.

Special personal matters

4.21 The guardianship legislation does not allow substituted decision-makers to exercise power for certain types of matters called 'special personal matters'. These matters are regarded as being of such an intimate or personal nature that it would be inappropriate for another person to be given the power to make such a decision on behalf of an adult.[165]

4.22 A 'special personal matter' is defined as:[166]

---

161 *Powers of Attorney Act 1998* (Qld) s 35(1). See n 158 above in relation to the operation of advance health directives.

162 *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 82(1)(g). If the Tribunal consents to special health care for an adult, the Tribunal may give power to a guardian to consent to subsequent special health care for the adult: *Guardianship and Administration Act 2000* (Qld) s 74. The powers of the Tribunal in relation to special health care are discussed in Chapters 13, 14 and 15 of this Discussion Paper.

163 Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

164 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 58.

165 The power to make decisions for an adult about special personal matters cannot be assigned in an enduring document*: Powers of Attorney Act 1998* (Qld) s 32(1)(a). Nor can it be granted to a substitute decision-maker by order of the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 14(3). Further, there are no other provisions in the guardianship legislation empowering other decision-makers in relation to special personal matters.

166 *Guardianship and Administration Act 2000* (Qld) sch 2 s 3; *Powers of Attorney Act 1998* (Qld) sch 2 s 3.

3 Special personal matter

A special personal matter, for an adult, is a matter relating to 1 or more of the following—

(a) making or revoking the adult's will;

(b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the adult;

(c) exercising the adult's right to vote in a Commonwealth, State or local government election or referendum;

(d) consenting to adoption of a child of the adult under 18 years;

(e) consenting to marriage of the adult.

4.23 Special personal matters therefore relate to voting; consenting to marriage; consenting to the adoption of a child; and making or revoking a will,[167] a power of attorney, an enduring power of attorney, or an advance health directive.

Legal matters

4.24 A legal matter may be classified as a financial matter or a personal matter, depending on the nature of the matter involved.[168] Legal matters relating to the adult's financial or property matters (for example, making a claim for damages for injuries sustained in motor vehicle accident) are classified as financial matters. Other types of legal matters (for example, making an application for a domestic violence order) are classified as personal matters. A 'legal matter' is defined as:[169]

18 Legal matter

A legal matter, for an adult, includes a matter relating to—

(a) use of legal services to obtain information about the adult's legal rights; and

(b) use of legal services to undertake a transaction; and

(c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession*

167 However, the Supreme Court has jurisdiction to make an order authorising a will to be made or altered, in the terms stated by the Court, for a person who lacks testamentary capacity, and to revoke a will or part of a will of a person who lacks testamentary capacity: see *Succession Act 1981* (Qld) ss 21–28, which commenced on 1 April 2006. An application for a grant of probate is not a special personal matter: *Re Wild* [2003] 1 Qd R 459, [20] (White J).

168 The appointment of a litigation guardian for an adult with impaired capacity is discussed in Chapter 23 of this Discussion Paper.

169 *Guardianship and Administration Act 2000* (Qld) sch 2 s 18; *Powers of Attorney Act 1998* (Qld) sch 2 s 18.

Act 1981, part 4 or an application for compensation arising from a compulsory acquisition; and

Editor's note—

The *Succession Act 1981*, part 4, enables the Supreme Court to make provision for a dependant of a deceased person from the deceased person's estate if adequate provision is not made from the estate for the dependant's proper maintenance and support.

(d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.

THE LAW IN OTHER JURISDICTIONS

4.25 In the other Australian jurisdictions, like Queensland, the guardianship legislation generally distinguishes between financial decisions and personal decisions. In addition, the legislation contains special provisions relating to substitute decisions for an adult's medical or dental treatment.[170] The legislation also identifies some personal decisions for an adult which cannot be delegated to another.

4.26 The legislation varies in the specificity of the powers conferred in relation to administration (or management). For example, in the ACT, the legislation provides that a manager may be appointed to 'manage all, or a stated part, of an adult's property'.[171] The legislation in South Australia and Tasmania confers similar broad powers, in addition to providing a wide range of specific examples of financial and property matters.[172]

4.27 In each of the other jurisdictions, the legislation confers on a guardian for an adult the general power to make personal decisions for the adult, subject to any limitations in the order.[173] Without limiting that general power, the legislation in the ACT, the Northern Territory, Tasmania, Victoria and Western Australia also specifies a range of personal matters for which power may be exercised.[174] For example, in the ACT, the list includes:[175]

---

170 In New South Wales, Tasmania, Victoria and Western Australia, the legislation makes provision for a hierarchy of 'persons responsible' for medical or dental treatment decisions: *Guardianship Act 1987* (NSW) ss 33A, 36; *Guardianship and Administration Act 1995* (Tas) s 39; *Guardianship and Administration Act 1986* (Vic) ss 37, 39, 42H; *Guardianship and Administration Act 1990* (WA) s 119. In South Australia, the legislation provides for an 'appropriate authority' to give consent to medical or dental treatment: *Guardianship and Administration Act 1993* (SA) s 59.

171 *Guardianship and Management of Property Act 1991* (ACT) s 8.

172 *Guardianship and Administration Act 1995* (Tas) s 56(2).

173 *Guardianship and Management of Property Act 1991* (ACT) s 7(2)–(3); *Guardianship Act 1987* (NSW) ss 16, 21; *Adult Guardianship Act* (NT) ss 17–18; *Guardianship and Administration Act 1993* (SA) s 31; *Guardianship and Administration Act 1995* (Tas) ss 25–26; *Guardianship and Administration Act 1986* (Vic) s 24(2); *Guardianship and Administration Act 1990* (WA) s 45(2).

174 *Guardianship and Management of Property Act 1991* (ACT) s 7(3); *Adult Guardianship Act* (NT) s 17(2); *Guardianship and Administration Act 1995* (Tas) ss 25, 26; *Guardianship and Administration Act 1986* (Vic) ss 24, 25; *Guardianship and Administration Act 1990* (WA) ss 45–46.

- to decide where, and with whom, the person is to live;
- to decide what education or training the person is to receive;
- to decide whether the person is to be allowed to work;
- if the person is to be allowed to work — to decide the nature of the work, the place of employment and the employer;
- to give, for the person, a consent required for a medical procedure or other treatment (other than a prescribed medical procedure);
- to bring or continue legal proceedings for or in the name of the person.

4.28 The legislation in Tasmania, Victoria and Western Australia also lists access visits to the adult as a matter for which a guardian may be appointed.[176]

4.29 Like Queensland, in relation to special personal matters, in the ACT, Victoria and Western Australia, the legislation does not permit a substitute decision-maker to make certain decisions for an adult. In the ACT, a guardian is not empowered to vote, make a will, consent to the adoption of a child, consent to marriage or give consent to certain medical procedures, for an adult.[177] In Victoria, an administrator has no power to execute a will for an adult.[178] In Western Australia, a guardian may not exercise power for an adult to vote, make a will, consent to an adoption or consent to certain matters related to surrogacy or marriage.

4.30 Similar to the position in Queensland for special health matters, the legislation in the other jurisdictions provides that special consent procedures apply to certain medical treatment.[179]

---

175 *Guardianship and Management of Property Act 1991* (ACT) s 7(3).

176 *Guardianship and Administration Act 1995* (Tas) s 25(2)(d), *Guardianship and Administration Act 1986* (Vic) s 24(2)(e), *Guardianship and Administration Act 1990* (WA) s 45(2)(f).

177 *Guardianship and Management of Property Act 1991* (ACT) s 7B. A guardian cannot consent to certain medical treatment (called 'prescribed medical treatment') including an abortion, reproductive sterilisation, a hysterectomy, a medical procedure concerned with contraception, donation or transplantation of non-regenerative tissue, treatment for mental illness, electroconvulsive therapy or psychiatric surgery: Dictionary (definition of 'prescribed medical procedure'). The Act empowers the Tribunal to make decisions about these matters: s 70.

178 *Guardianship and Administration Act 1986* (Vic) s 50(2).

179 *Guardianship Act 1987* (NSW) s 45; *Adult Guardianship Act* (NT) s 21(2); *Guardianship and Administration Act 1993* (SA) s 61; *Guardianship and Administration Act 1995* (Tas) ss 41(2), 45; *Guardianship and Administration Act 1986* (Vic) ss 42B, 42F; *Guardianship and Administration Act 1990* (WA) s 57.

ISSUES FOR CONSIDERATION

The scope of matters defined under the guardianship legislation

4.31 An adult with impaired capacity for a matter may require a substitute decision-maker for decisions about that matter. The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) make provision for a wide range of financial, personal and health care decisions to be made for an adult with impaired capacity, depending on the type of matter involved.

4.32 A 'financial matter' relates to the management of the adult's financial and property affairs. A 'personal matter' relates to the adult's lifestyle, living arrangements, employment, education and some legal matters. A personal matter also covers a 'health matter', which relates to certain health care decisions. Together, personal matters and financial matters cover almost all of the substitute decisions that may be made for an adult under the legislation.

4.33 Special health matters fall into a different category. These matters relate to 'special health care' of an adult, which concerns very significant health care such as sterilisation, termination of pregnancy and consent to special medical research. Decisions about these matters must be dealt with in accordance with the adult's direction in an advance health directive or, if there is no such directive, by the Tribunal.

4.34 The legislation also recognises that there are some types of decisions that are so personal that it would be inappropriate for the Tribunal or another person to exercise decision-making power for them. These decisions are 'special personal matters', such as voting in an election, consenting to marriage and making a will.

4.35 The parameters of the decision-making powers exercisable under the legislation are set by the scope of these definitions. This raises the general issue of whether these definitions are appropriate or whether they should be changed in some way.

4.36 For example, the *Guardianship and Administration Act 2000* (Qld) provides that an administrator is conferred, in accordance with the terms of appointment, with the authority to do anything in relation to a financial matter for which he or she is appointed that the adult could have done if the adult had capacity for the matter.[180] A guardian is conferred with similar authority in relation to a personal matter for which he or she is appointed.[181] Given the breadth of the powers that may be conferred on an administrator for a financial matter or a guardian for a personal matter, it is important to ensure that these matters have sufficient and appropriate definitions.

---

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

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

4.37 This raises the question of whether the definitions of 'personal matter' or 'financial matter' require clarification or modification. These definitions are cast in broad terms. They are non-exhaustive and include matters 'relating to' specific examples.[182] The addition of further specific examples of matters for which powers may be exercised may provide further guidance for the Tribunal in fashioning the terms of an appointment order, as well as for appointees in understanding the scope of their appointment. One example may be the inclusion of contact with or access visits for an adult as a type of personal matter. On the other hand it may be that the definitions are sufficient as they currently stand. The Commission is interested to hear of any difficulties arising in relation to the application of these definitions and, in particular, whether there are any gaps or anomalies in their coverage.

4.38 A related issue concerns the potential overlap between the financial and personal aspects of some decisions. This issue is dealt with in Chapter 6, in relation to the exercise of power by a guardian or an administrator,[183] and in Chapter 10, in relation to the exercise of power by a statutory health attorney.[184]

4-1 Are there any difficulties arising in relation to the application of the definitions of 'personal matter' or 'financial matter' under the guardianship legislation?

4-2 Are the following definitions in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) appropriate or should they be changed in some way:

(a) 'financial matter';

(b) 'personal matter';

(c) 'health matter' and 'health care';

(d) 'special health matter' and 'special health care';

(e) 'special personal matter';

(f) 'legal matter'?

182 While the words 'relating to' must be read in context, they are of wide import and 'do not ordinarily require a direct or immediate connection': *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 363 (Gaudron J); *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 373–4 (Toohey and Gaudron JJ). See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [12.7].

183 The exercise of ancillary powers by guardians and administrators is discussed at [6.38]–[6.44] below.

184 The scope of powers of statutory health attorneys is discussed in Chapter 10 of this Discussion Paper.

Chapter 5

The appointment of guardians and administrators

INTRODUCTION

5.1 One of the key issues that has arisen in the course of the Commission's review is the appointment of guardians and administrators. This issue is antecedent to the consideration of another issue within the Commission's terms of reference, the scope of the powers of guardians and administrators.[185]

5.2 This chapter gives an overview of the appointment of guardians and administrators under the *Guardianship and Administration Act 2000* (Qld). It also provides an outline of similar provisions in other jurisdictions, and raises some specific issues for consideration. However, it does not deal with the appointment of guardians for restrictive practice matters under Chapter 5B of the Act.[186]

---

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

186 Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) deals with substitute consent for the use of restrictive practice matters for an adult with an intellectual or cognitive disability who receives disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. Although the Commission is not generally reviewing ch 5B of the *Guardianship and Administration Act 2000* (Qld), Chapter 7 of this Discussion Paper considers a number of specific issues that have been raised in relation to the use of restrictive practices.

BACKGROUND

5.3 An adult is entitled at law to make his or her own decisions. If an adult has impaired capacity for making decisions about a particular matter or type of matter, he or she may need someone to make decisions on his or her behalf. This substitute decision-making can often be undertaken by the adult's family and friends in an informal way. Many adults also anticipate the time when they may need a substitute decision-maker and formally appoint an attorney under an enduring power of attorney.[187] If an appointed attorney is not competent, the *Guardianship and Administration Act 2000* (Qld) provides for the Adult Guardian to suspend the enduring power of attorney, and for the Adult Guardian to act as the guardian and the Public Trustee to act as administrator.[188] If there is no enduring power of attorney, and a substitute decision-maker is required,[189] the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian or an administrator to make decisions for the adult.[190]

5.4 A guardian can be appointed for personal matters, such as where the adult will live, who the adult will live with, where the adult will work, the services the adult will receive, and consent to certain health care.[191] An administrator can be appointed for financial matters, such as day-to-day financial decisions, buying and selling property, making investments and entering into contracts.[192]

5.5 In the 2007–08 reporting year, the Tribunal heard 1544 applications and reviews in relation to guardianship. Of these, the Tribunal made 689 appointments. The Tribunal also heard 3089 applications and reviews in relation to administration. Of these, the Tribunal made 2196 appointments.[193]

---

187 *Powers of Attorney Act 1998* (Qld) s 32. Enduring powers of attorney are considered in Chapter 9 of this Discussion Paper.

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

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

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

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

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

193 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 40–1.

THE GROUNDS FOR AN APPOINTMENT

The law in Queensland

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

The appointment of a guardian or administrator

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

> **12 Appointment**
>
> (1) The Tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied—
>
> (a) the adult has impaired capacity for the matter; and
>
> (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
>
> (c) without an appointment—
>
> (i) the adult's needs will not be adequately met; or
>
> (ii) the adult's interests will not be adequately protected.
>
> (2) The appointment may be on terms considered appropriate by the tribunal.[194]
>
> (3) The tribunal may make the order on its own initiative or on the application of the adult, the adult guardian or an interested person.
>
> (4) This section does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B. (note added)
>
> *Note—*
>
> Section 80ZD provides for the appointment of guardians for restrictive practice matters.

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

---

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

5.9 The first ground, or step, under section 12(1)(a) is that the adult has impaired capacity for the matter.[195] This is a threshold issue under the guardianship legislation because it determines whether an adult falls within the scope of the legislation. The Tribunal has no power to make an appointment order unless it is established on the evidence that an adult has impaired capacity for a matter.[196]

5.10 If it has been established that the adult has impaired capacity for the matter, the second ground, or step, under section 12(1)(b) is that there is a need for a decision in relation to the matter;[197] or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property.[198]

5.11 The scope of the application of section 12(1)(b) in relation to the criterion of 'a need for a decision in relation to the matter' was considered by the Supreme Court in *Williams v Guardianship and Administration Tribunal*.[199] This matter was taken on appeal to the Supreme Court after the Tribunal had dismissed the application by the adult's parents and brother to be appointed as her joint guardians. The Court summarised the proceedings at first instance as follows:[200]

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

5.12 The Supreme Court held that section 12(1)(b) was not to be construed as importing any criterion of urgency or immediacy; it merely contemplated a

---

195 This step requires the Tribunal to determine the issue of capacity based on the nature and sufficiency of the evidence before it.

196 *Re SWV* [2005] QGAAT 68, [40]. The Commission discussed the nature and assessment of decision-making capacity in its 2008 Discussion Paper on the General Principles, the Health Care Principle and capacity: Queensland Law Reform Commission, *Shaping Queensland's Guardianship System: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 6. The receipt of evidence in Tribunal proceedings is discussed in Chapter 16 of this Discussion Paper.

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

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

199 [2003] 1 Qd R 465.

200 Ibid [2].

situation where an adult had a subsisting need for a surrogate decision-maker.[201]

5.13 The Supreme Court further held that, in circumstances where an adult had a constant need for decision-making on the adult's behalf, there was doubt about the adequacy of her institutional care and members of her family were capable of performing the role and sought appointment, they should be appointed guardians:[202]

> In a case like this, where there are doubts about the adequacy of the institution's treatment of Kathleen — in some respects, why should her support be limited to advocacy on the part of her family? There being no question as to their devoted, competent, responsible approach, and their capacity to advance her interests, why should she be denied the assurance contemplated by the Act, through the appointment of guardians with the legal capacity to direct, as necessary, her future course? It seems to me that is plainly justified in this case to ensure, in terms of the Act, her "adequate" support in terms of s 12(1)(b).
>
> The Tribunal was influenced by s 5(d), acknowledging that Kathleen's right to make decisions should be restricted as little as possible. The sad reality, however, is that most decisions have to be made for her (cf *RL* [2002] VCAT 12 para [24]). The Tribunal was also bound to apply the "general principles" set out in sch 1 (s 11(1)), and referred to cll 2(1) and 7(2) especially. But again, those general principles neither excluded nor militated against the appointment sought here.
>
> The Tribunal read s 5(d) as requiring the Tribunal not to appoint a guardian should there be "a less restrictive option". But appointing guardians here would not in any practical way restrict or interfere with Kathleen's "right … to make decisions": she has the right, but, through impairment, no real capacity to exercise it.
>
> The Tribunal gave undue application to the principle that it respect any capacity in Kathleen to make relevant decisions for herself. It allied that consideration with its factual conclusion that there was no (pressing) need for decision-making to justify the ultimate refusal to appoint. Each plank was misfounded. As to the former, the Tribunal's findings as to her lack of capacity robs it of application. As to the latter, the finding was simply wrong in fact.
>
> In my view, consistently with the legislative intent, this was a prime case for the appointment of guardians: a need for decision-making; doubts about the standard of the institutional care — and to a degree its responsibility; consequent doubt about the adequacy of Kathleen's care; family members of indubitable, careful commitment to Kathleen who are plainly up to the task and seek appointment.

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

---

201 Ibid [6].

202 Ibid [9]–[13].

5.15 In *Public Trustee v Blackwood*,[203] the Supreme Court of Tasmania, considered the scope of the adult's 'needs' under section 51 of the *Guardianship and Administration Act 1995* (Tas) (the general equivalent of section 12 of the *Guardianship And Administration Act 2000* (Qld)).[204] Section 51 provided:

> **51 Administration orders**
>
> (1) If, after a hearing, the Board is satisfied that the person in respect of whom an application for an order appointing an administrator or an order appointing a guardian is made—
>
> (a) is a person with a disability; and
>
> (b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and
>
> (c) is in need of an administrator of his or her estate—
>
> the Board may make an order appointing an administrator of that person's estate.
>
> (2) In determining whether or not a person is in need of an administrator of his or her estate, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.

5.16 The Court held that the adult's 'needs' encompass the protection of the adult's interests generally, and include the need for a particular decision to be made by a guardian or an administrator:[205]

> In my opinion, the word "need" and the word "needs" in s 51(2) mean different things. The expression "needs of the proposed represented person" is of wide import and encompasses all the wants and necessaries of the proposed represented person. Such needs include food, clothing, housing, medical treatment and the like. One such need may be, and was in this case, to have someone to protect and manage the estate. This is the need firstly referred to in subs (2) as "the need for an administrator of his or her estate". In my opinion, acceptance of the construction contended for by Mr Porter, would do violence to the meaning and purpose of s 51(1) and (2). If the only need in subs (2) is the need for an administrator, the provisions of subs (1)(c) and (2) would, in the vast majority of cases, be otiose. Once it was established in accordance with s 51(1)(a) and (b), that the proposed person was under a disability and that he or she was, by reason thereof, unable to make reasonable judgments in respect of matters relating to all or part of his or her estate, it would almost invariably follow that there was a need for an administration order. In my view, Parliament, by enacting subs (2), directed the Board to consider, not only the need for an administrator to manage and protect the estate, but

---

203 (1998) 8 Tas R 256.

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

205 *Public Trustee v Blackwood* (1998) 8 Tas R 256, 265 (Underwood J).

> also all the other needs of the proposed represented person. If, having done this, the Board reaches the view that all the needs could be satisfied by means less restrictive of freedom of action and decision than would be the case if an administration order was made, then an administration order should not be made. This construction reflects the philosophy apparent in the Act and enacted in sections such as ss 6, 51 and 57, that control over and restriction on a person under a disability is to be kept to a minimum.

The law in other jurisdictions

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

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

5.19 There are some differences in terminology between the jurisdictions. In South Australia, Tasmania, Victoria and Western Australia, like Queensland, a person who is appointed to make decisions about the control and management of an adult's property is called an 'administrator', while in the ACT and New South Wales, the equivalent term is a 'manager'.[206] In each of the jurisdictions, a 'guardian' is a person appointed to make decisions for an adult for personal matters.[207]

5.20 The grounds for an appointment in the ACT are generally similar to the grounds in the Queensland provision.[208] In the other jurisdictions, the grounds are generally based on the incapacity of the adult and the adult's need for a guardian or an administrator.[209]

5.21 In Victoria, the legislation sets out a list of factors that the Tribunal must consider in deciding whether or not an adult is in need of a guardian or an administrator:[210]

---

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

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

208 *Guardianship and Management of Property Act 1991* (ACT) ss 7(1), 9(1).

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

210 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a)–(ab), 46(2).

- whether the needs of the adult could be met by other means less restrictive of the adult's freedom of decision and action; and

- the wishes of the adult, so far as they can be ascertained.

5.22 The Victorian legislation also requires the Tribunal, in deciding whether or not an adult is in need of a guardian, to consider:[211]

- the wishes of any nearest relatives or other family members of the adult; and

- the desirability of preserving existing family relationships.

5.23 In the ACT, New South Wales, the Northern Territory, Victoria and Western Australia, the legislation provides for several of these considerations to be taken into account in deciding whether a person is appropriate or suitable for appointment.[212] In Queensland, some of these considerations are provided for in the General Principles.[213]

Issues for consideration

5.24 The aim of the *Guardianship and Administration Act 2000* (Qld) is to establish a comprehensive regime for the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity in Queensland.[214] The Act seeks to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to receive adequate and appropriate support for decision-making.[215] The Act also recognises that decisions for an adult with impaired capacity may be made on an informal basis by members of the adult's existing support network.[216]

---

211 *Guardianship and Administration Act 1986* (Vic) s 22(2)(b)–(c).

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

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

214 Explanatory Notes, Guardianship and Administration Bill 1999 (Qld) 1.

215 *Guardianship and Administration Act 2000* (Qld) s 6.

216 *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

5.25 It is not always necessary that decisions for an adult with impaired capacity be made by a person who has formal legal authority.[217] However, there are various circumstances in which it may be necessary to appoint a guardian for a personal matter or an administrator for a financial matter for an adult with impaired capacity. A formal appointment may be necessary if the adult has no family or friends willing and able to make decisions for him or her and a decision needs to be made for the adult. It may also be necessary if the adult has family or friends willing and able to make decisions for him or her but, for some reason, the adult's needs are not being met. This situation may arise, for example, if inappropriate decisions are being made for the adult, including decisions which may endanger the adult's health, welfare or property.[218] It may also be that, for certain types of decisions, the decision-maker may need formal legal authority to make the decision or to have that decision recognised by third parties. A formal appointment may also be necessary if an attorney is not acting in the adult's interests and an alternative decision-maker is required.[219]

5.26 As mentioned earlier, the Tribunal may make an order to appoint a guardian or an administrator for an adult only if it is satisfied that each of the three grounds set out in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) is established.[220]

5.27 In addition, the Tribunal must apply the General Principles.[221] The Principles, which focus on the adult's rights, do not specifically refer to existing informal decision-making arrangements for the adult. They do provide, however, that the importance of maintaining the adult's 'existing supportive relationships' must be taken into account.[222] They also require that a person or entity (including the Tribunal) in performing a function or exercising a power under the *Guardianship and Administration Act 2000* (Qld) must do so in a way

---

217 However, medical treatment ordinarily requires consent from the patient. If an adult lacks capacity, health care decisions will need to be made for the adult by someone else, such as a guardian appointed by the Tribunal or the court, an attorney appointed under an enduring document, a statutory health attorney, or by the Tribunal or the court. If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction: *Guardianship and Administration Act 2000* (Qld) (Qld) ss 65(2), 66(2).

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

219 *Re SAD* [2007] QGAAT 8.

220 See [5.8]–[5.16] above.

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

222 *Guardianship and Administration Act 2000* (Qld) sch 1 s 8.

consistent with the adult's care and protection[223] and in the way least restrictive of the adult's rights.[224]

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

5.29 Section 12(1) is based on the recommendation of the Queensland Law Reform Commission in its original 1996 report.[225] In that Report, the Commission recognised the role of informal decision-making:[226]

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

5.30 In the Commission's earlier draft report, it also noted some disadvantages of informal decision-making, including that there is no formal control over decision-makers:[227]

> A person whose decision-making capacity is impaired may be vulnerable to abuse or exploitation. He or she will usually trust close relatives or members of support networks, and the closeness of the relationship may make abuse of that trust difficult to detect. However, it is the view of the Commission that, although in the majority of cases informal arrangements work perfectly well without supervision, some level of abuse is, unfortunately, probably inevitable. The question is whether a requirement that decision-makers be formally appointed would prevent that abuse. The Commission considers it unlikely that such a requirement would deter potential exploitation but would rather constitute an unwarranted intrusion into existing relationships and an additional burden on the honest. If there is conflict among relatives or if there is evidence

---

223 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5).

224 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). Section 5(d) of the Act also acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.

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

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

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

> that a person with a mental or intellectual disability is being overborne, neglected or abused, the facts may come to the notice of a professional carer, service provider or health care worker. A person who becomes aware of such a situation would be able to approach the Adult Guardian or to make an application to the tribunal if it appears that appropriate assistance is not being given or that advantage is being taken of the person. (note omitted)

5.31 An issue for consideration is whether the grounds for the appointment of a guardian or an administrator strike the right balance between formal guardianship and administration and informal decision-making. On the one hand, if the grounds for making an appointment order are too wide, an adult may be unnecessarily subject to an appointment order, with a consequential loss of decision-making autonomy.[228] On the other hand, if the grounds are too narrow, an adult may be unnecessarily deprived of having the safeguards or certainty provided by an appointment order.

5-1 Do the grounds for the appointment of a guardian or an administrator under section 12(1) of the *Guardianship and Administration Act 2000* (Qld) strike the right balance between formal guardianship and administration and informal decision-making?

5-2 Should the grounds in section 12(1) of the *Guardianship and Administration Act 2000* (Qld) be changed in any way? If so, how?

WHO MAY BE APPOINTED AS A GUARDIAN OR AN ADMINISTRATOR

The law in Queensland

The appointment of one or more guardians or administrators

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

> **14 Appointment of 1 or more eligible guardians and administrators**
>
> (1) The tribunal may appoint a person as guardian or administrator for a matter only if—
>
> (a) for appointment as a guardian, the person is—

228 In *Williams v Guardianship and Administration Tribunal* [2003] 1 Qd R 465, at [11], de Jersey CJ rejected this argument because the adult had no real capacity to exercise her autonomy:

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

(i) a person who is at least 18 years and not a paid carer, or health provider, for the adult; or

(ii) the adult guardian; and

(b) for appointment as an administrator, the person is—

(i) a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or

(ii) the public trustee or a trustee company under the *Trustee Companies Act 1968*; and

(c) having regard to the matters mentioned in section 15(1), the tribunal considers the person appropriate for appointment.

(2) Despite subsection (1)(a)(ii), the tribunal may appoint the adult guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.

(3) Subject to section 74, no-one may be appointed as a guardian for a special personal matter or special health matter.

Editor's note—

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

(4) The tribunal may appoint 1 or more of the following—

(a) a single appointee for a matter or all matters;

(b) different appointees for different matters;

(c) a person to act as appointee for a matter or all matters in a stated circumstance;

(d) alternative appointees for a matter or all matters so power is given to a particular appointee only in stated circumstances;

(e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;

(f) joint or several, or joint and several, appointees for a matter or all matters;

(g) 2 or more joint appointees for a matter or all matters, being a number less than the total number of appointees for the matter or all matters.

(5) If the tribunal makes an appointment because an adult has impaired capacity for a matter and the tribunal does not consider the impaired

> capacity is permanent, the tribunal must state in its order when it considers it appropriate for the appointment to be reviewed.
>
> *Editor's note—*
>
> Otherwise periodic reviews happen under section 28.

Persons eligible as guardians or administrators

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

5.34 A person may be appointed as guardian for a personal matter only if:[229]

- the person is either:
  - a person who is 18 years or older, is not a paid carer, or health provider, for the adult; or
  - the Adult Guardian;[230] and
- the Tribunal considers the person is appropriate for appointment.

5.35 A person may be appointed as administrator for a financial matter only if:[231]

- the person is either:
  - a person who is 18 years or older, is not a paid carer, or health provider, for the adult and not a bankrupt or taking advantage of Australian or foreign bankruptcy laws as a debtor; or
  - the Public Trustee[232] or a trustee company under the Trustee Companies Act 1968 (Qld); and
- the Tribunal considers the person is appropriate for appointment.

---

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

230 The Adult Guardian is an independent statutory official established under s 173 of the *Guardianship and Administration Act 2000* (Qld). The role of the Adult Guardian is to protect the rights and interests of adults with impaired capacity: *Guardianship and Administration Act 2000* (Qld) ss 174(1), 176. The Adult Guardian's functions are wide-ranging and include acting as the adult's guardian if appointed by the Tribunal: s 174(2). Other functions of the Adult Guardian include investigating complaints or allegations of neglect, exploitation or abuse of an adult and acting as an attorney for an adult under an enduring power of attorney or as an adult's statutory health attorney: s 174(2). The Adult Guardian also has a number of protective powers in relation to adults: ch 8 pt 3. The functions and powers of the Adult Guardian are discussed in Chapter 18 of this Discussion Paper.

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

232 The Public Trustee of Queensland is a corporation sole established under the *Public Trustee Act 1978* (Qld): *Public Trustee Act 1978* (Qld) ss 7–8. The Public Trustee's role is to provide Queenslanders with a range of financial, trustee and legal services. These services include providing financial management for people with a disability. The role of the Public Trustee is discussed in Chapter 19 of this Discussion Paper.

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

5.37 A 'paid carer' for an adult is someone who performs services for the adult's care and receives remuneration from any source for the services (other than a Government carer payment or other benefit for providing home care for the adult or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult's care).[233]

5.38 In considering the definition of 'paid carer', the Tribunal has distinguished between 'remuneration' and 'reimbursement'. In *Re BAI*,[234] the Tribunal considered that remuneration is a payment for services while reimbursement is a payment for expenses.

5.39 A health provider is a person who provides health care, or special health care, in the practice of a profession or in the ordinary course of business.[235]

Appointment of the Adult Guardian as a last resort

5.40 In the form in which it was originally enacted, section 14 gave no express priority to the appointment of an individual as a guardian. Section 14(2) was inserted in the *Guardianship and Administration Act 2000* (Qld)[236] in 2007 to give legislative effect to the decision of the Supreme Court of Queensland in *Adult Guardian v Hunt*.[237] As a result of that amendment, section 14(2) of the Act now provides that the Tribunal may appoint the Adult Guardian as a guardian for a matter only if there is no other appropriate person available for appointment for the matter.

5.41 In *Adult Guardian v Hunt*, the Adult Guardian appealed against orders made by the Tribunal on a review of its appointment as guardian for the

---

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

234 [2007] QGAAT 81. In that case, the Tribunal was considering the definition of 'paid carer' in the *Powers of Attorney Act 1998* (Qld), which is in nearly identical terms. The Tribunal considered that the definition contemplated that the payment received would compensate the carer for the services provided. Further, the weekly payment of $50 received by the adult's attorney for 'general assistance service' (the use of her own facilities for the adult's laundry and transport) to the adult was not remunerative in the circumstances and could be characterised as reimbursement of expenses.

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

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

237 [2003] QSC 297.

adult.[238] The orders appealed against were the removal of the Adult Guardian and the subsequent appointment of the adult's long term de facto partner as her guardian. The Adult Guardian argued that the Adult Guardian was a primary candidate for appointment under section 14 and that 'the Act might suggest that, were there a doubt, the Tribunal should err in favour of appointing the Adult Guardian'. Chesterman J dismissed the appeal, noting that, where an adult has friends or family who are able and willing to provide the requisite support and assistance, it is preferable that they be allowed to do so rather than be displaced by the Adult Guardian:[239]

> The second submission is that the Tribunal erred in describing the appointment of the appellant 'as a matter of last resort'. The appellant submitted that the Tribunal 'misdirected itself by assuming that there was a significant presumption against the appropriateness of the Adult Guardian … Section 14 … recognises the Adult Guardian as a prime candidate to be appointed … If anything the Act might suggest that, were there a doubt, the Tribunal should err *in favour* of appointing the Adult Guardian.'
>
> The Tribunal may have overstated the point a little by saying that the appointment of the Adult Guardian is a matter of 'last resort when there is no other appropriate person for appointment', but the notion underlying that expression is, in my opinion, correct. The Adult Guardian is a functionary of the State which, very properly, endeavours to protect the helpless and defenceless. But where a person has friends or family who are able and willing to provide the requisite support and assistance it is, in my view, preferable that they be allowed to do so rather than be supplanted by a bureaucrat, no matter how well intentioned. To take any other view is to deny the expression of what is good in human nature.

The manner of appointment of one or more appointees

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

Appropriateness considerations

5.43 Section 15 of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to take into account several 'appropriateness considerations' in deciding whether a person is appropriate and competent to

---

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

239 [2003] QSC 297, [29]–[30].

perform functions and exercise powers under an appointment order. That section provides:

> **15 Appropriateness considerations**
>
> (1) In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters (***appropriateness considerations***)—
>
> (a) the general principles and whether the person is likely to apply them;
>
> (b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;
>
> (c) the extent to which the adult's and person's interests are likely to conflict;
>
> (d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;
>
> (e) if more than 1 person is to be appointed—whether the persons are compatible;
>
> (f) whether the person would be available and accessible to the adult;
>
> (g) the person's appropriateness and competence to perform functions and exercise powers under an appointment order.
>
> (2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.
>
> (3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.
>
> (4) In considering the person's appropriateness and competence, the tribunal must have regard to the following—
>
> (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
>
> (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or other person making a decision for someone else;
>
> (c) if the proposed appointment is of an administrator and the person is an individual—
>
> (i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of

bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; and

(ii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors under the *Bankruptcy Act 1966* (Cwlth), part 10 or a similar law of a foreign jurisdiction; and

(iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management, direction or control the person is or was involved.

(5) In this section—

attorney means—

(a) an attorney under a power of attorney; or

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

power of attorney means—

(a) a general power of attorney made under the *Powers of Attorney Act 1998*; or

(b) an enduring power of attorney; or

(c) a power of attorney made otherwise than under the *Powers of Attorney Act 1998*, whether before or after its commencement; or

(d) a similar document under the law of another jurisdiction.

5.44 Before the appointment is made, an individual who has agreed to the proposed appointment as a guardian or an administrator is required to give written advice to the Tribunal about particular matters, which are largely the matters referred to in section 15.[240] The guardian or administrator is under a continuing duty to inform the Tribunal of anything which he or she has not previously advised the Tribunal; and of anything of which the guardian or administrator would be required to advise the Tribunal if the Tribunal were considering whether to appoint the guardian or administrator.[241] In addition, the Tribunal and the registrar have power to make inquiries about the appropriateness and competence of a person who has agreed to a proposed appointment or who is a guardian or administrator.[242]

240 *Guardianship and Administration Act 2000* (Qld) s 16.

241 *Guardianship and Administration Act 2000* (Qld) s 17.

242 *Guardianship and Administration Act 2000* (Qld) s 18.

The law in other jurisdictions

5.45 The eligibility provisions in each of the other jurisdictions vary in their requirements.[243] These provisions generally set out the eligibility criteria and appropriateness or suitability considerations for appointment. While many of these provisions have some commonality with the Queensland provisions, the Queensland provisions are the most comprehensive.

5.46 The legislation in each jurisdiction makes provision for an individual to be appointed as a guardian for personal matters.[244] Provision is also made for the appointment of the Adult Guardian (or its equivalent) as a guardian.[245] In the ACT, the Northern Territory, South Australia and Victoria, the Adult Guardian (or its equivalent) is the guardian of last resort.[246] In New South Wales, the appointment of the Public Guardian as a last resort applies only in relation to a continuing (final) guardianship order.[247]

5.47 The other jurisdictions also provide for an individual to be appointed as an administrator for financial matters.[248] Provision is also made for the appointment of the Public Trustee (or its equivalent) or a trustee company as an

---

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

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

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

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

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

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

administrator.[249] There is generally no preference for the appointment of an individual as an administrator. However, Western Australia provides for the appointment of an individual, a trustee company and the Public Trustee, in that order.[250]

5.48 There is some variation between the jurisdictions in the appropriateness considerations for determining whether a person is suitable for appointment. In New South Wales, in deciding whether an adult is in need of a guardian, the Tribunal must take into account:[251]

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

5.49 In the ACT, the Northern Territory, Tasmania, Victoria and Western Australia, the appropriateness considerations are the views of the adult and the importance of preserving the adult's existing family relationship.[252] There are no appropriateness considerations provided for in the South Australian legislation.

---

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

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

251 *Guardianship Act 1987* (NSW) s 14(2).

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

Issues for consideration

Persons eligible for appointment

5.50 Section 14(1) of the *Guardianship and Administration Act 2000* (Qld) specifies eligibility requirements for appointment as a guardian or an administrator.[253]

5.51 A person may be appointed as guardian for a personal matter only if:[254]

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

5.52 A person may be appointed as administrator for a financial matter only if:[255]

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

5.53 An issue to consider generally is whether the eligibility requirements for appointment in section 14(1) are appropriate and whether there are any difficulties in practice with these requirements.

5.54 A specific issue for consideration is whether the definition of a 'paid carer' for an adult under the *Guardianship and Administration Act 2000* (Qld) raises any problems in practice. As mentioned previously, the definition of 'paid carer' under the Act covers a person who performs services for the adult's care and receives remuneration from any source for the services. However, it does not apply to a person who receives a Government carer payment or other benefit for providing home care for the adult or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult's care.[256] The rationale for making a paid carer

253 There are generally similar requirements for an attorney appointed under an enduring power of attorney: *Powers of Attorney Act 1998* (Qld) s 29. However, s 29 also includes a person who is not a service provider for a residential service where the principal is resident. The eligibility requirements for attorneys are considered in Chapter 9 of this Discussion Paper.

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

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

256 See n 233 above.

ineligible for appointment is to ensure that there is no conflict of interest between a professional care provider for an adult and the adult.[257]

5.55 The legislation in South Australia, like Queensland, prohibits the appointment of a person who cares for an adult on a professional basis.[258] However, the eligibility provisions in New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia do not specifically exclude paid carers from appointment. In those jurisdictions, one of the eligibility requirements is that the appointee is not in a position where the appointee's interests conflict or may conflict with the interests of the adult.[259]

5.56 The definition of 'paid carer' under the *Guardianship and Administration Act 2000* (Qld) may, in some circumstances, capture a member of the adult's support network (for example, a close relative of the adult) who cares for the adult and receives remuneration for those services (other than a Government carer payment or other benefit for providing home care for the adult or remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the adult's care). If the remuneration received is a payment for services rather than a reimbursement of expenses, the person would fall within the definition of a paid carer for an adult and, therefore, be ineligible for appointment as a guardian or an administrator for the adult.[260]

5.57 The Commission is interested to know whether the definition of 'paid carer' under the Act causes any problems in practice, particularly in relation to the possibility that, in some circumstances, family members of the adult may fall within the definition. It is noted that the Act, amongst other things, requires the Tribunal, when considering whether a person is appropriate for appointment, to take into account the extent to which the adult's and the person's interests are likely to conflict.[261] It also recognises that the fact that a person is a relation of the adult does not, of itself, mean that the adult's and the person's interests are likely to conflict.[262] It may be that these provisions, by themselves, are sufficient to deal with the issue of a possible conflict of interest when a family member, who is also a paid carer for the adult, seeks appointment.

---

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

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

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

260 See [5.38] above.

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

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

5-3 Are the eligibility requirements in section 14(1) of the *Guardianship and Administration Act 2000* (Qld) appropriate?

5-4 Are there any difficulties in practice with the application of the eligibility requirements in section 14(1) of the *Guardianship and Administration Act 2000* (Qld)?

Consent to an appointment

5.58 An issue for consideration is whether the eligibility provisions under the *Guardianship and Administration Act 2000* (Qld) should generally provide that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment. Section 14, which deals with who may be appointed, contains no such requirement.[263] However, section 117 of the *Guardianship and Administration Act 2000* (Qld), which is a procedural provision, provides that an application for the appointment of a guardian or an administrator must include the proposed appointee's written agreement to the appointment.[264] It would appear that the effect of this provision is to ensure that a person, and in particular an individual, who is proposed for appointment is aware of the application for appointment, and has given his or her consent to the appointment. Section 117, however, will be repealed when the relevant provisions of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) commence.[265] Even if the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) were to provide that an application for the appointment of a guardian or an administrator must include the proposed appointee's written agreement to the appointment, it may be preferable to ensure that the consent of a proposed appointee is a substantive requirement for appointment under the *Guardianship and Administration Act 2000* (Qld).

---

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

264 The application form for the appointment of a guardian or administrator stipulates that, if proposed for an appointment, neither the Adult Guardian nor the Public Trustee is required to complete the relevant sections in the form which provide for the written agreement of a proposed appointee to the appointment: Guardianship and Administration Tribunal, *Application for Administration/Guardianship Appointment or Review*, http://www.gaat.qld.gov.au/files/Application_for_Administration_Guardianship_-_Appointment_or_Review.pdf at 31 October 2009.

265 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1448. That Act was assented to on 26 June 2009. Section 1448 of the Act has not yet been proclaimed into force.

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

5.60 As mentioned above, under the *Guardianship and Administration Act 2000* (Qld), the Public Trustee is eligible for appointment as an administrator for an adult. However, the Public Trustee's appointment is subject to the operation of section 27(3) of the *Public Trustee Act 1978* (Qld), which provides that, unless there is a specific exception made under the *Public Trustee Act 1978* (Qld) or any other Act, the Public Trustee's appointment to any office or capacity is subject to the Public Trustee's consent. The Commission understands that it is the policy of the Public Trustee not to refuse an appointment as an administrator for an adult.[266]

5.61 In most of the other jurisdictions, the eligibility provisions specify that a person cannot be appointed unless he or she has consented to the appointment.[267] In South Australia, the requirement for consent does not apply to the Public Advocate or the Public Trustee.[268]

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

5.63 Both the Adult Guardian and the Public Trustee meet an important public need. The Adult Guardian is the guardian of last resort. The Office of the Adult Guardian is publicly funded for the delivery of its services and charges no fees. The Public Trustee provides a range of trustee, financial and related services to the community, including acting as an administrator for an adult when appointed under the *Guardianship and Administration Act 2000* (Qld). The Public Trustee is entitled to charge an adult for the costs of administration. In the absence of any application from another person who is appropriate to be appointed to the role, the Public Trustee is the alternative appointee considered by the Tribunal.[269] In this situation, the Public Trustee is, in effect, the de facto administrator of last resort.

---

266 Information provided by the Official Solicitor for the Public Trustee of Queensland 8 October 2009. However, the Public Trustee has indicated that this policy is open to review in exceptional circumstances.

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

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

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

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

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

5-5 Should section 14 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that a person cannot be appointed as a guardian or an administrator unless he or she consents to the appointment?

5-6 Should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the consent of the Adult Guardian or the Public Trustee is not required for their appointment?

Appropriateness considerations for appointment

5.65 Section 15 of the *Guardianship and Administration Act 2000* (Qld) sets out the 'appropriateness considerations' the Tribunal must take into account in deciding whether a person is appropriate for appointment as a guardian or administrator for an adult with impaired capacity. These include:[270]

- the General Principles and, if the appointment is for a health matter, the Health Care Principle, and whether the person is likely to apply them;
- the extent to which the adult's and the person's interests are likely to conflict;
- whether the adult and the person are compatible including, for example, whether the person's communication skills and cultural or social experience are appropriate;
- whether the person would be available and accessible to the adult; and
- the person's appropriateness and competence to perform the functions and exercise the powers conferred by an appointment order.

5.66 The fact that a person is a relation of the adult, or a beneficiary of the adult's estate on the adult's death, does not of itself mean that the adult's and the person's interests are likely to conflict.[271]

5.67 In considering a person's appropriateness and competence for appointment, the Tribunal is required to take into account, amongst other things, the nature and circumstances of any criminal history of the person, or any

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

271 *Guardianship and Administration Act 2000* (Qld) s 15(2)–(3).

refusal of, or removal of, the person from appointment as a guardian, administrator or attorney in Queensland or elsewhere.[272]

5.68 An issue is whether these considerations are appropriate and whether there are any difficulties in practice with the application of these considerations.

5-7 Are the 'appropriateness considerations' in section 15 of the *Guardianship and Administration Act 2000* (Qld) appropriate?

5-8 Are there any difficulties in practice with the application of appropriateness considerations in section 15 of the *Guardianship and Administration Act 2000* (Qld)?

The relevance of family conflict in the appointment process

5.69 Family conflict is an issue that often arises in the context of Tribunal proceedings relating to the appointment, or the review of an appointment, of a guardian or an administrator for an adult, particularly where the appointee, or proposed appointee, is a member of the adult's family or support network. In circumstances where family conflict is involved, the Tribunal has sometimes appointed the Adult Guardian or the Public Trustee in preference to a family member on the basis that a statutory decision-maker has the ability to bring an 'independent and objective mind' to the decision-making process.[273]

5.70 As noted above, section 15 of the *Guardianship and Administration Act 2000* (Qld) sets out the 'appropriateness considerations' the Tribunal must take into account in deciding whether a person is appropriate for appointment as a guardian or administrator for an adult with impaired capacity. It appears that the Tribunal has generally dealt with the existence of family conflict as a relevant circumstance in considering whether a family member is an 'appropriate' appointee.[274]

5.71 For example, in *Re BAH*, the Tribunal considered that family conflict is relevant in deciding whether a person is a suitable appointee to the extent that it may impact on the appointee's ability to apply the General Principles when making decisions for the adult:[275]

---

272 *Guardianship and Administration Act 2000* (Qld) s 15(4).

273 See eg *Re KAB* [2008] QGAAT 29, [80]; *Re BL* [2006] QGAAT 23; *Re GA* [2004] QGAAT 15; *Re SAB* [2009] QGAAT 16, [47], [58].

274 *Guardianship and Administration Act 2000* (Qld) s 15 is set out at [5.43] above.

275 [2007] QGAAT 77, [32]–[33]. See also *Re BAJ* [2005] QGAAT 57, [42], [48]–[50]; *Re CRS* [2006] QGAAT 57, [90]. In deciding whether a person is appropriate for appointment as a guardian or an administrator for an adult, the Tribunal must consider, amongst other things, the General Principles and whether the person is likely to apply them: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a). See, for example, General Principle 8, which specifies that the importance of maintaining the adult's existing supportive relationships must be taken into account: *Guardianship and Administration Act 2000* (Qld) sch 1 s 8.

> The Tribunal accepts the submissions of KW in relation to the circumstances of conflict. That is, it is not the fact of conflict per se which militates against a family appointee. However, if the fact of conflict impacts on a proposed appointee's ability to comply with the general principles in his or her decision-making process, then that circumstance is a matter to which the Tribunal must have regard.
>
> Specifically, section 15 of the *Guardianship and Administration Act 2000* requires the Tribunal to consider the "appropriateness considerations" when determining whether a person is appropriate for appointment. One of those considerations is whether the person is likely to apply the general principles, and in turn, one of the general principles is the maintenance of an adult's existing supporting relationships.

5.72 The Tribunal has also considered that family conflict is a relevant circumstance to the extent that it may affect the person's appropriateness and competence to perform the functions and exercise the powers under the appointment order.[276] For example, the Tribunal has noted that family conflict sometimes may discourage or prevent other members of the adult's family or support network from providing their input to, or, in the case of a joint appointee, consulting with, the guardian or administrator about decisions made for the adult.[277]

5.73 The Tribunal has also noted that the existence of family conflict, particularly in relation to the adult's interests, may be detrimental to the adult's well-being.[278]

5.74 However, family conflict is not uncommon. Even though family conflict has the potential to complicate the process of substitute decision-making for an adult, it may be generally preferable, in some circumstances, to appoint a family member who has a personal and ongoing interest in the adult rather than a statutory office-holder.[279]

5.75 The Tribunal may also give directions to the appointees to do particular things in order to minimise the level of family conflict. For example, in *Re TAW*, the Tribunal considered it appropriate in the circumstances to continue the appointment of family members as administrators for the adult notwithstanding the existence of family conflict.[280] However, the Tribunal gave directions to the

---

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

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

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

279 See eg *Adult Guardian v Hunt* [2003] QSC 297, [30]. See [5.40] above.

280 [2004] QGAAT 56.

administrators to facilitate consultation with other family members:[281]

> The Tribunal does not accept that the conflict within this family is a reason to appoint an outside administrator such as the PTQ nor that Mrs A has breached her responsibilities as a current administrator.
>
> …
>
> While this conflict is acknowledged, there is a depth of expertise and knowledge within this family that should not be sacrificed to the conflict that exists. Rather, directions should be made by the Tribunal to try to minimise the antagonism. Mr TAW has clearly and logically expressed firm views concerning these appointments and the Tribunal is bound under the General Principles to take his views into account in making this decision.

5.76 It has been suggested that, in appropriate circumstances, it may be beneficial for the parties involved in a dispute to attempt to use mediation to resolve or manage family conflict, particularly prior to, or at an early stage in, proceedings.[282]

5.77 Although the Commission has not previously sought submissions on this issue, it has received a number of submissions during the course of this review that have referred to situations where, because of some level of family conflict, the Adult Guardian, rather than a family member, has been appointed as guardian.[283] In particular, the Public Advocate has commented, in relation to both the Adult Guardian and the Public Trustee:[284]

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

281 Ibid [52]–[53].

282 For a discussion of mediation in guardianship proceedings, see M Radford, 'Is the Use of Mediation Appropriate in Adult Guardianship Cases?' (2001–2002) 31 *Stetson Law Review* 611; R Carroll, 'Appointing decision-makers for incapable persons — what scope for mediation?' (2007) 17 *Journal of Judicial Administration* 75. Note the comments of R Carroll on the effectiveness of mediation in relation to particular stages of certain types of guardianship proceedings. Note also that the use of mediation services is subject to the availability of sufficient resources.

283 Submissions C78A, C110, C147, CF1, 94.

284 Correspondence from the Public Advocate dated 12 June 2009.

intimate affairs of an adult in the hands of a statutory body/officer, might be expected to frequently cause difficulty/aggravation for the adult and/or members of their support network.

5-9 How should the existence of family conflict be dealt with in proceedings for the appointment of a guardian or an administrator?

The appointment of the Adult Guardian or the Public Trustee

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

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

5.80 It has been suggested that the primary advantage of appointing the Adult Guardian or the Public Trustee lies in the fact that they are independent and objective decision-makers.[285] These features are perceived as beneficial in situations where family members are in dispute or where there may be a conflict of interest between the adult and a family member. Another advantage is that they have considerable professional experience in substitute decision-making. Additionally, as guardian of last resort, the Adult Guardian is always available to act for an adult.

5.81 On the other hand, it has been suggested that one of the key advantages of appointing a family member is that, in contrast to the Adult Guardian or the Public Trustee, the family member often has a close and continuing personal relationship with the adult.[286] The existence of such a relationship has been said to enable the family member to bring to his or her role as appointee the additional elements of love and affection, emotional

285 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 199; B Carter, 'Professional Guardianship in Australia: Is guardianship a profession and who cares anyway?' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009, <http://www.agac.org.au/index.php/Conference-Papers/2009-Conference-Papers.html> (at 6 October 2009). See also *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242, in which Kirby J discussed the competing advantages of appointing a family member or the protective Commissioner to manage the estate of a protected person.

286 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 199; B Carter, 'Professional Guardianship in Australia: Is guardianship a profession and who cares anyway?' (Paper presented at the Australian Guardianship and Administration Council, Australian Guardianship and Administration Conference, Brisbane, March 2009, <http://www.agac.org.au/index.php/Conference-Papers/2009-Conference-Papers.html> (at 6 October 2009). See also *Adult Guardian v Hunt* [2003] QSC 297, [30] (in relation to the Adult Guardian); *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242, in which Kirby J discussed the competing advantages of appointing a family member or the Protective Commissioner to manage the estate of a protected person.

support and practical assistance for the adult.[287] A family member's personal knowledge of the adult and his or her estate may also be beneficial when making decisions for the adult.[288] For example, where an adult has a small estate, the administration of the estate by a family member, who is familiar with and readily able to manage the estate may have a relatively cost-efficient outcome.[289]

5.82 The appointment of the Adult Guardian or the Public Trustee has implications for the financial and other resources of these bodies, which may impact on their ability to deliver services.[290] It has been suggested that the potential disadvantages of such an appointment are 'the reduced personal attention due to the generally heavy caseloads of the officers who act as case managers and a discontinuity of relationships when one case manager is replaced by another'.[291]

The appointment of the Public Trustee as an administrator of last resort

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

5.84 In its original 1996 report, the Queensland Law Reform Commission recommended that both the Adult Guardian and the Public Trustee should be available as decision-makers of last resort.[292] It is noted, however, that neither the Commission's draft legislation which was included in that report nor the *Guardianship and Administration Act 2000* (Qld), as it was originally enacted, contained an express order of priority of persons eligible for appointment.

5.85 One issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended to expressly provide that the Public Trustee may be appointed as an administrator only as a last resort.

---

287 Ibid.

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

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

290 For example, in the 2007–08 reporting year, the Adult Guardian, who is publicly funded, reported that a substantial yearly increase in the number of orders appointing the Adult Guardian resulted in 'a further increase in guardian's time and resources in order to make the most appropriate decisions for adults': Office of the Adult Guardian, *Annual Report 07–08* (2008) 29.

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

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

5.86 Such an amendment would be consistent with section 14(2), which provides for the appointment of the Adult Guardian for personal matters as a last resort. It would also be consistent with the Commission's recommendation in its original 1996 Report. However, the role of an administrator is becoming increasingly complex. This is often due to the intricate nature of the adult's estate (for example, often involving shares, superannuation and other financial investments), which necessarily entails significant accountability and risk factors.[293] In particular, the Act imposes additional obligations on administrators which are not imposed on guardians.[294] For these reasons, it may be argued that the Tribunal should not be required to exhaust all possibilities for the appointment of an administrator before the Public Trustee may be appointed.

5-10 Should the *Guardianship and Administration Act 2000* (Qld) be amended so that the Public Trustee may be appointed as an administrator only if there is no other appropriate person available for appointment?

The appointment of the Adult Guardian as guardian of last resort

5.87 Section 14(2) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may appoint the Adult Guardian as guardian only if there is no other appropriate person available for appointment. That section was inserted in the Act in 2007 to give legislative effect to the Supreme Court decision in *Adult Guardian v Hunt*.[295] According to the Explanatory Notes for the amending legislation, section 14(2) requires 'the Tribunal to consider and exhaust as possibilities the range of available and appropriate family members before the Adult Guardian is appointed'.[296]

5.88 In the ACT, the Northern Territory, South Australia and Victoria, the Adult Guardian (or its equivalent) is the guardian of last resort.[297] Although there is some variation between the wording of these provisions and the

293 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 19.

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

295 [2003] QSC 297, [30].

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

297 See [5.46] above. In New South Wales, the appointment of the Public Guardian as a last resort applies only in relation to a continuing guardianship order: *Guardianship Act 1987* (NSW) s 17(3).

Queensland provision, the test for the appointment of the Adult Guardian as a last resort is generally similar.[298]

5.89 Section 15 of the Act requires the Tribunal, in deciding whether a person is appropriate for appointment as a guardian or an administrator, to take into account various appropriateness considerations, including whether the person is likely to apply the General Principles and the Health Care Principle (if appropriate).[299] In particular, the existing General Principles provide that the importance of maintaining the adult's existing supportive relationships must be taken into account.[300] This principle does not specifically require decision-makers to consult with members of the adult's support network or to take account of their views. However, it is difficult to see how this principle may be applied in practice in the absence of such consultation. The General Principles also require that a person or entity (including the Tribunal) in performing a function or exercising a power under the *Guardianship and Administration Act 2000* (Qld) must do so in the way least restrictive of the adult's rights[301] and in a way consistent with the adult's care and protection.[302]

5.90 In addition to these considerations, the *Guardianship and Administration Act 2000* (Qld) also specifies that, if there are two or more people who are guardian, administrator or attorney for the adult, these persons must consult regularly with each other to ensure that the adult's interests are not prejudiced by a breakdown in communication between them.[303]

5.91 In its original 1996 report, the Queensland Law Reform Commission acknowledged the significant role that family and close friends often play in an adult's life.[304] However, the Commission recognised that there is sometimes a need for a decision-maker of last resort:[305]

---

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

299 *Guardianship and Administration Act 2000* (Qld) s 15(1)(a)–(b).

300 *Guardianship and Administration Act 2000* (Qld) sch 1 s 8.

301 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c). Section 5(d) of the Act also acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.

302 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5).

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

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

305 Ibid 411.

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

5.92 As mentioned previously, the Commission recommended that both the Adult Guardian and the Public Trustee should be available as decision-makers of last resort.[306]

The current test in section 14(2)

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

5.94 In addition, section 14(2) provides that, if there is no other appropriate person who is available for appointment, the Tribunal may appoint the Adult Guardian. As mentioned above, the principle embodied in that section is that the Adult Guardian should not be appointed in preference to an individual unless there is no other available 'appropriate' person.[307]

5.95 Section 14(2) was inserted in the Act in 2007. The Commission is interested to know if there are any perceived difficulties in practice with the application of the test of last resort in that section. An issue for consideration is whether the test in section 14(2), as it currently stands, is appropriate, or whether it should be changed in some way. If it is considered that the test in section 14(2) needs to be strengthened, one approach may be to require the Tribunal to make a specific finding that no available person is appropriate for appointment.

5-11 Are there any difficulties in practice with the application of the test of last resort in section 14(2) of the *Guardianship and Administration Act 2000* (Qld)?

306 See [5.84] above.

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

5-12 Is the test of last resort in section 14(2) of the *Guardianship and Administration Act 2000* (Qld) appropriate or should it be changed in some way (for example, should the Tribunal be required to make a specific finding that no available person is appropriate for appointment)?

REVOCATION, CONTINUATION OR CHANGE OF AN APPOINTMENT

The law in Queensland

Automatic revocation of an appointment

5.96 The appointment of a guardian or an administrator for an adult will end automatically if:[308]

- the guardian or administrator becomes a paid carer, or health provider, for the adult;
- the guardian or administrator becomes the service provider for a residential service where the adult is a resident;
- the guardian or administrator and the adult are married at the time of the appointment and the marriage is dissolved;
- the guardian or administrator, or the adult the subject of the appointment, dies;
- in relation to an appointment as an administrator, the administrator becomes bankrupt or insolvent.

5.97 If the appointment of a guardian or administrator for a matter ends in these circumstances, and the guardian or administrator was a joint guardian or administrator for the matter, any remaining guardians or administrators may exercise power for the matter.[309]

Withdrawal of a guardian or an administrator

5.98 An appointment as a guardian or administrator for an adult for a matter ends if, with the Tribunal's leave, the guardian or administrator withdraws as

---

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

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

guardian or administrator for the matter.[310] The Tribunal may appoint someone else to replace the withdrawing person as guardian or administrator for the matter.[311]

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

5.99 The appointment of a guardian or an administrator may be revoked, continued or changed by the Tribunal on a review of the appointment.[312]

5.100 Section 31 of the *Guardianship and Administration Act 2000* (Qld) sets out the process for the review of an appointment of a guardian or an administrator.[313] It provides:

> **31 Appointment review process**
>
> (1) The tribunal may conduct a review of an appointment of a guardian or administrator (an appointee) for an adult in the way it considers appropriate.
>
> (2) At the end of the review, the tribunal must revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an appointment were to be made.
>
> (3) If the tribunal is satisfied there are appropriate grounds for an appointment to continue, it may either—
>
> (a) continue its order making the appointment; or
>
> (b) change its order making the appointment, including, for example, by—
>
> (i) changing the terms of the appointment; or
>
> (ii) removing an appointee; or
>
> (iii) making a new appointment.

---

310 *Guardianship and Administration Act 2000* (Qld) s 27(1).

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

312 The Tribunal is required to review the appointment of a guardian or a private administrator at least every five years or such shorter period as stated in the order: *Guardianship and Administration Act 2000* (Qld) s 28. The Tribunal may also review an appointment on its own initiative or on application: s 29. The review of the appointment of a guardian or an administrator is discussed in Chapter 17 of this Discussion Paper.

313 For a review of an appointment, the Tribunal may require the guardian or administrator to advise it of any matters about his or her appropriateness or competence which the guardian or administrator has not previously advised, and would be required to advise, the Tribunal if it were considering whether to appoint him or her: *Guardianship and Administration Act 2000* (Qld) s 30. The grounds for making an application to review the appointment of a guardian or an administrator are discussed in Chapter 17 of this Discussion Paper.

(4) However, the tribunal may make an order removing an appointee only if the tribunal considers—

(a) the appointee is no longer competent; or

(b) another person is more appropriate for appointment.

(5) An appointee is no longer competent if, for example—

(a) a relevant interest of the adult has not been, or is not being, adequately protected; or

(b) the appointee has neglected the appointee's duties or abused the appointee's powers, whether generally or in relation to a specific power; or

(c) the appointee is an administrator appointed for a matter involving an interest in land and the appointee fails to advise the registrar of titles of the appointment as required under section 21(1); or

(d) the appointee has otherwise contravened this Act.

(6) The tribunal may include in its order changing or revoking the appointment of an administrator a provision as to who must pay the fee payable to the registrar of titles for advice of the change or revocation.

5.101 Section 31 requires the Tribunal to revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an order were to be made.[314] Section 31(3) specifies that, if the Tribunal is satisfied that the appointment should continue, it may continue its order making the appointment with no change or, alternatively, change the appointment order. The order may be changed, for example, by changing the terms of the appointment, making an additional appointment or replacing an existing appointee.

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

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

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

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

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

5.106 The operation of section 31(4)(b) was considered by the Supreme Court in *Adult Guardian v Hunt*.[315] In that case, the Adult Guardian appealed against orders made by the Tribunal under section 31(4)(b) to remove the Adult Guardian as guardian for the adult, and to appoint, in her place, the adult's long term de facto partner as her guardian. Chesterman J observed that section 31(4)(b) confers on the Tribunal 'a broad general discretion' to remove an existing guardian and to appoint a new one:[316]

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

5.107 As mentioned previously, the Adult Guardian argued in that case that the Adult Guardian was a primary candidate for appointment under section 14 and that 'the Act might suggest that, were there a doubt, the Tribunal should err in favour of appointing the Adult Guardian'. Chesterman J dismissed the appeal, noting that, where an adult has friends or family who are able and willing to provide the requisite support and assistance, it is preferable that they be allowed to do so rather than be supplanted by the Adult Guardian.[317] Section 14(2) was inserted subsequently in the *Guardianship and Administration Act 2000* (Qld) to give legislative effect to the decision in *Adult Guardian v Hunt*.[318] As a result of that amendment, section 14(2) of the Act now provides that the Tribunal may appoint the Adult Guardian as a guardian for a matter only if there is no other appropriate person available for appointment for the matter.

Notification of change, revocation or ending of appointment

5.108 If the Tribunal changes or revokes the appointment of a guardian or administrator, or the Tribunal is given advice of the ending of an appointment, the registrar of the Tribunal is required to take reasonable steps to advise the

315 [2003] QSC 297. See the discussion of *Adult Guardian v Hunt* at [5.41] above.

316 Ibid [19].

317 Ibid [30].

318 See [5.40] above.

adult and any remaining guardians and administrators of the change, revocation or ending of the appointment.

The law in other jurisdictions

5.109 In each of the other jurisdictions, the legislation makes specific provision for the review of an order for the appointment of a guardian or an administrator.[319] These provisions generally provide for the variation or revocation of an order on review. In the other jurisdictions, except the ACT, there are no specified grounds for the removal of a guardian or an administrator. In the ACT, the grounds for removal are that the guardian or administrator:[320]

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

Issues for consideration

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

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

5.111 Section 31(4)(b) gives the Tribunal a wide discretion to remove an existing guardian and to appoint a new guardian. This provision specifically requires the Tribunal to consider whether another person is more appropriate for appointment.[321]

5.112 The application of this test is relatively straightforward where both the existing appointee and a proposed new appointee are individuals. However, the position is less clear where the Adult Guardian is the existing appointee and the proposed new appointee is an individual. Section 14(2) provides that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is

---

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

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

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

no other appropriate person who is available for appointment for the matter. Although section 14(2) was enacted to give legislative effect to the decision in *Adult Guardian v Hunt*,[322] it appears to apply only where the Adult Guardian has not already been appointed. It is unclear whether, on a review of an appointment under section 31, section 14(2) would apply to require the Tribunal to prefer the appointment of an individual where the Adult Guardian is an existing appointee.

5.113 The Adult Guardian is the statutory guardian of last resort.[323] Where the Adult Guardian is an existing appointee, it may be difficult in practice for an individual to show that he or she is a 'more appropriate' appointee.

5.114 An issue for consideration is whether section 31 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that, if the Adult Guardian is the existing appointee, the appointment of the Adult Guardian may be continued only if there is no other appropriate person available for appointment for the matter.

5-13 Should section 31 of the *Guardianship and Administration Act 2000* (Qld) be amended to provide that, if the Adult Guardian is the existing appointee, the Tribunal may continue the appointment of the Adult Guardian only if there is no other appropriate person available for appointment for the matter?

322 [2003] QSC 297. See the discussion of *Adult Guardian v Hunt* at [5.41] above.

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

Chapter 6

The powers and duties of guardians and administrators

INTRODUCTION

6.1 The Commission's terms of reference direct it to review decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) including, but not limited to, the scope of the powers of guardians and administrators.[324]

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

6.3 This chapter gives an overview of the powers and duties of guardians and administrators under the Queensland guardianship legislation. It also provides an outline of similar provisions in other jurisdictions, and raises some specific issues for consideration. However, it does not deal with the powers and

---

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

duties of guardians for restrictive practice matters under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).[325]

BACKGROUND

6.4 The *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian or an administrator to make substitute decisions for an adult with impaired capacity.[326] A guardian can be appointed for a personal matter, including a health matter (but not a special health matter).[327] Personal matters relate to personal, health care, lifestyle and some legal decisions.[328] An administrator can be appointed for a financial matter.[329] Financial matters relate to an adult's financial or property affairs.[330] However, the Act does not allow substitute decision-makers (including guardians and administrators) or the Tribunal to exercise power for 'special personal matters', including voting, consenting to marriage or making a will.[331]

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

6.6 The appointment of a guardian or an administrator for an adult will inevitably involve some loss of the adult's decision-making autonomy. The Act confers potentially broad decision-making powers on guardians and

---

325 Ch 5B of the *Guardianship and Administration Act 2000* (Qld) deals with the use of restrictive practices for managing the challenging behaviour of certain adults. These procedures apply only in relation to adults with an intellectual or cognitive disability who receive disability services from a funded service provider within the meaning of the *Disability Services Act 2006* (Qld): *Guardianship and Administration Act 2000* (Qld) ss 80R, 80S. Although the Commission is not generally reviewing ch 5B of the *Guardianship and Administration Act 2000* (Qld), Chapter 7 of this Discussion Paper considers a number of specific issues that have been raised in relation to the use of restrictive practices.

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

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

328 The scope of personal matters is discussed in Chapter 4 of this Discussion Paper. Examples of personal matters specifically listed in the definition are matters relating to where and with whom the adult lives; the adult's employment, education and training; day-to-day issues such as the adult's diet and dress; the adult's health care (other than special health care) and legal matters that do not relate to the adult's financial or property matters.

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

330 The scope of financial matters is discussed in Chapter 4 of this Discussion Paper. Examples of financial matters included in the definition are matters relating to buying and selling property (including land); paying the adult's expenses, rates, insurance, taxes and debts; conducting a trade or business on behalf of the adult; making financial investments; performing the adult's contracts; and all legal matters relating to the adult's financial or property matters.

331 The scope of special personal matters is discussed in Chapter 4 of this Discussion Paper. Special personal matters relate to voting; consenting to marriage; consenting to the adoption of a child; and making or revoking a will, a power of attorney, an enduring power of attorney, or an advance health directive. These matters are regarded as being of such an intimate or personal nature that it would be inappropriate for another person to be given the power to make such a decision on behalf of an adult.

administrators, and also imposes a number of concomitant and other duties on them to ensure that these powers are exercised in the adult's interests. The legislative provisions which deal with powers and duties given to guardians and administrators establish the limits of their decision-making authority.

THE LAW IN QUEENSLAND

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

Powers of guardians and administrators

General powers of guardians and administrators

6.8 The Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, for an adult, on such terms it considers appropriate.[332]

6.9 Unless the Tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power was exercised.[333] An administrator is conferred with similar authority in relation to a financial matter.[334]

6.10 If necessary or convenient for the exercise of power given to the guardian or administrator, a guardian or administrator may, in his or her own name, execute an instrument or do any other thing.[335] Any instrument executed or thing done by the guardian or administrator is as effective as if executed by the adult.[336]

---

332 *Guardianship and Administration Act 2000* (Qld) s 12(1)–(2). The Tribunal may also impose requirements, including a requirement about giving security, on a guardian or an administrator or a person who is about to become a guardian or an administrator: *Guardianship and Administration Act 2000* (Qld) s 19. The appointment of guardians and administrators is discussed in Chapter 5 of this Discussion Paper.

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

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

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

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

Particular powers of administrators

6.11 An administrator has limited powers to give away the adult's property. Any gift or donation must be of the same nature that the adult made when he or she had capacity or that the adult might reasonably be expected to make, and the value of the gift must be reasonable in the circumstances.[337] An administrator may make provision from the adult's estate for a dependant of the adult. Unless the Tribunal orders otherwise, the provision must be no more than is reasonable having regard to all the circumstances, including the adult's financial circumstances.[338]

6.12 If authorised by the Tribunal to do so,[339] an administrator may make investments on the adult's behalf.[340] Generally, if an administrator has been given the power to invest, he or she may invest only in 'authorised investments'.[341] The legislation includes the following definition of 'authorised investment':[342]

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

6.13 The first limb of this definition allows a wide range of investments. In 2000, part 3 of the *Trusts Act 1973* (Qld) was amended to abolish the statutory list of authorised investments and to replace it with the 'prudent person' doctrine, which enables a trustee to invest trust funds in any form of investment.[343] The Act specifies a lengthy list of matters to which trustees must have regard when exercising a power of investment,[344] including the purposes of the trust and the needs and circumstances of the beneficiaries, the

---

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

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

339 *Guardianship and Administration Act 2000* (Qld) s 152(2).

340 *Guardianship and Administration Act 2000* (Qld) s 51.

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

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

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

344 *Trusts Act 1973* (Qld) s 24(1).

desirability of diversifying trust investments, and the nature and risk associated with existing trust investments and other trust property.[345]

6.14 The limitation of investing only in authorised investments does not apply if, when the administrator is appointed, the adult had investments that were not authorised. In that situation, the administrator may continue the investments, 'including by taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult's existing shareholding'.[346]

Duties of guardians and administrators

6.15 Given the broad powers that are conferred on guardians and administrators, the *Guardianship and Administration Act 2000* (Qld) imposes strict requirements on the exercise of their powers.[347] In some cases, the failure to comply with a particular requirement is an offence.[348]

General duties of guardians and administrators

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

- apply the General Principles contained in the legislation (and, the Health Care Principle, if appropriate);[349]
- exercise his or her power honestly and diligently;[350]
- act jointly if more than one, and act unanimously if joint;[351]

345 *Trusts Act 1973* (Qld) s 24(1)(a)–(c).

346 *Guardianship and Administration Act 2000* (Qld) s 51(3).

347 The appointment of a guardian or a private administrator is also subject to regular review. The review of the appointment of a guardian or an administrator is discussed in Chapter 17 of this Discussion Paper.

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

349 *Guardianship and Administration Act 2000* (Qld) s 34. The General Principles and the Health Care Principle are discussed in Queensland Law Reform Commission, *Shaping Queensland's Guardianship System: Principles and Capacity*, Discussion Paper, WP No 64 (2008). Guardians must also apply the Health Care Principle whenever they are called upon to make a decision about health care: *Guardianship and Administration Act 2000* (Qld) s 11, sch 1 s 12.

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

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

- consult regularly with other persons who are a guardian, an administrator or an attorney (including a statutory health attorney) for the adult;[352] and
- exercise his or her power as required by the terms of the appointment order.[353]

Particular duties of administrators

6.17 The guardianship legislation imposes a number of additional duties on administrators. For example, an administrator is required to keep records that are reasonable in the circumstances, and to produce those records if ordered by the Tribunal.[354] Generally, an administrator is also required to submit a financial management plan to the Tribunal for approval.[355] The Tribunal may also require an administrator to file a summary of receipts and expenditure or accounts, and may order the summary or accounts to be audited.[356]

6.18 An administrator must keep the administrator's property separate from the adult's property (unless the subject property is jointly owned).[357]

6.19 In addition, an administrator is under an obligation to avoid conflict transactions.[358] Section 37 of the *Guardianship and Administration Act 2000* (Qld) provides:[359]

---

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

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

354 *Guardianship and Administration Act 2000* (Qld) s 49. The maximum penalty for a breach of this duty is a fine of $10 000: *Guardianship and Administration Act 2000* (Qld) s 36; *Penalties and Sentences Act 1992* (Qld) s 5(1)(c).

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

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

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

358 However, see *Guardianship and Administration Act 2000* (Qld) s 58, which provides that, if a guardian or an administrator is prosecuted in a court for a failure to comply with ch 4 of the Act, the court may excuse the failure if it considers the guardian or administrator has acted honestly and reasonably and ought fairly to be excused for the failure.

359 A similar provision, which applies to attorneys, is included in the *Powers of Attorney Act 1998* (Qld) s 73. Section 73 of the *Powers of Attorney Act 1998* (Qld) is discussed in detail at [9.134]–[9.174] below.

37 Avoid conflict transaction

(1) An administrator for an adult may enter into a conflict transaction only if the tribunal authorises the transaction, conflict transactions of that type or conflict transactions generally.

(2) A ***conflict transaction*** is a transaction in which there may be conflict, or which results in conflict, between—

(a) the duty of an administrator towards the adult; and

(b) either—

(i) the interests of the administrator or a person in a close personal or business relationship with the administrator; or

(ii) another duty of the administrator.

Examples—

1 A conflict transaction happens if an administrator buys the adult's car.

2 A conflict transaction does not happen if an administrator is acting under section 55 to maintain the principal's dependants.

(3) However, a transaction is not a conflict transaction only because by the transaction the administrator in the administrator's own right and on behalf of the adult—

(a) deals with an interest in property jointly held; or

(b) acquires a joint interest in property; or

(c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

(4) A conflict transaction between an administrator and a person who does not know, or have reason to believe, the transaction is a conflict transaction is, in favour of the person, as valid as if the transaction were not a conflict transaction.

(5) In this section—

joint interest includes an interest as a joint tenant or tenant in common.

6.20 The Tribunal has a corresponding power to authorise a conflict transaction.[360]

360 The Tribunal's power to authorise a conflict transaction is discussed at [15.96]–[15.99] in vol 2 of this Discussion Paper. The Supreme Court of Queensland has held that the Tribunal's power to authorise a conflict transaction includes the power to give retrospective authorisation: *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] QSC 49, [78], [79]. See also *Re TAD* [2008] QGAAT 76, in which the Tribunal stated that 'it follows in the opinion of the Tribunal that an administrator who enters into a conflict transaction is not in contravention of section 37 until authorisation of the transaction by the Tribunal is refused or has been rendered futile by subsequent events': at [125]. The impact of such a finding

Other provisions related to the exercise of powers

The right of guardians and administrators to information

6.21 A guardian or an administrator who has power for a matter for an adult has a right to all the information that the adult would have been entitled to if the adult had capacity and which is necessary to make an informed exercise of the power.[361] A person who has custody or control of the information is required to give the information to the guardian or administrator on request, unless the person has a reasonable excuse. If the person does not comply with such a request, the Tribunal can order the person to give the information to the guardian or administrator.

Remuneration of professional administrators

6.22 If an administrator is a professional administrator, the Tribunal may order the payment of remuneration from the adult.[362] However, any guardian or administrator for an adult is entitled to reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator.[363]

Relationship between an appointment and an enduring document

6.23 The *Guardianship and Administration Act 2000* (Qld) includes particular provisions about the situation in which the Tribunal has appointed a guardian or an administrator for a matter without knowledge of an existing enduring document which gives power for the matter to an attorney for the adult and the guardian or administrator becomes aware of the existence or purported existence of the enduring document. In this situation, the guardian or administrator is required to give written advice to the Tribunal about the document, and his or her powers for the matter are suspended pending the review of his or her appointment.[364]

Liability

6.24 If the Tribunal has given power for a matter to a guardian or an administrator and the power is changed, a guardian or an administrator who, without knowing of the change, purports to exercise power for the matter does

---

is potentially wide. It may, for example, have the effect of giving de facto validity to transactions for which approval has not been sought.

361 *Guardianship and Administration Act 2000* (Qld) s 44. A health provider who is treating, or has treated, an adult must, upon request, give information to the adult's guardian, statutory health attorney or attorney who has power for a health matter for the adult, about the nature of the adult's condition and details about the health care, its effects, risks and alternatives: *Guardianship and Administration Act 2000* (Qld) s 76. The right of guardians, administrators and other substitute decision-makers to information is discussed in Chapter 24 of this Discussion Paper.

362 *Guardianship and Administration Act 2000* (Qld) s 48.

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

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

not incur any liability to the adult or anyone else because of the change.[365] Such a change may arise, for example, where the power for a matter is suspended or the guardian or administrator is removed.[366] In addition, a transaction between a guardian or administrator who purports to exercise a power and any other person who does not know of the change is, in favour of the person, valid as if the power had not been changed.[367]

Protection for non-compliance with the requirements of the Act

6.25 A guardian or an administrator may be ordered by a court or the Tribunal to pay compensation to an adult for a loss caused by the failure of the guardian or administrator to comply with the requirements of the Act in the exercise of a power.[368]

6.26 A court in which a guardian or an administrator is prosecuted for a failure to comply with certain provisions of the Act may excuse the failure if the court considers the guardian or administrator 'has acted honestly and reasonably and ought to be excused for the failure'.[369]

THE POSITION IN OTHER JURISDICTIONS

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

6.28 As mentioned in Chapter 5, in each of the other jurisdictions, like Queensland, a guardian or an administrator may be appointed for all matters (sometimes called a plenary or full order), or particular matters only (sometimes called a limited order). There are some differences in terminology between the jurisdictions. In South Australia, Tasmania, Victoria and Western Australia, like Queensland, an 'administrator' is appointed to make decisions about the control and management of an adult's property, while in the ACT and New South

365 *Guardianship and Administration Act 2000* (Qld) s 56(1)–(2).

366 *Guardianship and Administration Act 2000* (Qld) s 56(4).

367 *Guardianship and Administration Act 2000* (Qld) s 56(3). In certain circumstances, a guardian, who exercises a power for a matter without knowing that the adult has made a direction about the matter in an advance health directive prior to the guardian's appointment, does not incur any liability because of the direction being included in the directive: *Guardianship and Administration Act 2000* (Qld) s 25.

368 *Guardianship and Administration Act 2000* (Qld) s 59. See also s 60 of the Act, which provides that, if a person's benefit in the adult's estate is lost because of a sale or other dealing with the adult's property by an administrator, the Supreme Court may order that the person or the person's estate be compensated out of the adult's estate, as the court considers appropriate, up to the value of the lost benefit. A similar provision to s 59 of the *Guardianship and Administration Act 2000* (Qld) is included in the *Powers of Attorney Act 1998* (Qld): s 106.

369 *Guardianship and Administration Act 2000* (Qld) s 58. A similar provision to s 58 of the *Guardianship and Administration Act 2000* (Qld) is included in the *Powers of Attorney Act 1998* (Qld): s 105. The latter section provides for the court to relieve an attorney from all or part of the attorney's personal liability for a breach of the *Powers of Attorney Act 1998* (Qld).

Wales, the equivalent term is a 'manager'.[370] In each of the jurisdictions, a 'guardian' is a person appointed to make decisions for an adult for personal matters.[371] In the Northern Territory, a guardian may be appointed to exercise power for personal matters, and, in some circumstances, financial matters.[372]

6.29 The legislation in the other jurisdictions provides for an individual to be appointed as a guardian for personal matters.[373] Provision is also made for the appointment of the Adult Guardian (or its equivalent) as a guardian.[374] The legislation also confers broad powers on administrators (or managers) to manage the adult's financial or property affairs.[375]

6.30 The legislation in the other jurisdictions, as in Queensland, confers broad decision-making powers on guardians and administrators for some or all matters, subject to any limitations specified in the terms of appointment.[376]

6.31 The legislation in South Australia gives administrators the power, in some circumstances, to avoid dispositions and contracts entered into by the adult during the period of administration.[377] There is no similar provision in Queensland.

---

370 See [5.47] above.

371 See [5.46] above.

372 *Adult Guardianship Act* (NT) s 16(1)(a), (2). If the court is satisfied that the guardian is competent to manage the adult's estate, the court may appoint the guardian to manage the adult's estate on such terms and conditions as it thinks fit. The guardian has the powers of a manager of a protected estate under s 17 of the *Aged and Infirm Persons' Property Act* (NT) and subject to s 21(2) of that Act, the liability of a manager under s 21(1) of that Act. Generally, the *Aged and Infirm Persons' Property Act* (NT) provides for the appointment of a manager of a protected estate: *Aged and Infirm Persons' Property Act* (NT) s 17.

373 *Guardianship and Management of Property Act 1991* (ACT) s 9; *Guardianship Act 1987* (NSW) s 6; *Adult Guardianship Act* (NT) s 14; *Guardianship and Administration Act 1993* (SA) s 29; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 44.

374 *Guardianship and Management of Property Act 1991* (ACT) s 9; *Guardianship Act 1987* (NSW) ss 16–17; *Adult Guardianship Act* (NT) s 14; *Guardianship and Administration Act 1993* (SA) s 29; *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 44(5). In the ACT, New South Wales, the Northern Territory, South Australia and Victoria, the Public Advocate or Public Guardian is the guardian of last resort: *Guardianship and Management of Property Act 1991* (ACT) s 11; *Guardianship Act 1987* (NSW) s 17(3); *Adult Guardianship Act* (NT) s 14(4); *Guardianship and Administration Act 1993* (SA) s 29(4); *Guardianship and Administration Act 1995* (Tas) s 21(1); *Guardianship and Administration Act 1986* (Vic) s 23(4). In Western Australia, the Public Advocate is the guardian of last resort: *Guardianship and Administration Act 1990* (WA) s 44(5).

375 *Guardianship and Management of Property Act 1991* (ACT) s 8; *Guardianship Act 1987* (NSW) ss 16, 21; *Adult Guardianship Act* (NT) ss 17–18; *Guardianship and Administration Act 1993* (SA) ss 29, 31; *Guardianship and Administration Act 1995* (Tas) ss 25–26; *Guardianship and Administration Act 1986* (Vic) s 24(2); *Guardianship and Administration Act 1990* (WA) s 69.

376 *Guardianship and Management of Property Act 1991* (ACT) ss 7(2)–(3), 8(2)–(3); *Guardianship Act 1987* (NSW) ss 16, 21; *Adult Guardianship Act* (NT) ss 17–18; *Guardianship and Administration Act 1993* (SA) ss 29, 31; *Guardianship and Administration Act 1995* (Tas) ss 25–26; *Guardianship and Administration Act 1986* (Vic) ss 24–25; *Guardianship and Administration Act 1990* (WA) ss 45(2), 69, 71–72.

377 *Guardianship and Administration Act 1993* (SA) s 42. In Victoria, the legislation restricts the powers of an adult with impaired capacity to enter into contracts while he or she is subject to an administration order: *Guardianship and Administration Act 1986* (Vic) s 52.

6.32 Generally, the legislation in the other jurisdictions contains fewer provisions about the duties of guardians and administrators than the legislation in Queensland. The legislation in the ACT requires guardians and administrators to exercise their powers in accordance with statutory decision-making principles.[378] The legislation in Tasmania, Victoria and Western Australia requires an appointee to exercise power in the adult's best interests. Like Queensland, the ACT imposes specific requirements on administrators to avoid conflict transactions and to keep the adult's property separate.[379] The legislation in the ACT, South Australia, Tasmania, Victoria and Western Australia contains reporting requirements for administrators.[380]

6.33 South Australia, Tasmania and Victoria also make provision for the remuneration of professional administrators.[381]

ISSUES FOR CONSIDERATION

The scope of the powers of guardians and administrators

6.34 The *Guardianship and Administration Act 2000* (Qld) seeks to balance the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support in decision-making. It is important to ensure that the powers given to a guardian or an administrator are adequate and appropriate to satisfy the needs of the adult for whom they are exercised. It is also important to ensure that the powers are exercised in a way that preserves and, where possible, enhances the adult's autonomy.

6.35 The Act authorises a guardian or an administrator to do anything in relation to a matter for which he or she is appointed that the adult could have done if the adult had capacity for the matter. These broad powers must be exercised in accordance with the terms of the appointment.

6.36 As outlined above, the Act also confers on administrators a number of specific powers in relation to the management of the adult's financial and property affairs. These powers include the power to give away, or make a gift or donation of, the adult's property and the power to maintain an adult's

---

378 *Guardianship and Management of Property Act 1991* (ACT) s 4. The predominant principle for consideration is that any decision should interfere to the least extent with the lifestyle of the adult. That involves adopting, wherever possible, the patterns of decision-making of the adult, that is, the substituted judgement principle. However, if the adult's views or wishes on a matter are not capable of being discovered, the decision-maker's decision must be the one which best protects the adult's interests.

379 *Guardianship and Management of Property Act 1991* (ACT) s 14(1)(a)–(b).

380 *Guardianship and Management of Property Act 1991* (ACT) s 26, *Guardianship and Administration Act 1993* (SA) ss 44–45, *Guardianship and Administration Act 1995* (Tas) s 63; *Guardianship and Administration Act 1986* (Vic) s 58; *Guardianship and Administration Act 1990* (WA) s 80.

381 *Guardianship and Administration Act 1993* (SA) s 46; *Guardianship and Administration Act 1995* (Tas) s 55; *Guardianship and Administration Act 1986* (Vic) s 47A(1)–(2).

dependants. They also include the power to make investments, if authorised by the Tribunal to do so.[382] These powers must be exercised in accordance with certain requirements set out in the Act.[383]

6.37 An issue for consideration is whether the powers conferred on guardians and administrators under the *Guardianship and Administration Act 2000* (Qld) are appropriate or should be changed in some way.

6-1 Are the powers conferred on guardians under the *Guardianship and Administration Act 2000* (Qld) appropriate or should they be changed in some way?

Ancillary powers

6.38 As mentioned above, a guardian is authorised to do, in accordance with the terms of appointment, anything in relation to a personal matter for which he or she is appointed that the adult could have done if the adult had capacity for the matter.[384] An administrator has similar powers in relation to a financial matter for which he or she is appointed.[385]

6.39 Consequently, a guardian has no power to make decisions about financial or property matters. A similar limitation applies to administrators in relation to decisions about personal matters. A person may have authority to exercise powers for both personal and financial matters for an adult if he or she is appointed as both guardian and administrator for the adult.[386]

6.40 Some types of decisions invariably involve both personal and financial decision-making. For example, 'lifestyle decisions', which include decisions about matters such as where the adult lives, or whether the adult will go on holidays and where, fall within the category of 'personal matters'.[387] However, these types of decisions often have a financial dimension as well.

---

382 *Guardianship and Administration Act 2000* (Qld) s 51.

383 The power to make a gift or donation is subject to the requirement that any gift or donation must be of the same nature that the adult made when he or she had capacity or that the adult might reasonably be expected to make, and the value of the gift must be reasonable in the circumstances: *Guardianship and Administration Act 2000* (Qld) s 54. The power to maintain an adult's dependants is subject to the requirement that the provision must be no more than is reasonable having regard to the all the circumstances, including the adult's financial circumstances: s 55. Generally, if an administrator has been given the power to invest, he or she may invest only in 'authorised investments', as defined under the Act: s 51(1)–(2).

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

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

386 Other avenues for substitute decision-making include acting as an attorney for one or more financial, personal and health matters under an enduring power of attorney and acting as a statutory health attorney for health matters.

387 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2; *Powers of Attorney Act 1998* (Qld) sch 2 s 2.

6.41 The Act acknowledges the potential overlap between these different types of decision. It requires guardians and administrators to exercise power 'in a way that is appropriate to the adult's characteristics and needs'.[388] This may include consideration of the adult's lifestyle and social needs by an administrator, and consideration of the adult's financial circumstances by a guardian.[389] In addition, the Act requires different substitute decision-makers (for example, guardians and administrators) who are appointed for an adult to consult regularly with each another to ensure the adult's interests are not prejudiced by a breakdown in communication.[390] However, notwithstanding this requirement, decision-makers may disagree with each other about the way a particular decision should be made. In the event of such a disagreement, there is an avenue under the Act for the resolution of the disagreement.[391]

6.42 The Australian Law Reform Commission, in its Report on the guardianship and management of property, recommended that the Tribunal have power to appoint a guardian as a manager of an adult's property, with specified management powers, if the Tribunal is satisfied that the powers are necessary to ensure that the guardian can exercise the powers he or she has as guardian:[392]

> In many cases a person subject to a guardianship order will also experience day-to-day difficulties in such matters as handling money, dealing with banks and entering tenancy agreements. In such cases, if the guardianship order is to be properly exercised and the person's health and welfare to be adequately protected, the guardian will need incidental management powers. It should therefore be open to the Tribunal to appoint the guardian a manager with the powers necessary to perform the guardianship duties adequately. This would not preclude the Tribunal from appointing the guardian a full manager, if one were required, or from appointing another manager to deal with more complex property transactions such as share dealing or real estate management.

388 *Guardianship and Administration Act 2000* (Qld) sch 1 s 10; *Powers of Attorney Act 1998* (Qld) sch 1 s 10.

389 The Commission has discussed the application of the General Principles (which substitute decision-makers are required to apply when exercising powers under the Act) in relation to financial decisions and considerations in an earlier Discussion Paper for this review: Queensland Law Reform Commission, *Shaping Queensland's Guardianship System: Principles and Capacity*, Discussion Paper, WP No 64 (2008) 67–8. The scope of a statutory health attorney's powers is discussed in Chapter 10 of this Discussion Paper.

390 *Guardianship and Administration Act 2000* (Qld) s 40. The requirement to consult with other guardians, administrators or attorneys is discussed at [6.59]–[6.66] below.

391 The *Guardianship and Administration Act 2000* (Qld) provides for the resolution of disagreements between a guardian, an administrator and an attorney under an enduring document about the way the power for a matter should be exercised. If the disagreement cannot be resolved by mediation by the Adult Guardian, the Adult Guardian or the guardian, administrator or attorney, may apply for directions to the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 41. See n 352 above.

392 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.42]. That recommendation was included as cl 4(5) in the Commission's draft Guardianship and Management of Property Bill 1989: Appendix A, 55. However, cl 4(5) was not enacted in the *Guardianship and Management of Property Act 1991* (ACT).

6.43 The Guardianship and Administration Reform Drivers ('GARD') have suggested that lifestyle decisions with only a minor financial impact should be decided by a guardian rather than by an administrator.[393]

> There are very few decisions in modern society which do not have monetary consequences. It is considered that there are many circumstances where such decisions would more accurately be described as 'lifestyle decisions' than 'financial decisions', albeit that they involve minor monetary transactions. Presently where both a guardian and administrator are appointed, the administrator can effectively compromise the guardian's lifestyle decision-making by refusing to fund the consequences of the decisions. GARD believes this restriction should be removed from guardians in relation to lifestyle decisions with only minor financial implications by clarifying in the Act that such decisions are 'lifestyle decisions' rather than financial decisions. An example of this is where an impaired person is in receipt of a pension, the impaired person's guardian should manage the person's financial affairs, rather than the Public Trustee, to allow for greater flexibility for spending on lifestyle needs.

6.44 An issue to consider is whether the Act should authorise a guardian to exercise an ancillary or incidental power for a financial matter. A related issue is whether an ancillary power should be exercisable only in limited circumstances — for example, where the financial decision has only a minor financial impact. In circumstances where a decision has more than a minor financial impact, it is arguable that the decision should be made by an administrator. It may also be difficult for a guardian to assess the relative meaning of a 'minor' financial impact and, therefore, to determine the limits of his or her decision-making power. Another or an alternative limitation may be that an ancillary financial power should be exercised by a guardian only where there is no administrator appointed. On the other hand, it may not be appropriate for a guardian to be given ancillary financial powers given that an administrator may be appointed if there is a need for a financial decision to be made.

6-2 Should the *Guardianship and Administration Act 2000* (Qld) be amended to enable a guardian to exercise an ancillary, or incidental, power for a financial matter?

6-3 If yes to Question 6-2, should the exercise of such a power be limited in one or more of the following ways:

(a) where the financial decision has only a minor financial impact;

(b) where there is no administrator appointed;

393 Submission C24. GARD is an informal alliance of the Caxton Legal Centre Inc, Queensland Advocacy Inc, Queensland Parents of People with Disability, Speaking Up For You Inc, Carers Queensland, and Queenslanders with Disability Network. The GARD submission was first made to the Attorney-General and Minister for Justice and was later submitted to the Queensland Law Reform Commission in response to its review.

(c) in some other way?

The exercise of power by a guardian or an administrator for an adult with fluctuating capacity

6.45 The Queensland guardianship legislation adopts a functional approach to the definition of capacity.[394] This approach recognises the variable nature of capacity in relation to decision-making for particular matters. A person's capacity may also fluctuate depending on factors such as his or her mental and physical health, personal strengths, the quality of services and the types and amount of any other support he or she receives.[395] For example, an adult's capacity to make certain decisions may be impaired at times when he or she is under the influence of, or stops taking, certain medications.

6.46 In its Discussion Paper, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*,[396] the Commission raised the issue of problems arising in practice in relation to adults who experience fluctuating or episodic capacity.[397] The Commission also foreshadowed that 'the question of fluctuating capacity raises wider issues about the powers of the Tribunal to make guardianship or administration orders about adults with variable capacity'.[398]

6.47 Section 12 of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to appoint a guardian for a personal matter, or an administrator for a financial matter, on terms it considers appropriate, if, amongst other things, the Tribunal is satisfied that the adult lacks capacity for the matter.[399] Therefore, the Tribunal's jurisdiction to make a guardianship or administration order for an adult with fluctuating capacity will depend on whether the Tribunal considers that the adult lacks capacity for the particular

---

394 ***Capacity***, for a person for a matter, means the person is capable of understanding the nature and effect of decisions about the matter, freely and voluntarily making decisions about the matter and communicating the decisions in some way: *Guardianship and Administration Act 2000* (Qld) sch 4.

395 New South Wales Attorney General's Department, *Capacity Toolkit* (2008) 21 <http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_s5 > at 19 October 2008.

396 Queensland Law Reform Commission, *Shaping Queensland's Guardianship System: Principles and Capacity*, Discussion Paper, WP No 64 (2008).

397 Ibid [6.121].

398 Ibid [6.122]. The *Guardianship and Administration Act 2000* (Qld) acknowledges that the capacity of an adult with impaired capacity to make decisions may differ depending on the nature and extent of the impairment, the type of decision to be made, including its complexity, and the support available from members of the adult's existing support network: *Guardianship and Administration Act 2000* (Qld) s 5(c).

399 The *Guardianship and Administration Act 2000* (Qld) provides that an adult is presumed to have capacity for a matter: *Guardianship and Administration Act 2000* (Qld) sch 1 s 1. Before the Tribunal can appoint a decision-maker for an adult, the Tribunal must be satisfied that, on the balance of probabilities, this presumption of capacity is rebutted.

matter. If the adult has the requisite capacity at the time of the hearing, the Tribunal cannot make an appointment order.[400]

6.48 The Tribunal's determination of an application for an appointment order may be complicated if the adult has fluctuating capacity. This may especially be the case where the relevant decisions will need to be made on an ongoing basis for some time into the future. While the Tribunal has power to appoint a guardian or administrator on the terms it considers appropriate,[401] its ability to do so in a way that appropriately takes account of an adult's fluctuating capacity will be limited by the nature and sufficiency of the evidence before it.

6.49 These considerations raise questions about the circumstances in which guardianship and administration orders for an adult with fluctuating capacity are appropriate to be made and whether the exercise of power by a guardian or an administrator for an adult with fluctuating capacity should be limited in some way. One option would be to adopt the approach taken under the *Powers of Attorney Act 1998* (Qld), which provides that the power for a personal matter under the enduring power of attorney is exercisable by an attorney only during a period when the principal (the adult) has impaired capacity.[402]

6.50 If the Act were amended to provide for such a limitation, a related issue is whether that limitation should apply to the appointment of both guardians and administrators or to the appointment of guardians only. The appointment of an administrator or a guardian may pose some difficulties in practice. Under such an order, the appointee's power would be enlivened only during a period when the adult lacks the requisite capacity. This raises the issue of who should bear the responsibility for proving the issue of capacity in particular circumstances, and how, and in what circumstances, capacity should be assessed. It may also be difficult for third parties to determine, at any given time, whether the

---

400 See eg *Re WAE* [2007] QGAAT 72, [22]; *Re SWV* [2005] QGAAT 68, [40]. In *Re SWV*, the Tribunal dismissed an application for administration in relation to an adult who had capacity for the relevant matters at the time of the hearing. The lack of an appointment order may pose difficulties for an adult with fluctuating capacity if the adult, during a period of incapacity, makes decisions detrimental to his or her health or well-being or financial position. While it may be possible to bring a fresh application for an appointment order during a period when the adult has lost capacity, this approach carries a risk that the adult may have already made a decision to his or her detriment prior to the application being heard. It may also be necessary in these circumstances to ensure that there is a formal mechanism in place to facilitate or expedite the application process. An alternative option available under the *Powers of Attorney Act 1998* (Qld) is for the adult, at a time when he or she has the requisite capacity, to appoint an attorney under an enduring power of attorney to exercise power for one or more of the adult's financial, personal or health matters.

401 *Guardianship and Administration Act 2000* (Qld) s 12(2). The Tribunal may appoint a person to act for a matter or all matters for an adult in a stated circumstance: s 14(4)(c).

402 By an enduring power of attorney, a principal may authorise his or her nominated attorney or attorneys to make decisions for some or all financial matters or personal matters, including health matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). A principal cannot, however, give power to an attorney for 'special health matters' or 'special personal matters': s 32(1)(a).

An attorney can exercise his or her power with respect to personal matters only during a period when the principal no longer has capacity for the particular matter: *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3). The power for financial matters becomes exercisable either at the time or in the circumstance the principal nominates in the document, or otherwise, once the enduring power of attorney is made: *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000* (Qld) s 66.

appointee, or the adult, has the legal authority to make decisions. There may be particular difficulties associated with the appointment of an administrator, due to the formal, and often legal, nature of some financial decisions. For example, a financial institution may be uncertain about whether the administrator or the adult has the legal authority to make financial decisions at any particular time.

6.51 The practical difficulties associated with the application of guardianship legislation to adults with fluctuating capacity have been recognised by other law reform bodies.[403] The Australian Law Reform Commission considered that 'the solution lies in the Tribunal fashioning an order which is appropriate to the circumstances'.[404] The Commission also noted that a guardian or a manager, faced with implementing an order which attempts to cater for episodic capacity, can always come back to the Tribunal for advice or for a modification to the terms of the order.[405]

6.52 On the other hand, it may be unnecessary to make special provision under the Act to limit the powers exercisable by a guardian or an administrator who is appointed for an adult with fluctuating capacity. The Tribunal may make an appointment on such terms it considers appropriate.[406] In addition to this broad discretion, the Act specifically provides that the Tribunal may appoint 'a person to act as appointee for a matter or all matters in a stated circumstance'.[407] These provisions are arguably sufficient to enable the Tribunal to make an appointment order that is appropriate in the circumstances.

6-4 Should the *Guardianship and Administration Act 2000* (Qld) provide for the exercise of the power by a guardian or administrator for an adult with fluctuating capacity to be limited in some way? If yes, should the powers be exercisable only during a period the adult has impaired capacity?

6-5 If the *Guardianship and Administration Act 2000* (Qld) were amended to provide for such orders, should they apply to the appointment of both guardians and administrators or to the appointment of guardians only?

403 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) 66; Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.32].

404 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.32].

405 Ibid.

406 *Guardianship and Administration Act 2000* (Qld) s 12(2).

407 *Guardianship and Administration Act 2000* (Qld) s 14(4)(c).

The scope of the duties of guardians and administrators

6.53 As mentioned above, the *Guardianship and Administration Act 2000* (Qld) seeks to balance the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support in decision-making. The Act confers potentially broad decision-making powers on guardians and administrators. In order to ensure that these powers are exercised in the adult's interests, the Act also imposes a number of concomitant and other duties, or requirements, on guardians and administrators.

6.54 One of the primary duties imposed under the legislation on a guardian or an administrator is to act 'honestly and with reasonable diligence to protect the adult's interests'. This duty reflects the standard of responsibility ordinarily expected from a person who acts as another's agent. This standard requires that a guardian or an administrator must not act for his own benefit but for the benefit of the adult.[408]

6.55 Guardians and administrators are also required to:

- apply the General Principles contained in the legislation (and, the Health Care Principle, if appropriate);
- act jointly if more than one and act unanimously if joint;
- consult regularly with other persons who are a guardian, an administrator or an attorney (including a statutory health attorney) for the adult; and
- exercise his or her power as required by the terms of the appointment order.

6.56 The guardianship legislation also imposes a number of additional requirements on administrators. These requirements would appear to reflect the general duty to act honestly and with reasonable diligence to protect the adult's interests. They include the obligations for an administrator to keep his or her property separate from the adult's property[409] and to avoid conflict transactions.[410] In addition, an administrator is required to keep financial records and to produce those records if the Tribunal orders.

6.57 The duties imposed on guardians and administrators promote particular purposes sought to be achieved by the Act. For example, the requirement to

---

408 PD Finn, *Fiduciary Obligations* (1977) [28]. See eg *Re BAB* [2007] QGAAT 19, [50]; and *Re JK* [2005] QGAAT 58, [48]–[53] in which the Tribunal commented that attorneys and administrators, respectively, are in a fiduciary relationship with the principal.

409 This requirement does not apply if the property is jointly owned by the adult and the administrator: *Guardianship and Administration Act 2000* (Qld) s 50(2).

410 *Guardianship and Administration Act 2000* (Qld) s 55. A similar provision, which applies to attorneys, is included in the *Powers of Attorney Act 1998* (Qld) s 73. Section 73 of the *Powers of Attorney Act 1998* (Qld) is discussed in detail at [9.134]–[9.174] below.

apply the General Principles acts as a safeguard for the adult's rights and interests. Amongst other things, these principles provide a set of decision-making guidelines which require a substitute decision-maker to preserve the adult's autonomy to the maximum extent possible. Additional examples are the general obligation to act in the adult's interests, and the specific obligation of an administrator to avoid conflict transactions. These duties constitute a safeguard to protect the adult from abuse, neglect or exploitation or the adult's property from dissipation or exploitation.

6.58 An issue to consider is whether the duties imposed by the *Guardianship and Administration Act 2000* (Qld) on guardians and administrators are adequate and appropriate or whether they should be changed in some way.

6-6 Are the duties imposed by the *Guardianship and Administration Act 2000* (Qld) on guardians appropriate or should they be changed in some way?

6-7 Are the duties imposed by the *Guardianship and Administration Act 2000* (Qld) on administrators appropriate or should they be changed in some way?

Consultation with other guardians, administrators or attorneys

6.59 Section 40 of the *Guardianship and Administration Act 2000* (Qld) requires a person, who is a guardian, an administrator or an attorney for an adult, to consult regularly with other persons who are a guardian, an administrator or an attorney for the adult. This requirement for consultation is intended to ensure that, where different decision-makers have been appointed for an adult, the appointees adopt a cooperative and constructive approach towards decision-making for the adult.

6.60 Section 40 provides:

> **40 Consult with adult's other appointees or attorneys**
>
> (1) If there are 2 or more persons who are guardian, administrator or attorney for an adult, the persons must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them.
>
> (2) However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney.
>
> (3) In this section—
>
> ***attorney*** means an attorney under an enduring document or a statutory health attorney.

6.61 The South Australian legislation requires guardians and administrators to keep each other informed of decisions or actions of a substantial nature. Section 75 of the *Guardianship and Management Act 1993* (SA) provides:

> Where both a guardian and an administrator have been appointed under this Act in respect of the same person, each must endeavour to keep the other informed of decisions or actions of a substantial nature taken in pursuance of powers under this Act.

6.62 Although the Commission has not previously sought submissions on this issue, it has received a number of submissions during the course of this review that have expressed concern about the level of practical compliance with the requirement for substitute decision-makers to consult with each other.[411] Some of these concerns have related to individual guardians or administrators, while others have related to the Adult Guardian or the Public Trustee.

6.63 An issue for consideration is whether section 40 of the *Guardianship and Administration Act 2000* (Qld) is appropriate or should be changed in some way.

6.64 The requirement under section 40(1) is for regular consultation between substitute decision-makers. The South Australian legislation is narrower in its scope. It simply requires guardians or administrators to keep each other informed about substantial decisions made or actions taken in the exercise of their powers.

6.65 Section 40(2) provides that a failure to comply with section 40(1) does not affect the validity of the exercise of decision-making power by a guardian, an administrator or an attorney. In a submission to the Attorney-General and Minister for Justice, the Guardianship and Administration Reform Drivers ('GARD') suggested that, in practice, section 40(2) weakens the effect of the requirement to consult under section 40(1).[412]

6.66 Section 40 does not provide that failure to comply with that section is an offence. The requirement to consult may seem less significant without specific provision for its enforcement. On the other hand, it may be unnecessary to make specific provision about a person's failure to comply because of existing review mechanisms. For example, the appointment of a guardian or an administrator may be revoked by the Tribunal if the appointee is no longer competent because the appointee has neglected his or her duties or has otherwise contravened the *Guardianship and Administration Act 2000* (Qld). There may also be practical difficulties in attempting to enforce the application of a subjective requirement.

---

411 Submissions C24 C96, C124, 10, 71.

412 Submission C24.

6-8 Is section 40 of the *Guardianship and Administration Act 2000* (Qld) appropriate or should it be changed in some way?

Chapter 7

Restrictive practices

INTRODUCTION

7.1 The use of restrictive practices is primarily regulated by Part 10A of the *Disability Services Act 2006* (Qld) (the 'DSA'). Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) regulates the approval and consent mechanisms for the use of certain restrictive practices in relation to adults with an intellectual or cognitive disability who receive disability services from a funded service provider within the meaning of the DSA.[413] These provisions commenced on 1 July 2008.

7.2 As explained in Chapter 2 of this Discussion Paper, the Commission is not generally reviewing Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) as part of this review. Chapter 5B has been in operation for a relatively short period. Further, there is already a legislative process in place requiring the efficacy and efficiency of Chapter 5B to be reviewed as soon as practicable after 1 July 2011.[414] That review must be undertaken jointly by the Minister for Disability Services and Multicultural Affairs (who administers the DSA) and the Attorney-General and Minister for Industrial Relations (who administers the *Guardianship and Administration Act 2000* (Qld)).[415]

7.3 The purpose of Chapter 5B and the related provisions of the DSA is outlined in the Explanatory Notes for the Disability Services and Other

---

413 *Guardianship and Administration Act 2000* (Qld) s 80R. The definition of 'funded service provider' is set out at [7.12] below.

414 *Disability Services Act 2006* (Qld) ss 233–233A.

415 *Disability Services Act 2006* (Qld) s 233A.

Legislation Amendment Bill 2008 (Qld):[416]

> The Bill will amend the *Disability Services Act 2006* and the *Guardianship and Administration Act 2000*, to create a legislative scheme to safeguard the rights of adults with an intellectual or cognitive disability who have 'challenging behaviour' and where restrictive practices may be required to manage their behaviour. The Bill aims to balance the rights of the adult with the need to protect the rights of others to live and work free of violent and other potentially damaging behaviour.

7.4 When Chapter 5B is reviewed in 2011, the application of that chapter to only some adults with an intellectual or cognitive disability may be an issue that arises for consideration. In the meantime, the primary issue for this Commission, which is examined in this chapter, is whether there are adequate safeguards for adults who may be subjected to restrictive practices but who do not fall within the scope of Chapter 5B for the reason that they do not receive disability services that are provided or funded by Disability Services Queensland ('DSQ').[417]

7.5 This chapter also examines a particular issue that has been brought to the Commission's attention concerning the scope of the definition of chemical restraint that applies for the purposes of Chapter 5B.

7.6 As background to these issues, this chapter gives an overview of the scheme for the use of restrictive practices, with particular emphasis on the provisions in Chapter 5B that deal with the approval of, and consent to, the use of restrictive practices.

THE SCHEME FOR RESTRICTIVE PRACTICES UNDER CHAPTER 5B

Key concepts

The restrictive practices to which Chapter 5B applies

7.7 There are three types of restrictive practices:[418]

- containing or secluding an adult with an intellectual or cognitive disability; or
- using chemical, mechanical or physical restraint on an adult with an intellectual or cognitive disability; or
- restricting the access of an adult with an intellectual or cognitive disability to certain objects.

---

416 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 1.

417 See [7.11]–[7.14] below.

418 The *Guardianship and Administration Act 2000* (Qld) s 80U applies the definition of restrictive practice that appears in s 123E of the *Disability Services Act 2006* (Qld).

7.8 Containment and seclusion have some similarities in that the adult who is contained or secluded is confined to particular premises.[419] However, the additional element of isolation that is involved in seclusion distinguishes it from containment.[420]

7.9 Chemical restraint means 'the use of medication for the primary purpose of controlling the adult's behaviour'.[421] Mechanical restraint means 'the use, for the primary purpose of controlling the adult's behaviour, of a device to restrict the free movement of the adult or prevent or reduce self-injurious behaviour'.[422] Physical restraint means 'the use, for the primary purpose of controlling the adult's behaviour, of any part of another person's body to restrict the free movement of the adult'.[423]

7.10 Restricting access means 'restricting the adult's access, at a place where the adult receives disability services, to an object to prevent the adult using the object to cause harm to the adult or others',[424] for example, locking a drawer in which knives are kept to prevent an adult using the knives to cause harm.

Adults to whom Chapter 5B applies

7.11 Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) applies to adults with an intellectual or cognitive disability who receive services from a funded service provider within the meaning of the DSA.[425] In Chapter 5B, such a service provider is referred to as a 'relevant service provider'.

7.12 The DSA includes the following definition of 'funded service provider':

> **14 Meaning of funded service provider**
>
> (1) A funded service provider is a service provider that receives funds from the department to provide disability services.
>
> (2) A funded service provider includes the department to the extent it provides disability services.
>
> (3) However, a funded service provider does not include another department receiving funds from the department.

---

419 *Guardianship and Administration Act 2000* (Qld) s 80U; *Disability Services Act 2006* (Qld) s 123E (definition of 'seclude'), 123G.

420 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 37.

421 *Guardianship and Administration Act 2000* (Qld) s 80U; *Disability Services Act 2006* (Qld) s 123F(1). The full definition of 'chemical restraint' is set out at [7.35] below.

422 *Guardianship and Administration Act 2000* (Qld) s 80U; *Disability Services Act 2006* (Qld) s 123H(1).

423 *Guardianship and Administration Act 2000* (Qld) s 80U; *Disability Services Act 2006* (Qld) s 123E.

424 *Disability Services Act 2006* (Qld) s 123E.

425 *Guardianship and Administration Act 2000* (Qld) s 80R.

7.13 Accordingly, Chapter 5B does not apply to an adult who does not receive disability services or to an adult who receives disability services from a service provider that is not a funded service provider. The Explanatory Notes for the Disability Services and Other Legislation Amendment Bill 2008 (Qld) give the following examples of adults to whom the legislation does not apply:[426]

> - Adult with an intellectual or cognitive disability living at home being cared for by a family member (and not receiving a disability service from DSQ or a funded non-government service provider);
>
> - Adult with an intellectual or cognitive disability residing in a boarding house or hostel (and not receiving a disability service from DSQ or a funded non-government service provider);
>
> - Adult with an intellectual or cognitive disability when receiving a service from Queensland Health (For example, a patient in a Queensland Health residential care facility); …

7.14 For these adults, the issues of whether they may lawfully be subjected to a particular restrictive practice (using that term in its ordinary sense) and who may make the decision to do so depends to a large extent on the meaning of 'health matter' and 'personal matter' under the *Guardianship and Administration Act 2000* (Qld).

Approval and consent requirements

7.15 The DSA requires that, before a relevant service provider uses a restrictive practice, an approval for, or consent to, the use of the restrictive practice be obtained in accordance with the requirements of that Act. The Act provides for different levels of approval or consent, depending on the nature of the restrictive practice and the circumstances in which the restrictive practice is to be used, namely:

- generally;
- in the course of providing respite or community access services to an adult; and
- on a short-term basis.

7.16 Approval for the use of a restrictive practice may be given by the Tribunal, the Adult Guardian or the chief executive of the Department of Communities (which incorporates Disability Services Queensland). Consent may be given by a guardian for a restrictive practice matter appointed by the Tribunal or, in certain circumstance, by an informal decision-maker for the adult. The following table gives a broad overview of the requirements for approval of, or consent to, the use of restrictive practices.

---

426 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 31.

Restrictive practice	Requirement for approval or consent		
	General use	Use during respite or community access services	Short term use
Containment or seclusion	Tribunal approval[427]	Consent of a guardian for a restrictive practice (respite) matter[428]	Adult Guardian approval[429]
Chemical, mechanical or physical restraint	Consent of a guardian for a restrictive practice (general) matter[430]	Consent of: • a guardian for a restrictive practice (respite) matter; or • for mechanical or physical restraint, if there is no guardian for a restrictive practice (respite) matter—an informal decision-maker[431]	Approval by: • the Adult Guardian; or • the chief executive of the Department of Communities[432]
Chemical restraint (fixed dose)	–	Consent of: • a guardian for a restrictive practice (respite) matter; or • if there is no guardian for a restrictive practice (respite) matter—an informal decision-maker[433]	–
Restricted access to objects	Consent of: • a guardian for a restrictive practice (general) matter; or • if there is no guardian for a restrictive practice (general) matter—an informal decision-maker[434]	Consent of: • a guardian for a restrictive practice (respite) matter; or • if there is no guardian for a restrictive practice (respite) matter—an informal decision-maker[435]	Approval by: • the Adult Guardian; or • the chief executive of the Department of Communities[436]

Table 1

427 *Disability Services Act 2006* (Qld) s 123M.

428 *Disability Services Act 2006* (Qld) s 123N.

429 *Disability Services Act 2006* (Qld) s 123O.

430 *Disability Services Act 2006* (Qld) s 123ZA.

431 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZB.

432 *Disability Services Act 2006* (Qld) ss 123E (definition of 'short term approval'), 123ZD.

433 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZC.

434 *Disability Services Act 2006* (Qld) s 123ZA.

435 *Disability Services Act 2006* (Qld) ss 123E (definition of 'relevant decision maker (respite)'), 123ZB.

436 *Disability Services Act 2006* (Qld) ss 123E (definition of 'short term approval'), 123ZD.

7.17 The general approach of the scheme is that containment and seclusion are regarded as the most serious forms of restrictive practice and therefore have the strictest requirements for their use (including a general requirement for Tribunal approval), while restricted access is regarded as the least serious form of restrictive practice and provides for the greatest flexibility for approval or consent.

7.18 Further, the requirements for the use of restrictive practices during respite services or community access services are generally less onerous than for their use generally. The Explanatory Notes for the Disability Services and Other Legislation Amendment Bill 2008 (Qld) explain the rationale for this approach:[437]

> This situation refers to those adults within the target group who only receive a respite service and/or community access from DSQ or a DSQ funded non-government service. These clients live with their families and enter the DSQ system for short periods in order to receive respite and/or community access services. They do not receive any other disability service.
>
> Consultation indicated that the requirements under the main scheme would prove too onerous for these services and the likely unintended outcome is that respite and community access service providers may consider it unviable to provide respite or community access to adults who exhibit challenging behaviour and their families, who are in most need of these services.
>
> The proposed amendments aim to maintain adequate safeguards for the adult while providing flexibility for respite or community access services.

Tribunal approval of containment and seclusion

7.19 Section 80V(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may, by order, give approval for a relevant service provider to contain or seclude an adult, subject to the conditions stated in the order. However, the Tribunal may give the approval only if it is satisfied that:[438]

> (a) the adult has impaired capacity for making decisions about the use of restrictive practices in relation to the adult; and
>
> (b) there is a need for the relevant service provider to contain or seclude the adult because—
>
> (i) the adult's behaviour has previously resulted in harm to the adult or others; and
>
> (ii) there is a reasonable likelihood that, if the approval is not given, the adult's behaviour will cause harm to the adult or others; and

437 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 10.

438 *Guardianship and Administration Act 2000* (Qld) s 80V(2).

(c) a positive behaviour support plan has been developed for the adult that provides for the containment or seclusion; and

(d) containing or secluding the adult in compliance with the approval is the least restrictive way of ensuring the safety of the adult or others; and

(e) the adult has been adequately assessed by appropriately qualified persons, within the meaning of the DSA, section 123E, in the development of the positive behaviour support plan for the adult; and

(f) if the positive behaviour support plan for the adult is implemented—

(i) the risk of the adult's behaviour causing harm will be reduced or eliminated; and

(ii) the adult's quality of life will be improved in the long-term; and

(g) the observations and monitoring provided for under the positive behaviour support plan for the adult are appropriate.

7.20 Section 80W of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal, in deciding whether to give a containment or seclusion approval, to consider the following:

(a) the suitability of the environment in which the adult will be contained or secluded;

(b) if the tribunal is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—

(i) the terms of the order; and

(ii) the views of the authorised psychiatrist responsible for treatment of the adult under that Act about the containment or seclusion of the adult;

(c) any strategies, including restrictive practices, previously used to manage or reduce the behaviour of the adult that causes harm to the adult or others, and the effectiveness of those strategies;

(d) the type of disability services provided to the adult.

7.21 A containment or seclusion approval has effect for the period stated in the order, which cannot exceed 12 months.[439] The Tribunal may review a containment or seclusion approval at any time on its own initiative or on the application of certain specified persons.[440]

439 *Guardianship and Administration Act 2000* (Qld) s 80Y.

440 *Guardianship and Administration Act 2000* (Qld) s 80ZA.

Appointment of, and consent by, a guardian for a restrictive practice matter

Appointment of a guardian for a restrictive practice matter

7.22 Section 80ZD of the *Guardianship and Administration Act 2000* (Qld) deals generally with the appointment by the Tribunal of a guardian for a restrictive practice matter. The Tribunal may, by order, appoint a guardian for a restrictive practice matter[441] if it is satisfied that:[442]

(a) the adult has impaired capacity for the matter; and

(b) the adult's behaviour has previously resulted in harm to the adult or others; and

(c) there is a need for a decision about the matter; and

(d) without the appointment—

(i) the adult's behaviour is likely to cause harm to the adult or others; and

(ii) the adult's interests will not be adequately protected.

7.23 The appointment of a guardian for a restrictive practice matter cannot exceed 12 months.[443] The Tribunal may review the appointment of a guardian for a restrictive practice matter at any time on its own initiative or on the application of certain specified persons.[444]

Consent by a guardian for a restrictive practice (general) matter

7.24 Section 80ZE of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian for a restrictive practice (general) matter[445] may consent to the use of a restrictive practice by a relevant service provider in

---

441 *Guardianship and Administration Act 2000* (Qld) s 80U includes the following definition:

> ***restrictive practice matter*** means—
>
> (a) a restrictive practice (general) matter; or
>
> (b) a restrictive practice (respite) matter.

442 *Guardianship and Administration Act 2000* (Qld) s 80ZD(1).

443 *Guardianship and Administration Act 2000* (Qld) s 80ZD(4).

444 *Guardianship and Administration Act 2000* (Qld) s 29(1)(a), (c). The appointment of a guardian for a restrictive practice matter must be reviewed at least once before the term of the appointment ends: s 29(2).

445 *Guardianship and Administration Act 2000* (Qld) s 80U provides:

> ***restrictive practice (general) matter***, for an adult, means a matter relating to the use of a restrictive practice in relation to the adult by a relevant service provider, other than—
>
> (a) containment or seclusion; or
>
> (b) any restrictive practice used in the course of providing respite services or community access services to the adult.

compliance with a positive support plan for the adult.[446] However, section 80ZE(4) provides that the guardian may give consent only if:

(a) the adult's behaviour has previously resulted in harm to the adult or others; and

(b) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and

(c) using the restrictive practice in compliance with the positive behaviour support plan mentioned in subsection (2) is the least restrictive way of ensuring the safety of the adult or others; and

(d) the adult has been adequately assessed for developing or changing the positive behaviour support plan; and

(e) use of the restrictive practice is supported by the recommendations of the person who assessed the adult; and

(f) if the restrictive practice is chemical restraint—in developing the positive behaviour support plan, the relevant service provider consulted the adult's treating doctor; and

(g) if the positive behaviour support plan is implemented—

(i) the risk of the adult's behaviour causing harm will be reduced or eliminated; and

(ii) the adult's quality of life will be improved in the long-term; and

(h) the observations and monitoring provided for under the positive behaviour support plan are appropriate.

7.25 Section 80ZE(5) further provides that, in deciding whether to consent, the guardian must consider the following:

(a) if the guardian is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—

(i) the terms of the order; and

(ii) the views of the authorised psychiatrist responsible for treatment of the adult under that Act about the use of the restrictive practice;

(b) any information available to the guardian about strategies, including restrictive practices, previously used to manage the behaviour of the adult that causes harm to the adult or others, and the effectiveness of those strategies;

(c) the type of disability services provided to the adult;

446 *Guardianship and Administration Act 2000* (Qld) s 80ZE(1)–(2).

(d) the suitability of the environment in which the restrictive practice is to be used;

(e) if the restrictive practice is chemical restraint—the views of the adult's treating doctor about the use of the chemical restraint.

Consent by a guardian for a restrictive practice (respite) matter

7.26 Section 80ZF of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian for a restrictive practice (respite) matter[447] may consent to the use of a restrictive practice by a relevant service provider in compliance with a respite/community access plan for the adult.[448] However, section 80ZF(4) provides that the guardian may give consent only if he or she is satisfied that:

(a) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and

(b) the relevant service provider has complied with the DSA, part 10A, division 5; and

(c) if the respite/community access plan is implemented—

(i) the risk of the adult's behaviour causing harm will be reduced or eliminated; and

(ii) the adult's quality of life will be improved in the long-term; and

(d) the observations and monitoring provided for under the respite/community access plan are appropriate.

7.27 However, for giving consent to the use of chemical restraint (fixed dose),[449] the use of the restrictive practice is not required to be in compliance with a respite/community access plan and the guardian is not required to be satisfied of the matters mentioned in section 80ZF(4). Instead, the guardian may give consent only if he or she is satisfied that there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others.[450]

---

447 *Guardianship and Administration Act 2000* (Qld) s 80U provides:

> ***restrictive practice (respite) matter***, for an adult, means a matter relating to the use of a restrictive practice in relation to the adult by a relevant service provider in the course of providing respite services or community access services to the adult.

448 *Guardianship and Administration Act 2000* (Qld) s 80ZF(1)–(2).

449 *Guardianship and Administration Act 2000* (Qld) s 80U applies the definition of 'chemical restrain (fixed dose) in s 123E of the *Disability Services Act 2006* (Qld):

> ***chemical restraint (fixed dose)*** means chemical restraint using medication that is administered at fixed intervals and times.

450 *Guardianship and Administration Act 2000* (Qld) s 80ZF(5).

Consent by an informal decision-maker

7.28 In certain circumstances, an informal decision-maker for an adult may consent to a relevant service provider using a restrictive practice in relation to the adult.[451]

7.29 If an informal decision-maker is giving consent to a relevant service provider restricting an adult's access to objects, other than in the course of providing respite services or community access services, the informal decision-maker must:[452]

(a) apply the general principles; and

(b) be satisfied—

(i) the adult's behaviour has previously resulted in harm to the adult or others; and

(ii) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and

(iii) using the restrictive practice in compliance with the positive behaviour support plan for the adult is the least restrictive way of ensuring the safety of the adult or others; and

(iv) if the positive behaviour support plan for the adult is implemented—

(A) the risk of the adult's behaviour causing harm will be reduced or eliminated; and

(B) the adult's quality of life will be improved in the long-term; and

(v) if the informal decision maker is aware the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*—the authorised psychiatrist responsible for treatment of the adult under that Act has been given an opportunity to participate in the development of the positive behaviour support plan.

7.30 If an informal decision-maker is giving consent to a relevant service provider's use of mechanical or physical restraint, or the restriction of an adult's access to objects, in the course of providing respite services or community access services to the adult, the informal decision-maker must:[453]

(a) apply the general principles; and

---

451 See Table 1 at [7.16] above.

452 *Guardianship and Administration Act 2000* (Qld) s 80ZS(2).

453 *Guardianship and Administration Act 2000* (Qld) s 80ZS(3).

(b) be satisfied—

(i) the adult's behaviour has previously resulted in harm to the adult or others; and

(ii) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others; and

(iii) using the restrictive practice in compliance with the respite/community access plan for the adult is the least restrictive way of ensuring the safety of the adult or others; and

(iv) if the respite/community access plan for the adult is implemented—

(A) the risk of the adult's behaviour causing harm will be reduced or eliminated; and

(B) the adult's quality of life will be improved in the long-term.

7.31 However, the requirements for an informal decision-maker's consent to a relevant service provider's use of chemical restraint (fixed dose), in the course of providing respite services or community access services to an adult, are more limited. The informal decision-maker must:[454]

(a) apply the general principles; and

(b) be satisfied—

(i) the adult's behaviour has previously resulted in harm to the adult or others; and

(ii) there is a reasonable likelihood that, if the consent is not given, the adult's behaviour will cause harm to the adult or others.

7.32 The reason for having fewer conditions for consenting to the use of chemical restraint (fixed dose) is:[455]

> to allow for the continued use in respite of daily (fixed) dose medication, which has already been prescribed by a doctor; and where, often, the service provider is not in a position to know if the medication is being used primarily for behaviour control. Nor is the service provider of occasional respite care in a position to try and influence the longer term management of behaviour for that adult and to determine the least restrictive option. Adults receiving respite usually do so for short periods only, and it would be impracticable to require a service provider to assess and develop a plan for an adult who they only see occasionally and for short periods. Service providers strongly indicated during consultation that it may become unviable for them to continue to provide respite if there were no lesser requirements for daily (fixed) dose medication.

454 *Guardianship and Administration Act 2000* (Qld) s 80ZS(3)–(4).

455 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 64–5.

Short term approval of restrictive practices

7.33 Section 80ZH of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may give approval for a relevant service provider to contain or seclude an adult for a period up to three months. The Adult Guardian must be satisfied of a number of specified matters, including that 'there is an immediate and serious risk that, if the approval is not given, the adult's behaviour will cause harm to the adult or others'.[456] Further, unless it is not practicable in the circumstances, the Adult Guardian must, in deciding whether to give approval, consult with and consider the views of the adult, a guardian or informal decision-maker for the adult and, if the Adult Guardian is aware that the adult is subject to a forensic order or an involuntary treatment order under the *Mental Health Act 2000* (Qld), the authorised psychiatrist responsible for the treatment of the adult under that Act.

7.34 The DSA also sets out the requirements that apply when the approval of the chief executive of the Department of Communities is sought for the short term use of a restrictive practice other than containment or seclusion.[457]

THE SCOPE OF CHEMICAL RESTRAINT UNDER CHAPTER 5B

The meaning of 'chemical restraint'

7.35 Section 123F of the DSA includes the following definition of 'chemical restraint':

> **123F Meaning of chemical restraint**
>
> (1) Chemical restraint, of an adult with an intellectual or cognitive disability, means the use of medication for the primary purpose of controlling the adult's behaviour.
>
> (2) However, using medication for the proper treatment of a diagnosed mental illness or physical condition is not chemical restraint.
>
> (3) To remove any doubt, it is declared that an intellectual or cognitive disability is not a physical condition.
>
> (4) In this section—
>
> ***diagnosed***, for a mental illness or physical condition, means a doctor confirms the adult has the illness or condition.
>
> ***mental illness*** see the *Mental Health Act 2000*, section 12.

456 *Guardianship and Administration Act 2000* (Qld) s 80ZH(1).

457 *Disability Services Act 2006* (Qld) s 123ZK.

The decision in *Re AAG*

7.36 In *Re AAG*,[458] the Tribunal considered an application for the appointment of a guardian and an administrator for AAG. AAG had an intellectual impairment but did not have a mental illness.[459]

7.37 AAG had been charged with a number of sexual offences against children. The Mental Health Court determined that AAG 'was not of unsound mind' when the alleged offences were committed. However, it determined that he was permanently unfit for trial.[460] The Mental Health Court therefore imposed a forensic order on AAG with conditions of limited community treatment.[461] One of the conditions of the forensic order required AAG to comply with the requirements of the authorised psychiatrist in relation to the taking of prescribed medication and other treatment.[462]

7.38 The antilibidinal drug Androcur was prescribed for AAG to reduce his sexual urges.[463] Androcur is an antiandrogenic hormone that inhibits the influence of male sex hormones.[464] The administration of Androcur to AAG was described as 'effecting a reversible chemical castration'.[465] AAG's mental health workers were of the view that, while AAG was taking this medication, the risk to the community was reduced and, as a result, AAG was able to reside in the community and it was less likely that he would need to be detained in an authorised mental health service under secure conditions.[466]

---

458 [2009] QGAAT 43.

459 Ibid [1], [3].

460 Ibid [2]. See *Mental Health Act 2000* (Qld) ss 267, 270.

461 If the Mental Health Court decides that a person charged with an indictable offence is permanently unfit for trial for the alleged offences, it may make a forensic order for the person, which is an order that the person be detained in a stated authorised mental health service for involuntary treatment or care: *Mental Health Act 2000* (Qld) s 288(1)(b), (2). The Mental Health Court may, under the forensic order, decide to do any one or more of the following (*Mental Health Act 2000* (Qld) s 289(1)(a)–(b)):

> (a) order that the patient have limited community treatment subject to the reasonable conditions the court considers appropriate;
>
> (b) approve limited community treatment for the patient subject to the reasonable conditions the court considers appropriate; …

462 [2009] QGAAT 43, [2].

463 Ibid [23]. Anti-libidinal medication is sometimes prescribed to reduce the sexual urges of men who have a history of sexual offending or problematic sexual behaviour. Generally, see S Hayes, F Barbouttis and C Hayes, *Anti-libidinal medication and people with disabilities — long-term follow-up of outcomes following third party consent to medication for problematic sexual behaviour: Report to the Criminology Research Council* (2002) <http://www.criminologyresearchcouncil.gov.au/reports/200001-38.html> at 13 October 2009.

464 [2009] QGAAT 43, [16]. Androcur is also used in the treatment of inoperable prostate cancer: *MIMS Online*, Androcur (Full prescribing information) <https://www.mimsonline.com.au> at 9 October 2009.

465 Ibid [58].

466 Ibid [43].

7.39 The forensic order was reviewed and confirmed by the Mental Health Review Tribunal on several occasions. When a decision of that Tribunal was taken on appeal to the Mental Health Court, one of the psychiatrists assisting the presiding judge expressed a concern about the use of Androcur in AAG's case, stating that it was not a medication for the treatment of a mental illness and could not therefore be authorised under a forensic order.[467]

7.40 On the application for the appointment of a guardian and an administrator for AAG, the Tribunal made a declaration that AAG had capacity for all financial matters and for simple personal matters.[468] The Tribunal considered that that an adult who is not able to consent to medication because of an intellectual disability, but who does not have a mental illness, cannot be compelled to take medication under a forensic order that may include limited community treatment.[469]

7.41 The Tribunal commented that, in the event that a guardian was appointed to make health care or accommodation decisions for AAG or to consent to restrictive practices for him while he was subject to a forensic order, it would be 'important to clarify whether the guardian has authority to make decisions for AAG about his care and about taking medication prescribed by the authorised psychiatrist and in particular Androcur'.[470]

7.42 The Tribunal referred to the evidence before it that:[471]

> Androcur can have significant long term side effects, has had a limited clinical evaluation about its use to reduce sexual urges in men with sexual deviations and has limited efficacy in the absence of the simultaneous use of psychotherapeutic measures.

7.43 The Tribunal considered that 'a person making a decision to consent to the administration of Androcur would be exercising decision-making about a complex matter',[472] although it did not specify whether it was a complex health matter or a complex personal matter. It found that AAG did not have capacity to provide informed consent to the taking of Androcur and that consideration would need to be given to the appointment of a substitute decision-maker for AAG to make such a complex decision for him.[473]

7.44 The Tribunal then considered the following options for appointing a guardian for AAG:

---

467 Ibid [5].

468 Ibid [7].

469 Ibid [20].

470 Ibid [24].

471 Ibid [44].

472 Ibid [46].

473 Ibid.

- appointing a guardian to make health care decisions;
- appointing a guardian to make decisions about personal matters relating to his care; and
- appointing a guardian under Chapter 5B if the administration of Androcur constitutes a restrictive practice.

Appointment of a guardian to make health care decisions for AAG

7.45 The appointment of a guardian to make health care decisions for AAG was necessary only if the administration of Androcur was health care. The Tribunal therefore sought submissions on that issue.[474]

7.46 The Public Advocate submitted that Androcur had been prescribed to control AAG's behaviour and was not treatment that fell within the definition of health care as it was not being administered 'for the purpose of maintaining or treating a physical or mental condition experienced by AAG'. The Adult Guardian expressed a preliminary view that the administration of Androcur 'may not be health care as defined'. The representative of the Director of Mental Health submitted that 'the administration of Androcur was not health care as the medication was not designed to achieve a therapeutic outcome but to reduce sexual urges'. The representative of DSQ submitted that the administration of Androcur 'may be health care as being for the treatment of a mental condition'.[475]

7.47 The Tribunal noted that in a number of decisions made by it before the commencement of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld):[476]

> the Tribunal had determined that where a person had challenging behaviours that were a manifestation of a mental condition (as distinct from a mental illness), then the use of restrictive practices for the purpose of relieving the distress of challenging behaviours could in some circumstances be considered to be treatment for the mental condition provided that it was carried out for this purpose and it was carried out at the direction or under the supervision of a health provider.

7.48 Although the Tribunal did not decide whether the administration of Androcur amounted to health care, it commented that, if the appointment of a guardian for health care was considered as the appropriate means to facilitate lawful consent being given to the administration of Androcur to AAG, it should undertake 'an analysis of the current legislative consent regime post commencement of the [Chapter] 5B provisions … to ascertain whether the

474 Ibid [49].

475 Ibid [50].

476 Ibid [51].

rationale in the Tribunal's previous decisions is still sustainable'.[477] It noted that this 'is particularly applicable to people with an intellectual or cognitive disability only who do *not* receive services or funding from Disability Services Queensland'.[478]

Appointment of a guardian to make decisions about personal matters relating to AAG's care

7.49 The Tribunal referred to the definition of 'personal matter' in the *Guardianship and Administration Act 2000* (Qld), which is, relevantly, 'a matter … relating to the adult's care, including the adult's health care, or welfare'.[479] It also noted that the Act authorises a guardian to do anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.[480]

7.50 The Adult Guardian submitted that 'a guardian appointed for personal matters could give consent for the administration of Androcur if it was determined that taking the medication was for the care or welfare of the adult'.[481] The representative of DSQ also submitted on a tentative basis that the definition of personal matter could provide the authority for a guardian to consent to Androcur.[482]

7.51 However, the Public Advocate submitted that:[483]

> it would in effect be an untenable strain on the wording of the legislation to interpret the meaning of personal matter in such a manner. It was submitted that if the interpretation of personal matter was extended in this manner, an informal decision maker could give consent to the use of Androcur outside either the health care principles or other statutory protections for the use of restrictive practices in the *Guardianship and Administration Act 2000*.

7.52 Similarly, the representative of the Director of Mental Health submitted that 'it would be difficult to make a finding that the administration of Androcur was for the care or welfare of AAG'.[484]

7.53 The Tribunal noted that its decision in *Re JD*[485] had considered the extent to which a guardian could make decisions for personal matters and had

---

477 Ibid [52].

478 Ibid (emphasis added). This issue is considered at [7.65]–[7.84] below.

479 *Guardianship and Administration Act 2000* (Qld) sch 2 s 2.

480 *Re AAG* [2009] QGAAT 43, [54], referring to s 33(1) of the *Guardianship and Administration Act 2000* (Qld).

481 Ibid [54].

482 Ibid [56].

483 Ibid [55].

484 Ibid [56].

485 [2003] QGAAT 14. This decision is discussed at [7.69]–[7.70] below.

considered issues of a similar nature to those raised in the Adult Guardian's submission about the scope of personal matters.

Appointment of a guardian under Chapter 5B if the administration of Androcur constitutes a restrictive practice

7.54 The Tribunal commented that the evidence before it established that 'the use of Androcur in the case of AAG had as its primary purpose the control of his behaviour and was not being used for the proper treatment of a diagnosed mental illness or physical condition'.[486] The Tribunal observed that, if it found that Androcur was being used as a chemical restraint (which is a restrictive practice under the DSA), it would be necessary that consent for its use be obtained from a guardian for a restrictive practice matter appointed under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).[487]

7.55 The Tribunal did not make a decision about the scope of personal matters and health matters (or appoint a guardian for AAG) as the hearing was adjourned.

Issues for consideration

7.56 As the very purpose of prescribing Androcur and similar drugs is to control the behaviour of an adult, it appears that their administration would constitute a chemical restraint within the meaning of the DSA.[488]

7.57 The significance of Androcur constituting a chemical restraint is that:

- consent to its general use for an adult may be given by a guardian for a restrictive practice (general) matter; and
- consent for its use during respite or community access services may be given by a guardian for a restrictive practice (respite) matter.

7.58 In addition, the administration of Androcur at fixed intervals and times would arguably constitute a 'chemical restraint (fixed dose)'.[489] In that case, if there was no guardian for a restrictive practice (respite) matter, an informal decision-maker for an adult could consent to the administration of Androcur by a relevant service provider in the course of providing respite or community access services to the adult. As explained earlier, there are fewer requirements for an informal decision-maker's consent to 'chemical restraint (fixed dose)' in those circumstances than there are for other types of restrictive practices.[490]

---

486 [2009] QGAAT 43, [59].

487 Ibid [60].

488 The definition of 'chemical restraint' is set out at [7.35] above.

489 The definition of 'chemical restraint (fixed dose)' is set out at n 449 above.

490 See [7.31]–[7.32] above.

7.59 However, it does not appear that the administration of antilibidinal medications was contemplated in the development of the restrictive practices legislation. The Explanatory Notes for the Disability Services and Other Legislation Amendment Bill 2008 (Qld) referred to the meaning of 'chemical restraint' in section 123F and gave, as an example, the sedation of the adult:[491]

> Section 123F defines chemical restraint — it is intended to cover the use of medication to primarily control the person's behaviour, such as to sedate the person. It is not intended to cover the use of medication to properly treat a medical cause. …
>
> Example of 'chemical restraint'
>
> Person C has an acquired brain injury and is receiving a DSQ funded accommodation service. C has a history of extensively damaging his home including the destruction of furniture and fittings, windows, doors, walls, and ceilings. During such an episode, C threw chairs and kitchen knives, injuring cotenants and support staff, as well as C himself. Assessment has identified a number of reliable 'early warning' signs which occur prior to an episode of property destruction. When support staff observe these specific signs, C is administered medication prescribed by a psychiatrist which, as a result of its sedative effects, reduces the escalation in his behaviour. The medication de-escalates the behaviour, resulting in fewer incidents and overall a safer and more stable living environment for all residents.

7.60 While the administration of sedatives and antilibidinal drugs both have the purpose of behavioural control, the use of sedatives differs from the use of antilibidinal drugs in that sedatives tend to be administered on an *ad hoc* basis when an adult is exhibiting particular early warning signs that his or her destructive or harmful behaviour is likely to escalate. In contrast, antilibidinal drugs tend to be administered on a long term basis and not to deal with any particular imminent situation.

7.61 Further, the decision whether to administer Androcur to reduce a man's sexual urges involves important legal, medical and ethical considerations. Androcur has a number of serious side-effects, including liver toxicity, thrombotic phenomena, breast development and osteoporosis.[492] It has been suggested that there are particular risks 'associated with prescription of medication for people with intellectual disabilities who may not be able to report side effects and bodily changes, and who may be taking multiple other medications that could result in drug interactions'.[493]

---

491 Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld) 38–9.

492 See *MIMS Online*, Androcur (Full prescribing information) <https://www.mimsonline.com.au> at 9 October 2009.

493 S Hayes, F Barbouttis and C Hayes, *Anti-libidinal medication and people with disabilities — long-term follow-up of outcomes following third party consent to medication for problematic sexual behaviour: Report to the Criminology Research Council* (2002) 14 <http://www.criminologyresearchcouncil.gov.au/reports/200001-38.html> at 7 October 2009.

7.62 These factors raise the issue of whether the consent requirements that apply to 'chemical restraint' and 'chemical restraint (fixed dose)' under Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) are appropriate for the administration of antilibidinal drugs or whether the administration of antilibidinal drugs should require greater safeguards.

7.63 If it is considered desirable to provide greater safeguards for the administration of antilibidinal drugs as a restrictive practice, an option would be to require that such drugs may be administered only with Tribunal approval. As explained earlier, Tribunal approval is currently required in order to contain or seclude an adult under the restrictive practices regime. If Tribunal approval were required for the administration of an antilibidinal drug, it would be necessary to amend Chapter 5B to specify when the Tribunal may approve the use of an antilibidinal drug and the matters that the Tribunal must consider in deciding whether to approve its use. One option would be to model those provisions generally on sections 80V and 80W of the Act, which regulate the Tribunal's approval of containment and seclusion. It would also be necessary to amend the DSA to provide for the specific circumstances in which an antilibidinal drug may be administered with Tribunal approval.

7.64 For consistency with the provisions regulating the Tribunal's approval of containment and seclusion, the *Guardianship and Administration Act 2000* (Qld) could also provide that the Tribunal's approval of the administration of an antilibidinal drug does not have effect for more than 12 months.[494]

7-1 Is it appropriate that, on the basis that the administration of an antilibidinal drug for the purpose of behavioural control constitutes a 'chemical restraint' within the meaning of section 123F of the *Disability Services Act 2006* (Qld), a guardian for a restrictive practice (general) matter may consent to the administration of an antilibidinal drug to an adult with an intellectual or cognitive disability?

7-2 Is it appropriate that, on the basis that the administration of an antilibidinal drug at fixed intervals and times for the purpose of behavioural control constitutes a 'chemical restraint (fixed dose)' within the meaning of section 123E of the *Disability Services Act 2006* (Qld):

494 See *Guardianship and Administration Act 2000* (Qld) s 80Y.

(a) a guardian for a restrictive practice (respite) matter may consent to the administration of an antilibidinal drug at fixed intervals and times to an adult with an intellectual or cognitive disability in the course of the provision of respite or community access services to the adult; or

(b) if there is no guardian for a restrictive practice (respite) matter, an informal decision-maker may consent to the administration of an antilibidinal drug at fixed intervals and times to an adult with an intellectual or cognitive disability in the course of the provision of respite or community access services to the adult?

7-3 If no to Questions 7-1 or 7-2(a) or (b), should Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) be amended so that Tribunal approval is required for the administration to an adult with an intellectual or cognitive disability of any or all of the following for the purpose of behavioural control:

(a) an antilibidinal drug generally;

(b) an antilibidinal drug in the course of providing respite services or community access services to the adult; or

(c) an antilibidinal drug at fixed intervals and times in the course of providing respite services or community access services to the adult?

7-4 If Tribunal approval is required for the administration of an antilibidinal drug to an adult with an intellectual or cognitive disability, should the *Guardianship and Administration Act 2000* (Qld):

(a) specify the circumstances in which the Tribunal may approve its administration and, if so, should those circumstances be generally modelled on section 80V(2) of the Act;

(b) specify the matters that the Tribunal must consider in deciding whether to approve its administration and, if so, should those matters be generally modelled on section 80W of the Act; and

(c) provide that the Tribunal's approval does not have effect for more than 12 months (or some other period)?

RESTRICTIVE PRACTICES OUTSIDE CHAPTER 5B

The decision in *Re AAG*

7.65 The Tribunal's decision in *Re AAG*[495] also raises some important issues about the use of restrictive practices in relation to adults to whom Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) does not apply.

7.66 The Tribunal commented on the fact that not all people who might be taking an antilibidinal medication for behaviour modification have the benefit of the safeguards provided by Chapter 5B of the *Guardianship and Administration Act 2000* (Qld). It referred in particular to the potential vulnerability of adults who do not receive disability services that are provided or funded by DSQ:[496]

> There are at least three categories of persons with impaired decision-making capacity who may be taking medication such as Androcur for behaviour modification due to their behaviours being a risk to the community but not all of those categories of persons are covered by legislation which safeguards their basic human rights.
>
> The first category is people with an intellectual or cognitive disability who receive services or funding from Disability Services Queensland. These people have safeguards provided by legislation about the use of restrictive practices in [Chapter] 5B of the *Guardianship and Administration Act 2000*.
>
> The second category is people with a mental illness who receive treatment under the *Mental Health Act 2000* who also have safeguards to protect their human rights through the exercise of the General Principles set out in that Act.
>
> The third category is people with an intellectual or cognitive disability only but who do not receive services or funding from Disability Services Queensland. These people, because of their lack of financial connection with Disability Services Queensland do not have the safeguards provided by [Chapter] 5B of the *Guardianship and Administration Act 2000*. While they can have a guardian appointed for health care, it was a matter in contention at this hearing whether a guardian for health care can lawfully consent to the administration of medication constituting a restrictive practice. A similar unresolved issue arises as to whether a guardian for personal matters can lawfully consent to the use of restrictive practices for this category of persons. This potentially places this category of people at a greater risk than those in the first two categories.

7.67 The Tribunal suggested that legislative reform may be necessary to provide safeguards for this third category of persons:[497]

> It is quite possible that the only way to provide safeguards in the use of restrictive practices for those persons with an intellectual or cognitive disability only but who do not receive services or funding from Disability Services

---

495 [2009] QGAAT 43.

496 Ibid [61]–[64].

497 Ibid [66].

Queensland is through legislative changes. The Tribunal notes that the Queensland Law Reform Commission is currently undertaking a reference on the guardianship regime in Queensland.

The Tribunal's earlier decisions about the use of restrictive practices

7.68 In *Re AAG*,[498] the Tribunal noted that it had made a number of decisions about the use of restrictive practices before the enactment of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld).

7.69 In *Re JD*,[499] the Tribunal held that 'a guardian does have the power to make decisions which can involve restriction and in some cases containment provided the decisions are made in accordance with the General Principles and the Health Care Principle set out in Schedule 1 of the Act'.[500] The Tribunal referred to the definition of 'personal matters' and stated that the expression 'the adult's care or welfare' should be interpreted widely.[501] Further, the Tribunal noted that the definition of 'personal matters' includes 'legal matters not relating to finance or property'. It considered that consent to being retained or contained in a particular place is a legal matter, to which a guardian can consent if the adult is unable to give a valid consent.[502]

7.70 The Tribunal also held that a guardian has wide powers under section 33 of the *Guardianship and Administration Act 2000* (Qld), 'which is essentially the basis for the Tribunal's view that a guardian can consent to restriction and containment'.[503] It stated that a 'guardian can provide the consent necessary to allow restriction or containment just as an adult himself could do so if they had capacity'.[504]

7.71 Subsequently, in *Re WCM*[505] the Tribunal held that the use of restrictive practices could amount to health care. Application was made for the appointment of a guardian for WCM so that consent could be given to the use of restrictive practices in relation to WCM. It was argued that, at times, he needed to be placed in seclusion and given medication.[506]

7.72 Although WCM did not have a mental illness, the Tribunal found that he had a 'mental condition' and that his destructive behaviours and aggression

498 [2009] QGAAT 43.

499 [2003] QCAAT 14.

500 Ibid [22].

501 Ibid [27].

502 Ibid [28].

503 Ibid [32].

504 Ibid.

505 [2005] QGAAT 26.

506 Ibid [7].

were a manifestation of that condition.[507] The Tribunal referred to the definition in the legislation of 'health care' and held that 'any medication which is required to be given to treat Mr WCM's mental condition is health care within the definition as it is given to maintain or treat Mr WCM's mental condition and is given at the direction of his health provider'.[508] It therefore held that the Adult Guardian as WCM's statutory health attorney could consent to the use of medication to treat WCM's mental condition.[509]

7.73 The Tribunal also considered that the management of WCM's mental condition involved the need to consent to a Behaviour Management Plan, 'which could involve the use of restrictive practices such as seclusion' to control his behaviour.[510]

7.74 The Tribunal was satisfied on the evidence that:[511]

> seclusion and indeed some other restrictive practices can be accurately characterised as 'treatment' and therefore come within the definition of 'health care' because seclusion and indeed restraint do relieve symptoms of the mental condition and do have a therapeutic effect on aggression and disruptive behaviour, which are the manifestations of the mental condition.

7.75 Although the Tribunal held that the Adult Guardian, as WCM's statutory health attorney, could consent to the use of seclusion or restraint, it nevertheless appointed the Adult Guardian as WCM's guardian. It considered that:[512]

> The Tribunal is satisfied in this case that this is an appropriate case for the appointment of the [Adult Guardian] as a formal guardian for health care because if there is an appointment the appointment will be regularly reviewed by the Tribunal and the Tribunal can in fact monitor the use of seclusion if it is actually used from time to time.

7.76 The Tribunal appointed the Adult Guardian as WCM's guardian for six months. This was consistent with a protocol between the Tribunal and the Office of the Adult Guardian regarding behaviour management and restrictive practices, which provided that the six months was the maximum period for which a guardian for a restrictive practice would be appointed.[513]

7.77 Section 80T of the *Guardianship and Administration Act 2000* (Qld) provides that Chapter 5B does not limit the extent to which a substitute

---

507 Ibid [45]. The *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(1) defines 'health

508 Ibid [47].

509 Ibid.

510 Ibid [48]. The Tribunal took a similar view in *Re MLI* [2006] QGAAT 31.

511 Ibid.

512 Ibid [55].

513 Ibid [13].

decision-maker is authorised under a provision of the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* to make a health care decision in relation to an adult to whom Chapter 5B does not apply.

Issues for consideration

The consent requirements for restrictive practices generally

7.78 The consequence of characterising the use of restrictive practices, at least in some circumstances, as health care is that it is possible for consent to the use of such practices to be given by a much wider group of decision-makers than is possible under Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld). For example, consent to containment or seclusion, which requires Tribunal approval under Chapter 5B, could be given by:

- a guardian appointed for all personal matters or all health matters;
- an attorney appointed under an enduring power of attorney to exercise power for all personal matters or all health matters; or
- a statutory health attorney.

7.79 The preliminary issue is whether the approach taken by the Tribunal in its pre-Chapter 5B decisions is still appropriate. Given the greater regulation of the use of restrictive practices under the DSA and the safeguards created by the approval and consent mechanisms in the *Guardianship and Administration Act 2000* (Qld), it is arguable that, to the greatest extent practicable, the consent mechanisms for the use of restrictive practices outside Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) should broadly correspond with the approval and consent mechanisms provided by Chapter 5B. This will not provide identical safeguards because the provisions in Part 10A of the DSA have no application to adults who do not receive disability services from a funded service provider. However, it would go some way to providing greater parity in relation to the two groups of adults.

7.80 If it were considered desirable to maintain broad consistency with the use of restrictive practices under Chapter 5B:

- the Tribunal's approval would be required for the use of containment or seclusion;
- the consent of a guardian would generally be required for the use of chemical, mechanical or physical restraint;[514] and

514 Consent to the use of antilibidinal drugs for the purpose of behavioural modification is considered at [7.85]–[7.94] below.

- the consent of a guardian would generally be required to restrict an adult's access to objects, although consent could be given by an informal decision-maker if there was no guardian.

7.81 It would also be desirable to include specific provisions dealing with the requirements for approval or consent by the Tribunal, a guardian or an informal decision-maker. In order to maintain consistency, as far as possible, with Chapter 5B of the Act, these provisions could be generally modelled on sections 80V and 80W (for the Tribunal),[515] section 80ZD (for a guardian)[516] and section 80ZS (for an informal decision-maker).[517]

7.82 The *Guardianship and Administration Act 2000* (Qld) could also be amended to provide that a Tribunal approval of containment or seclusion does not have effect for more than 12 months[518] and that the appointment of a guardian to consent to one of the types of restrictive practice mentioned above may not be made for more than 12 months.[519]

7.83 It might be also be desirable to extend the definition of 'personal matter' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) to refer to the new restrictive practice matters that are to be specifically regulated, which would need to be described in a way that distinguishes them from restrictive practice matters under Chapter 5B of the Act.[520]

7.84 However, it would be necessary to provide that approval for, or consent to, the use of the new restrictive practice matters may be given only in accordance with the new provisions described at [7.80] and [7.81] above. That would ensure that, as a type of personal matter, consent could not be given by a statutory health attorney or an attorney appointed under an enduring document.

7-5 Should the *Guardianship and Administration Act 2000* (Qld) be amended to include new consent mechanisms, broadly corresponding with the approval and consent mechanisms in Chapter 5B of the Act, for the use of restrictive practices in relation to adults to whom Chapter 5B does not apply?

515 See [7.19]–[7.20] above.

516 See [7.22] above.

517 See [7.29]–[7.31] above.

518 See *Guardianship and Administration Act 2000* (Qld) s 80Y.

519 See *Guardianship and Administration Act 2000* (Qld) s 80ZD(4).

520 Note, the definition of 'personal matter' in the *Guardianship and Administration Act 2000* (Qld) currently refers to 'a restrictive practice matter under chapter 5B': sch 2 s 2(j).

7-6 If yes to Question 7-5, for the containment or seclusion of an adult who is outside the scope of Chapter 5B, should the *Guardianship and Administration Act 2000* (Qld):

(a) specify the circumstances in which the Tribunal may approve the containment or seclusion and, if so, should those circumstances generally be modelled on the requirements of section 80V(2) of the Act;

(b) specify the matters that the Tribunal must consider in deciding whether to approve the containment or seclusion and, if so, should those matters generally be modelled on the matters specified in section 80W of the Act; and

(c) provide that the Tribunal's approval for the containment or seclusion does not operate for more than 12 months?

7-7 If yes to Question 7-5, for restrictive practices (other than containment or seclusion or the administration of an antilibidinal drug[521]) in relation to an adult who is outside the scope of Chapter 5B, should the *Guardianship and Administration Act 2000* (Qld) specify:

(a) the circumstances in which the Tribunal may appoint a guardian to consent to the restrictive practice and, if so, should those circumstances generally be modelled on the requirements of section 80ZD of the Act (including that the appointment may not be made for more than 12 months);

(b) the circumstances in which the guardian may consent to the restrictive practice and, if so, should those circumstances generally be modelled on the requirements of section 80ZE(4) of the Act; and

(c) the matters that the guardian must consider in deciding whether to consent and, if so, should those matters generally be modelled on the matters specified in section 80ZE(5) of the Act?

521 The consent requirements for the administration of an antilibidinal drug outside ch 5B of the *Guardianship and Administration Act 2000* (Qld) are considered at [7.85]–[7.94] below.

7-8 If yes to Question 7-5, for the restriction of an adult's access to objects by an informal decision-maker outside the scope of Chapter 5B:

(a) should the *Guardianship and Administration Act 2000* (Qld) specify the requirements for the informal decision-maker's consent; and

(b) should those requirements generally be modelled on the requirements of section 80ZS of the Act?

7-9 Alternatively, is there some other way of providing greater safeguards for the use of restrictive practices in relation to adults to whom Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) does not apply?

The consent requirements for the administration of an antilibidinal drug

7.85 If the administration of an antilibidinal drug to an adult outside the provisions of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) amounts to heath care, a decision about its administration to an adult with impaired capacity will be able to be made by a very wide range of decision-makers:[522]

- a guardian appointed for all personal matters or all health matters;
- an attorney appointed under an enduring document for all personal matters or all health matters; or
- a statutory health attorney.

7.86 However, if the administration of an antilibidinal drug is not health care, a decision about its administration to an adult with impaired capacity will simply be a decision about a personal matter. Such a decision may be made by a guardian or attorney appointed for personal matters and possibly informally by an informal decision-maker. The substitute decision-maker would be required to apply the General Principles but would not be required to apply the Health Care Principle.

7.87 The Public Advocate has expressed concern about the possibility that a decision in relation the administration of an antilibidinal drug could be made by

522 Note, the substitute decision-maker would be required to apply the General Principles and the Health Care Principle.

a statutory health attorney or an attorney under an enduring document, as there would be no oversight of the decision-maker:[523]

> The efficacy of chemical castration as a treatment is questionable … , the side effects are serious and it represents a major infringement of basic human rights. It would appear grossly inappropriate for there to be any possibility that a decision about chemical castration is a health care decision in relation to which the decision-maker is not subject to supervision. For similar reasons, arguably, it should also not be another type of personal matter which could be made by an informal personal decision-maker.

7.88 The Public Advocate has suggested that, even in relation to guardians, for whom the Tribunal 'provides some minimal supervision', 'the level of supervision available through GAAT combined with the guidance that the [General Principles] and the Health Care Principle currently provide is also inadequate in relation to chemical castration'.[524]

7.89 The Public Advocate has raised the possibility that 'chemical castration should be specifically excluded from health care or other type of personal matter'. However, if it remains as health care, she has suggested a possible way of providing greater safeguards for its use:[525]

> Consideration could be given to whether it is special health care, if indeed, it can or should be characterised as health care at all … If it was special health care, arguably specific criteria should be prescribed to guide decision-making about it (as they have been in relation to other types of special health care, including sterilisation).

7.90 Earlier in this chapter, the Commission has raised the issue of whether the consent requirements that apply in relation to the use of a 'chemical restraint' under Part 10A of the DSA and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) are appropriate for the administration of antilibidinal drugs or whether the administration of antilibidinal drugs should require greater safeguards. If it is decided that:

- the administration of antilibidinal drugs under Part 10A of the DSA should require Tribunal approval under Chapter 5B of the *Guardianship and Administration Act 2000* (Qld); and

- the *Guardianship and Administration Act 2000* (Qld) should, to the greatest extent practicable, include approval and consent mechanisms for the use of restrictive practices outside Chapter 5B of the Act that broadly correspond with the approval and consent mechanisms provided by Chapter 5B;

---

523 Correspondence from the Public Advocate 12 June 2009.

524 Ibid.

525 Ibid.

then the approval or consent requirements for the administration of antilibidinal drugs as a restrictive practice outside Chapter 5B should generally be consistent with the requirements under Chapter 5B and also require Tribunal approval.

7.91 In order to maintain consistency, as far as possible, with Chapter 5B of the Act, a new provision dealing with the Tribunal's approval of the use of an antilibidinal drug could be generally modelled on the requirements of sections 80V and 80W, which regulate the Tribunal's approval of containment and seclusion, but without the references in those sections to the adult's positive behaviour support plan.[526] For the same reason, the legislation could also be amended to provide that the Tribunal's approval has effect for a period of not more than 12 months.[527] This would ensure that the drug could not be administered indefinitely but would be reviewed regularly to determine whether it was continuing to have a positive effect on the adult.

7.92 New South Wales is the only Australian jurisdiction whose guardianship legislation deals specifically with this issue. Under the *Guardianship Act 1987* (NSW), only the NSW Guardianship Tribunal may consent to the carrying out on a relevant patient of 'special treatment'.[528] 'Special treatment' includes 'any kind of treatment declared by the regulations to be special treatment for the purposes of this Part',[529] which includes any treatment that involves the use of androgen-reducing medication for the purpose of behavioural control:[530]

7.93 Because the definition refers to the purpose for which the androgen-reducing medication is used, the definition does not capture the administration of androgen reducing medication when it is used in the treatment of a medical condition, for example, prostate cancer.[531] Accordingly, the Tribunal's consent for that purpose is not required.

7.94 The *Guardianship Act 1987* (NSW) also provides that the NSW Guardianship Tribunal may consent to the carrying out of such treatment if it is satisfied that:[532]

> (c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient, and

526 See [7.19]–[7.20] above.

527 See *Guardianship and Administration Act 2000* (Qld) s 80Y.

528 *Guardianship Act 1987* (NSW) ss 33(1) (definitions of 'major treatment', 'minor treatment'), 36(1).

529 *Guardianship Act 1987* (NSW) s 33(1) (definition of 'special treatment' (para (c))).

530 *Guardianship Regulation 2005* (NSW) cl 9(b).

531 See n 464 above.

532 *Guardianship Act 1987* (NSW) s 45(3)(b)–(d).

(d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment—those guidelines have been or will be complied with as regards the patient.

7-10 Should the approval or consent requirements for the administration of an antilibidinal drug as a restrictive practice outside the scope of Chapter 5B of the *Guardianship and Administration Act 2000* (Qld) generally be consistent with the approach that is taken in relation to the approval or consent requirements for the administration of an antilibidinal drug under Part 10A of the *Disability Services Act 2006* (Qld) and Chapter 5B of the *Guardianship and Administration Act 2000* (Qld)?

7-11 If no to Question 7-10:

(a) who should be able to consent to the administration of an antilibidinal drug for the purpose of behavioural control to an adult with impaired capacity; and

(b) in what circumstances should it be possible for consent to be given?

Chapter 8

Binding direction by a parent for the appointment of a guardian or an administrator

INTRODUCTION

8.1 The Commission's terms of reference direct it to review:[533]

> whether there are circumstances in which the *Guardianship and Administration Act 2000* (Qld) should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

8.2 In undertaking this review, the Commission is to have regard to:[534]

> 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.

8.3 This chapter considers whether, in light of the existing mechanisms under the *Guardianship and Administration Act 2000* (Qld) for the appointment of guardians and administrators, there is a need for the Act to include an alternative mechanism by which the parent of an adult child with impaired capacity may make a binding direction appointing a guardian or administrator

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

534 Ibid.

for the adult child. It also considers whether, before a child with impaired capacity turns 18, the child's parent should be able to make an appointment that takes effect when the child turns 18 or in other specified circumstances after the child has turned 18.

8.4 In this context, the reference to a 'binding direction appointing a person as a guardian … or an administrator' is taken to refer to a mechanism for the private appointment of a person as a guardian or an administrator, with the same powers as may be conferred by the Tribunal, that would have legal effect until such time as the appointment was varied or revoked by the Tribunal[535] or revoked by operation of law.[536]

BACKGROUND

8.5 An issue that is of concern to many parents who have children with impaired capacity is who will care for, and make decisions for, their children when the parents are no longer able to do so themselves or when they die.

Minor children

8.6 The *Succession Act 1981* (Qld)[537] provides that a parent[538] or guardian[539] of a child may, by will, appoint a person as a testamentary guardian of the child.[540] In this context, a 'child' is an individual under the age of 18 who is not, and has never been, married.[541]

8.7 If the appointor (that is, the parent or guardian making the appointment) is not survived by a parent of the child, the appointment takes effect on the appointor's death.[542]

---

535 See *Guardianship and Administration Act 2000* (Qld) s 31, which sets out the Tribunal's powers when reviewing the appointment of a guardian or an administrator.

536 See *Guardianship and Administration Act 2000* (Qld) s 26, which sets out a number of grounds of automatic revocation.

537 Part 5A the *Succession Act 1981* (Qld), which deals with the appointment of testamentary guardians, had a retrospective commencement date of 23 March 2000. Previously, the appointment of testamentary guardians was dealt with by s 90 of the *Children's Services Act 1965* (Qld). That Act was repealed and replaced by the *Child Protection Act 1999* (Qld) on 23 March 2000.

538 For the purpose of pt 5A of the *Succession Act 1981* (Qld), '***parent*****,** of a child' does not include a parent whose parental authority for the child has been ended by a decision or order of a federal court or a court of a State or a decision or order of another court that has effect in Queensland: *Succession Act 1981* (Qld) s 61A.

539 For the purpose of pt 5A of the *Succession Act 1981* (Qld), '***guardian*****,** of a child' does not include a person who has guardianship of the child, under another Act, in the person's capacity as the chief executive of a department of government of the Commonwealth or a State or as a Minister of the Commonwealth or a State: *Succession Act 1981* (Qld) s 61A.

540 *Succession Act 1981* (Qld) s 61C(1). The appointment is of no effect if the appointor is not a parent or guardian of the child immediately before the appointor's death: s 61C(2).

541 *Succession Act 1981* (Qld) s 61A.

542 *Succession Act 1981* (Qld) s 61D(2).

8.8 If the appointor is survived by one or more parents of the child, the commencement of the appointment depends on the intention of the appointor. If the appointor's will shows that the appointor intended the appointment to take effect on his or her death, the appointment takes effect on the appointor's death.[543] In that situation, the parent may apply to the Supreme Court for an order that the appointment be revoked, suspended until the parent's death or suspended for another period stated in the application.[544] If the appointor's will does not show that the appointor intended the appointment to take effect on his or her death, the appointment does not take effect on the appointor's death, but instead takes effect on the death of the last surviving parent.[545] In that situation, a person who has been appointed as a testamentary guardian may apply to the Supreme Court for an order that the appointment take effect immediately.[546]

8.9 Section 61E of the *Succession Act 1981* (Qld) sets out the powers, rights and responsibilities of a testamentary guardian:

> **61E Effect of appointment**
>
> (1) A testamentary guardian of a child has all the powers, rights and responsibilities, for making decisions about the long-term care, welfare and development of the child, that are ordinarily vested in a guardian.
>
> *Examples of matters concerned with a child's long term care, welfare and development—*
>
> The child's education and religious upbringing.
>
> (2) The appointment of a person as testamentary guardian of a child gives the person daily care authority for the child if and only if—
>
> (a) the child has no surviving parent; and
>
> (b) no-one else has daily care authority for the child (however described) under a decision or order of a federal court or a court of a State.
>
> (3) In this section—
>
> ***daily care authority,*** for a child, means—
>
> (a) the right to have the child's daily care; and
>
> (b) the right and responsibility to make decisions about the child's daily care.

543 *Succession Act 1981* (Qld) s 61D(3)(a).

544 *Succession Act 1981* (Qld) s 61H.

545 *Succession Act 1981* (Qld) s 61D(3)(b).

546 *Succession Act 1981* (Qld) s 61G.

Adult children

8.10 Once a person is 18 years of age, the person is an adult.[547] As a result, the parents of a child with impaired capacity no longer have the power to make decisions for their child once he or she turns 18. Similarly, if a child has a testamentary guardian, the testamentary guardian's powers, rights and responsibilities cease once the child turns 18.

8.11 If the parents of an adult child with impaired capacity are concerned to make financial provision for their adult child in the event that they lose capacity, the parents may make enduring powers of attorney that include specific terms or provisions about how their attorneys are to exercise their powers for financial matters in favour of the parents' adult child (or other children).[548] However, it is not possible for parents to make directions, whether in an enduring power of attorney or otherwise, about guardianship matters in relation to their adult children:[549]

> Enduring powers of attorney, even one covering 'personal matters' rather than property, are of no assistance at all in realising this wish to delegate 'parenting' powers, since parents of adult children have no formal guardianship responsibility to hand over.

8.12 Further, because a testamentary guardian may be appointed only for a person under the age of 18, any provision in the parents' wills appointing a testamentary guardian for their adult child does not have effect.[550]

8.13 The Cerebral Palsy League has referred to the distress experienced by the ageing parents of adult children with impaired capacity:[551]

> Some of the families were mothers who had cared for their disabled children for some 45–50 years. When they realised they had to make other arrangements for their sons/daughters to accommodate their ageing process, they felt vulnerable and unsupported. Consequently they feared the [Adult Guardian's] involvement and 'letting go' and only viewed [the Adult Guardian's] involvement as a 'last resort' or as their own failure to protect the interests of their disabled family members.

---

547 *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'adult').

548 See *Powers of Attorney Act 1998* (Qld) s 32(1).

549 T Carney and P Keyzer, 'Planning for the Future: Arrangements for the assistance of people planning for the future of people with impaired capacity' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 255, 268.

550 See [8.6] above.

551 Submission C86.

IS THERE A NEED FOR AN ALTERNATIVE MECHANISM FOR APPOINTING A GUARDIAN OR AN ADMINISTRATOR?

Existing mechanisms

8.14 Before the commencement of the *Guardianship and Administration Act 2000* (Qld), the legal mechanisms for substitute decision-making for an adult with impaired capacity were largely concentrated in the hands of a public officer.[552]

8.15 The *Guardianship and Administration Act 2000* (Qld) has created more choice in terms of formal substitute decision-makers by establishing the Tribunal and enabling it to appoint individuals as guardians and administrators. Subject to satisfying the requirements in the Act in relation to the grounds for appointment and the eligibility and appropriateness considerations,[553] a parent may be appointed as a guardian or an administrator for his or her adult child.[554] In addition, even without formal appointment, the parent of an adult child with impaired capacity may qualify as the adult's statutory health attorney,[555] in which case the parent is authorised to make decisions in relation to health matters for his or her adult child.

8.16 Although there is considerably greater scope under the *Guardianship and Administration Act 2000* (Qld) for the parents of an adult child with impaired capacity to be formally appointed as their child's guardian or administrator, there is no scope under the Act for parents to make a direction about who should be their child's guardian or administrator when they are no longer able to continue in that role or die. The appointment of a guardian or administrator may only be made by the Tribunal.

8.17 There may, however, be some opportunity under the Act for the parent of an adult child with impaired capacity to have input into the appointment of a future guardian or administrator for his or her adult child if the appointment can be made during the lifetime of the parent and while the parent still has capacity. Section 14 of the *Guardianship and Administration Act 2000* (Qld), which deals with the Tribunal's power to appoint guardians and administrators, enables the Tribunal to appoint successive guardians and administrators:

---

552 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 25. See Ch 2 in relation to the then existing law in Queensland. Financial decisions were generally made by the Public Trustee and health decisions were generally made by the Legal Friend, an office established under the *Intellectually Disabled Citizens Act 1985* (Qld).

553 See *Guardianship and Administration Act 2000* (Qld) ss 12, 14–15, which are considered in Chapter 5 of this Discussion Paper.

554 Of course, if the adult child had capacity at one time, he or she may have made an enduring power of attorney appointing a parent as a guardian or attorney. However, the primary concern of this chapter is the appointment mechanism for a substitute decision-maker for an adult who has never had capacity.

555 See *Powers of Attorney Act 1998* (Qld) s 63 (Who is the statutory health attorney), which is considered in Chapter 10 of this Discussion Paper.

> **14 Appointment of 1 or more eligible guardians and administrators**
>
> …
>
> (4) The tribunal may appoint 1 or more of the following—
>
> …
>
> (e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;

8.18 This power is wide enough to enable the Tribunal, when appointing a parent as the guardian or administrator for his or her adult child, to appoint a person to be the adult's guardian or administrator when the parent's appointment ends, whether through death or loss of capacity, although it is not confined to that situation.[556] It appears, however, that successive appointments are not commonly made.

Direct appointment by a parent

8.19 Although the Commission has not previously sought submissions on this issue, it has received a submission from the parent of a teenager with an intellectual disability, suggesting that legislative reform is needed in relation to this issue. This respondent commented:[557]

> There is a gap in the law at the present time where persons who are disabled or have an intellectual handicap have someone to apply for them to the Guardianship and Administration Tribunal for the appointment of a guardian or financial administrator. In particular, parents with children who have intellectual disabilities do not have an ability to make decisions for the appointment of such persons.
>
> Legislative action is desired to reform this area. Legislation similar to that by which Enduring Powers of Attorney are created could be expressed with some changes to permit parents to make such appointments. The safeguards could be that an appropriate medical practitioner must certify that the child is unlikely to have that capacity. The legislation should also permit the parents to make guidelines and joint appointments.

8.20 What has been suggested is essentially a private form of appointment by a parent, which would not involve the Tribunal:[558]

---

556 See *Re CMB* [2004] QGAAT 20, [2], where the Tribunal, in setting out the history of the application, noted that when it appointed Mr CMB as administrator for his wife, Mrs CMB, it also appointed Mr R (the son of Mr and Mrs CMB) as successive administrator for when Mr CMB 'was no longer competent or it was appropriate for him to act in that capacity'. See also s 57 of the *Guardianship and Administration Act 2000* (Qld), which imposes notice requirements if the power of a previous appointee ends. If that occurs, the previous appointee must advise the next successive appointee of the ending of the previous appointment and the next successive appointee must advise the Tribunal in writing of the change as soon as practicable.

557 Submission C23A.

558 Ibid.

> Listed below are suggestions for your consideration:
>
> 1. The appointment of a guardian for financial and guardianship matters would only be in circumstances where the child is unlikely to be able to make decisions as an adult.
>
> 2. The power should be similar to that in the powers granted by an enduring power of attorney.
>
> 3. The form should be similar to the existing documents under the Power of Attorney Act but with the ability for parents to make joint appointments.
>
> 4. The aim is to privatise the decision making and to give parents a role in their children's lives after death.
>
> 5. The legislation should also permit guidelines to be given to the appointees and should also reflect the principles enshrined in the Guardianship Act.

8.21 It is not clear from this submission whether the proposed scheme would apply to all parents or would apply only if the parent was in fact the appointed guardian or administrator of his or her adult child.

8.22 In its review of guardianship laws for the ACT, the Australian Law Reform Commission ('ALRC') acknowledged the concern that many parents have about who will be their adult child's substitute decision-maker when they are no longer able to perform that role:[559]

> One problem that arises, when a parent is made guardian or manager of an adult incapacitated son or daughter is the parent's concern over making arrangements for the taking over of guardianship or management when the parent either dies or becomes incapacitated.

8.23 The ALRC briefly considered the option of enabling a parent who was a guardian or manager to appoint a new guardian or manager. However, it considered that, as the Tribunal had made the original appointment, the better approach was for the Tribunal, during the life of the parent, to make an appointment that was conditional on the death or incapacity of the parent. This approach would not create a mechanism for private appointments, but would enable a parent to have input into the appointment of a future guardian or administrator for his or her adult child:[560]

> One solution is for the parent to nominate a new guardian or manager. Alternatively, the Tribunal could have the power to appoint an alternative or replacement while the parent is still acting as guardian or manager. The replacement person would then take over upon the parent's death or incapacity. Appointing a replacement ahead of time relieves the existing guardian or manager of worry about what will happen when he or she dies or becomes incapacitated. The latter course of action, whereby the Tribunal rather than the

559 Australian Law Reform Commission, *Guardianship and Management of Property*, Report No 52 (1989) [4.30].

560 Ibid.

> parent appoints a replacement guardian or manager, is preferable because the Tribunal made the original appointment and should make any other appointments. The Tribunal, with its experience, expertise and detachment, will be able to appoint a suitable alternative guardian or manager in consultation with both the incapacitated person and the existing guardian or manager. The simplest way to achieve this objective is for the Tribunal to make an appointment conditional on the death or incapacity of the existing guardian or guardians.

8.24 The ALRC further recommended that, once the conditional appointment became unconditional, the appointment should be reviewed to confirm that the replacement was still suitable:[561]

> Once the condition has been fulfilled and the new guardianship is operating, the Commission recommends that a review should be held to confirm or vary the appointment or, in appropriate cases, to replace the guardian where he or she has ceased to be suitable.

8.25 The ALRC's proposal about the making of conditional appointments is similar in approach to Queensland Tribunal's power under section 14(4) of the *Guardianship and Administration Act 2000* (Qld) to make successive appointments of guardians or administrators.[562]

ISSUES FOR CONSIDERATION

Direct appointment by a parent

8.26 The main issue for consideration is whether the *Guardianship and Administration Act 2000* (Qld) should be amended so that the parent of an adult child with impaired capacity may appoint a guardian or an administrator for his or her adult child without resort to the Tribunal — what is, in effect, a private appointment.

8.27 The private appointment of a substitute decision-maker is provided for by the *Powers of Attorney Act 1998* (Qld). That Act enables an adult with capacity, by an enduring power of attorney, to appoint a person ('the attorney') to do anything in relation to financial matters or personal matters that the adult could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised.[563]

8.28 However, a significant difference between the appointment of an attorney under an enduring power of attorney, as provided for in the *Powers of Attorney Act 1998* (Qld), and a parent's appointment of a guardian or an

---

561 Ibid. This recommendation is implemented by s 19(3) of the *Guardianship and Management of Property Act 1991* (ACT), which requires the Tribunal to consider the suitability of a person as a replacement guardian or manager as soon as practicable after the person becomes a replacement guardian or manager.

562 See [8.17]–[8.18] above.

563 *Powers of Attorney Act 1998* (Qld) s 32(1). Enduring powers of attorney are considered in Chapter 9 of this Discussion Paper.

administrator for his or her adult child is that, in the former case, the appointment is made by the adult for whom the powers will be exercised and at a time when the adult has capacity. In the latter case, the person making the direction is appointing a decision-maker for another person, rather than for himself or herself. Further, while an enduring power of attorney is not revoked by the principal's loss of capacity,[564] it is revoked by the principal's death.[565] Although a binding direction would share some similarities with an enduring power of attorney, to be of real value it would need to survive both the loss of capacity and the death of the parent who made it.

8.29 If the *Guardianship and Administration Act 2000* (Qld) were to be amended to enable a parent to appoint a guardian or an administrator for his or her adult child, it would need to ensure that the making of such an appointment was consistent with the rights and principles underlying the legislation and that it ensured the same safeguards as an appointment made by the Tribunal.

8.30 However, if a mechanism could be developed that was consistent with the rights and principles underlying the legislation and that ensured the same safeguards for the adult as an appointment made by the Tribunal, it would have the potential to:

- remove the uncertainty and distress for the parents of adult children with impaired capacity about who will make decisions for their children when they are no longer capable of doing so or when they die;
- ensure a smooth transition of decision-making for those adults with impaired capacity whose parents choose to make a binding direction;
- avoid the need for a Tribunal hearing as there would be no need for an application to be made for the appointment of a guardian or an administrator for the adult.

Consistency with the Guardianship and Administration Act 2000 (Qld)

8.31 The *Guardianship and Administration Act 2000* (Qld) acknowledges several important matters in relation to the rights of adults with impaired capacity.

8.32 First, the Act acknowledges that an adult's right to make decisions is fundamental to the adult's inherent dignity.[566] As a corollary to this right, the Act provides that an adult 'is presumed to have capacity for a matter'[567] — the matter being the personal or financial matter to which the decision relates. Because the right to make one's own decisions is such a fundamental right, the

564 *Powers of Attorney Act 1998* (Qld) s 32(2).

565 *Powers of Attorney Act 1998* (Qld) s 51.

566 *Guardianship and Administration Act 2000* (Qld) s 5(a).

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

Act requires that, before the Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, it must be satisfied that the adult has impaired capacity for the matter.[568]

8.33 Secondly, the Act acknowledges that the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.[569] As a corollary to this right, the Act provides that, before the Tribunal may appoint a guardian for a personal matter or an administrator for a financial matter, it must be satisfied that:[570]

- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- without an appointment, either the adult's needs will not be adequately met or the adult's interests will not be adequately protected.

8.34 The requirement for the Tribunal to be satisfied of these matters means that the fact that an adult has impaired capacity is not, of itself, sufficient to enable the Tribunal to appoint a guardian or an administrator. These further requirements ensure that the adult's right to make decisions is not too lightly restricted or interfered with.

8.35 If a parent who wishes to make a binding direction appointing a guardian or an attorney for his or her adult child has already been appointed as the adult's guardian or an administrator, then the Tribunal has at some stage made a finding of impaired capacity and has been satisfied that there is a need for formal decision-making for the adult.

8.36 However, if a parent could make a binding direction appointing a guardian or an administrator for his or her adult child, regardless of whether the parent had been appointed in that capacity by the Tribunal, it raises an issue of whether there is a risk that the presumption of capacity might be too readily displaced. That risk might be addressed by the suggestion made earlier that a medical practitioner could certify that the child is unlikely to have capacity (presumably at the relevant time, which would be when the appointment takes effect).[571]

8.37 If the parent has not been appointed as a guardian or administrator by the Tribunal, there may also be a risk that a binding appointment will be made when there is no need for the appointment and that, as a result, the adult child's right to make his or her own decisions might be too readily restricted.

---

568 *Guardianship and Administration Act 2000* (Qld) s 12(1)(a).

569 *Guardianship and Administration Act 2000* (Qld) s 5(d).

570 *Guardianship and Administration Act 2000* (Qld) s 12(1)(b)–(c).

571 See [8.16] above.

Consistency with the safeguards in the Guardianship and Administration Act 2000 (Qld)

8.38 In order to safeguard the interests of adults with impaired capacity, the *Guardianship and Administration Act 2000* (Qld) includes provisions dealing with the eligibility and appropriateness of persons for appointment as guardians and administrators.[572] If parents were to be given the power to make a binding direction for the appointment of a guardian or an administrator, the legislation could be amended to provide that a parent may appoint a person as a guardian or an administrator only if the person would be eligible for appointment by the Tribunal as a guardian or an administrator.

8.39 The eligibility requirements in section 14 of the Act are relatively straightforward, and it would not be particularly difficult for a parent to determine whether they were satisfied. For example, section 14(1)(a) provides that the Tribunal may appoint a guardian for a matter only if the person is:[573]

- a person who is at least 18 years and not a paid carer, or health provider, for the adult; or
- the Adult Guardian.

8.40 Section 14(1)(b) provides that the Tribunal may appoint a person as an administrator only if the person is:

- at least 18 years, not a paid carer, or health provider, for the adult and not a person taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction; or
- the public trustee or a trustee company under the *Trustee Companies Act 1968* (Qld).

8.41 However, section 14(1)(c) further provides that the Tribunal may appoint a person as guardian or administrator only if, having regard to the matters mentioned in section 15(1), the Tribunal considers the person appropriate for appointment. The matters mentioned in section 15(1) — referred to in the legislation as the 'appropriateness considerations' — are as follows:

> (a) the general principles and whether the person is likely to apply them;
>
> (b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;

---

572 *Guardianship and Administration Act 2000* (Qld) ss 14–15. These provisions are considered in Chapter 5 of this Discussion Paper.

573 Note, however, that the Tribunal may appoint the Adult Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter: *Guardianship and Administration Act 2000* (Qld) s 14(2).

(c) the extent to which the adult's and the person's interests are likely to conflict;

(d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;

(e) if more than 1 person is to be appointed—whether the persons are compatible;

(f) whether the person would be available and accessible to the adult; and

(g) the person's appropriateness and competence to perform functions and exercise powers under an appointment order.

8.42 In considering a person's appropriateness and competence for appointment, the Tribunal must also have regard to:[574]

(a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult; and

(b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else; and

(c) if the proposed appointment is of an administrator and the person is an individual—

(i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; and

(ii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors under the *Bankruptcy Act 1966* (Cwlth), part 10 or a similar law of a foreign jurisdiction; and

(iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management, direction or control the person is or was involved.

8.43 An adult's parent would generally be expected to know whether the adult and the person are compatible,[575] whether, if more than one person is to

574 *Guardianship and Administration Act 2000* (Qld) s 15(4).

575 *Guardianship and Administration Act 2000* (Qld) s 15(1)(d).

be appointed, those persons are compatible,[576] and whether the person would be available and accessible to the adult[577] (assuming the person's availability and accessibility remained unchanged between the time of the appointment and the time when it came into effect). However, it might be more difficult for the parent to consider matters such as:

- the General Principles and whether the person is likely to apply them;[578]
- if the appointment is for a health matter — the Health Care Principle and whether the person is likely to apply it;[579]
- the extent to which the adult's and the person's interests are likely to conflict;[580]
- the nature and circumstances of the person's criminal history or history of removal as a guardian, administrator or attorney;[581] and
- the nature and circumstances of any past bankruptcy.[582]

8.44 Another factor to consider is that, even if the person is suitable when he or she is appointed by the parent, the person may not be suitable when the appointment comes into effect — namely, when the parent loses capacity or dies. However, that difficulty is not unique to the concept of a binding direction; it would also be relevant if the Tribunal made a successive appointment where the appointee's powers were not exercisable for a considerable period of time.[583]

8-1 Should the *Guardianship and Administration Act 2000* (Qld) be amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child or is it undesirable for guardians and administrators to be appointed other than by the Tribunal?

576 *Guardianship and Administration Act 2000* (Qld) s 15(1)(e).

577 *Guardianship and Administration Act 2000* (Qld) s 15(1)(f).

578 *Guardianship and Administration Act 2000* (Qld) s 15(1)(a).

579 *Guardianship and Administration Act 2000* (Qld) s 15(1)(b).

580 *Guardianship and Administration Act 2000* (Qld) s 15(1)(c). See also s 15(2)–(3).

581 *Guardianship and Administration Act 2000* (Qld) s 15(4)(a)–(b).

582 *Guardianship and Administration Act 2000* (Qld) s 15(4)(c).

583 See the discussion at [8.17]–[8.18] above of the Tribunal's power under s 14(4)(e) of the *Guardianship and Administration Act 2000* (Qld) to make successive appointments.

Limitations on direct appointment

Requirement for a parent to be the appointed guardian or administrator

8.45 If the *Guardianship and Administration Act 2000* (Qld) is amended to enable a parent to appoint a guardian or an administrator for his or her adult child, an issue that arises is whether a parent should be able to exercise that power only if he or she has already been appointed as the guardian or administrator of his or her adult child.

8.46 Such a limitation would have the advantage of preventing an appointment from being made where the adult does not have impaired capacity or does not have an unmet decision-making need.[584] It would also limit the operation of the provision to those situations where the Tribunal had already found that the parent was appropriate to be appointed.[585]

8.47 However, the imposition of such a limitation could also operate to defeat the utility of the mechanism of direct appointment by a parent. It may be that the reason a parent has not sought to be appointed as the guardian or administrator for his or her adult child is that, because of the parent's support, informal decision-making presently meets the adult's decision-making needs. As a result, the parent might not be able to satisfy the grounds for appointment under section 12(1)(b) and (c) of the Act — namely, that:

> (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
>
> (c) without an appointment—
>
> (i) the adult's needs will not be adequately met; or
>
> (ii) the adult's interests will not be adequately protected.

8.48 Once the adult's parent is no longer capable of providing that support, or dies, it may be that the grounds mentioned in section 12(1) can be satisfied, but by that time the opportunity for the parent to have input into the appointment has been lost.

---

584 See [8.31] above.

585 See the requirement in s 14(1)(c) of the *Guardianship and Administration Act 2000* (Qld).

8-2 If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, should the Act limit the exercise of that power to a parent who has been appointed by the Tribunal as the guardian or administrator for his or her adult child?

The scope of the powers that may be conferred by a binding direction for appointment

8.49 A further issue that arises concerns the range of powers that should be able to be conferred on a guardian or an administrator who is directly appointed by the adult's parent.

8.50 The Act provides that the appointment of a guardian or an administrator may be on terms considered appropriate by the Tribunal.[586] Further, the General Principles provide that:[587]

> a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

8.51 Accordingly, when the Tribunal appoints a guardian or an administrator for a matter, it will not necessarily appoint a guardian for all personal matters or an administrator for all financial matters. If an appointment for only some matters will be sufficient to meet the adult's decision-making needs — for example, the appointment of an administrator for complex financial matters — the Tribunal will make the appointment on those terms.

8.52 If a parent could appoint another person as guardian or administrator only in relation to the matters for which the parent has been appointed, that requirement would be likely to prevent an appointment from being made that was unnecessarily restrictive of the adult's rights. However, if the power to appoint a guardian or an administrator was not limited to a parent who had already been appointed, it would be necessary to ensure by some other mechanism that a guardian or an administrator was not appointed with greater powers than were necessary.

586 *Guardianship and Administration Act 2000* (Qld) s 12(2).

587 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(c).

8-3 If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, how should the Act ensure that the powers conferred on the guardian or administrator do not unnecessarily restrict the adult's rights?

Disagreement between parents

8.53 If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, the situation could arise where one of the adult's parents appoints someone as the adult's guardian or administrator and the other parent appoints a different person.

8.54 It might be possible to avoid this situation by providing that, if an adult has more than one parent who has capacity, an appointment is effective only if both parents make the appointment or, where the appointment is made by one parent, if the other parent consents. However, if there are doubts about the effectiveness of the appointment, third parties might be reluctant to deal with a guardian or an administrator who has been appointed by this mechanism.

8-4 If the *Guardianship and Administration Act 2000* (Qld) is amended to enable the parent of an adult child with impaired capacity to appoint a guardian or an administrator for his or her adult child, how should the Act ensure that, where an adult has two parents with capacity, the parents do not make conflicting appointments?

The power to make a binding direction during the minority of a person with impaired capacity

8.55 A further issue that arises under the terms of reference is whether the parent of a child with impaired capacity should be able to make a binding direction, before his or her child turns 18, for the appointment of a guardian or administrator for the child. Obviously, such an appointment would not take effect before the child turned 18.[588]

588 The *Guardianship and Administration Act 2000* (Qld) provides for advance appointments in ss 13 and 13A. The earliest age at which the Tribunal may appoint a guardian or an administrator for an individual is 17½ years: s 13(1). The appointment takes effect when the individual turns 18: s 13(3). Section 13A includes similar provisions in relation to the appointment of a guardian for a restrictive practice matter.

8.56 A parent might wish to make a binding direction while his or her child is still a minor because of the risk that, by the time the child turns 18, the parent may not have the capacity to make an appointment or may have died. In either situation, the opportunity for the parent to have input into the future decision-making for his or her child will have been lost.

8.57 The issues discussed earlier in this chapter are also relevant to whether a parent should be able to make a binding direction for his or her child before the child turns 18. However, one issue has particular significance in this context. Earlier, the Commission has raised the issue of whether, if the *Guardianship and Administration Act 2000* (Qld) is amended to provide for a binding appointment by a parent, the provisions should apply only to a parent who has been appointed by the Tribunal as a guardian or administrator for his or her child.[589] Such a requirement would generally prevent a parent from making a binding appointment for his or her child before the child turned 18.[590]

8.58 Accordingly, the desirability of extending the mechanism for the making of a binding direction to parents of minor children will be a factor to be taken into account in deciding whether any legislative recognition of binding directions should be limited to parents who have themselves been appointed by the Tribunal as a guardian or administrator of their child.

8-5 Should the *Guardianship and Administration Act 2000* (Qld) be amended to enable the parent of a child with impaired capacity to appoint a guardian or an administrator for his or her child while the child is under 18 years of age?

589 See [8.45]–[8.48] above.

590 The earliest age at which an appointment may be made is 17½: see n 588 above.

Chapter 9

Enduring powers of attorney

INTRODUCTION

9.1 The Commission's terms of reference direct it to review the law relating to enduring powers of attorney as part of its review of the law on personal, financial and health care decision-making under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).[591]

9.2 This chapter gives an overview of the current scheme for enduring powers of attorney in Queensland, followed by an outline of similar measures in other jurisdictions. It then raises some specific issues for consideration. Some of these issues relate to attorneys, including attorneys appointed under advance health directives and, in some instances, to statutory health attorneys.[592]

BACKGROUND

9.3 A general power of attorney is a formal arrangement by which an adult (called the donor or principal) gives authority to another person (called an

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

592 Advance health directives are considered in Chapter 11 of this Discussion Paper and statutory health attorneys are considered in Chapter 10.

attorney) to act on his or her behalf. Traditionally, a power of attorney gave authority in relation to business matters.[593]

9.4 The usefulness of a general power of attorney is limited by two factors. The first is that a general power of attorney is automatically revoked upon the loss of the principal's capacity to manage his or her affairs.[594] This means that a person cannot use a general power of attorney to provide for the future management of his or her affairs in the event of his or her incapacity.

9.5 In many jurisdictions, this limitation was overcome by the statutory creation of enduring powers of attorney that continue to have effect beyond the loss of the principal's capacity.[595] In some cases, the attorney's authority is enlivened only if the principal's decision-making capacity becomes impaired.[596]

9.6 The second limitation of a general power of attorney is that its subject matter does not extend to personal matters.[597] This limitation has been overcome in some jurisdictions by enabling a principal to make an enduring power of attorney for certain personal or health care matters.[598]

9.7 Enduring powers of attorney have several advantages.[599] They are private arrangements that reserve the choice of substitute decision-maker to the adult and minimise the need for intervention by the Tribunal or the court. They are also relatively inexpensive and simple. The passing of decision-making power to a third party in a private arrangement, however, involves a potential for abuse and a resultant need for safeguards. Many aspects of the legislative scheme for enduring powers of attorney are directed to that end.

---

593 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 93.

594 *Powers of Attorney Act 1998* (Qld) s 18(1). This reflects the rule at common law: B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 222.

595 In Queensland, enduring powers of attorney were first introduced by the *Property Law Act Amendment Act 1990* (Qld) s 6 which inserted a new division into the *Property Law Act 1974* (Qld). As to the other Australian jurisdictions, see [9.23]–[9.27] below. An enduring power of attorney which continues notwithstanding the principal's incapacity is also sometimes referred to as a 'continuing', 'lasting' or 'durable' power of attorney.

596 This is sometimes referred to as a 'springing power of attorney' because it springs into effect on the principal's loss of capacity.

597 *Powers of Attorney Act 1998* (Qld) s 8(1). At common law, there was also some doubt whether a principal could delegate authority to make decisions about the principal's personal life rather than his or her business affairs: B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 42.

598 In Queensland, the extension of the subject matter of enduring powers of attorney to personal and health matters was introduced by the *Powers of Attorney Act 1998* (Qld) s 32(1)(a). As to the other Australian jurisdictions, see [9.24]–[9.25] below. See also eg *Protection of Personal and Property Rights Act 1988* (NZ) s 98; *Powers of Attorney Act 1996* (Ireland) s 6(6).

599 Generally Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 83–4; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 93–4.

9.8 It is difficult to determine with accuracy the rate of uptake of enduring powers of attorney. However, research conducted in Queensland has recently been relied on for the following statistics:[600]

- Queensland has the highest uptake of enduring powers of attorney. The national figure is approximately 11 percent of the population while in Queensland it is approximately 16 percent.
- There is a slightly higher proportion of people who live in Brisbane who have an enduring power of attorney (17.6 percent) than those living outside the capital city (16.8 percent).
- Of those people in Queensland who have an enduring power of attorney, a significant proportion are over 65 years old (approximately 42 percent) while approximately 44 per cent are aged between 35 and 64 years, and only 13 percent are under 35 years old.

9.9 Barriers to the uptake of enduring powers of attorney include lack of knowledge about power of attorney provisions, fear of exploitation, family dynamics and difficulties in thinking about future incapacity or advance planning.[601] The Adult Guardian undertakes community education to raise awareness about enduring powers of attorney.[602]

THE LAW IN QUEENSLAND

9.10 Chapter 3 of the *Powers of Attorney Act 1998* (Qld) provides for the making of enduring powers of attorney. By an enduring power of attorney, a principal may appoint an attorney to exercise power for one or more of the principal's financial, personal or health matters.[603] Authority may be given for anything that the principal could lawfully do by an attorney if the principal had capacity for the matter. The principal may also stipulate terms for the exercise

600 Public Advocate Queensland, *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law* (5 December 2006) 7 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub76.pdf> at 31 October 2009 citing research on the management of assets of older people conducted by the University of Queensland School of Social Work and supported by the Australian Research Council in partnership with the Queensland: Department of Families, Public Trustee, Guardianship and Administration Tribunal, Adult Guardian, and Public Advocate (ARC Linkage Grant LP0216561 Management of Assets of Older People, Principal Investigators Dr C Tilse, Dr J Wilson, Dr D Setterlund and Professor L Rosenman).

601 D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 3.

602 Office of the Adult Guardian, *Annual Report 07–08* (2008) 43. The provision of education and advice about the guardianship legislation is one of the Adult Guardian's statutory functions: *Guardianship and Administration Act 2000* (Qld) s 174(2)(h).

603 *Powers of Attorney Act 1998* (Qld) s 32. See also s 69(3) in relation to the execution of instruments by an attorney.

of an attorney's powers. In the absence of such stipulations, the attorney will be taken to have the maximum power that could be given by the document.[604]

9.11 Section 32 of the Act provides:

> **32 Enduring powers of attorney**
>
> (1) By an ***enduring power of attorney***, an adult (***principal***) may—
>
> (a) authorise 1 or more other persons who are eligible attorneys (***attorneys***) to do anything in relation to 1 or more financial matters or personal matters[32] for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and
>
> (b) provide terms or information about exercising the power.
>
> (2) An enduring power of attorney[33] giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter.
>
> 32 *Personal matters* includes health matters but does not include special personal matters or special health matters—schedule 2, section 2.
>
> 33 An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

9.12 A principal may also appoint an attorney in an advance health directive 'to exercise power for a health matter for the principal in the event the directions in the directive prove inadequate'.[605] This is in addition to the principal's ability to make a general appointment for an attorney for personal or financial matters. Advance health directives are specifically discussed in Chapter 11, but many of the issues raised later in this chapter relating to attorneys also apply to attorneys appointed under advance health directives.

9.13 An attorney's power for a personal or health matter is exercisable only during a period when the principal has impaired capacity for the matter.[606] On the other hand, power for a financial matter is exercisable:[607]

- at the time, or in the circumstance, specified in the enduring power of attorney; or

---

604 *Powers of Attorney Act 1998* (Qld) s 77.

605 *Powers of Attorney Act 1998* (Qld) s 35(1)(c). The approved form for making an advance health directive, however, allows a principal, by use of that form, to appoint an attorney to exercise powers for health or other personal matters generally: *Powers of Attorney Act 1998* (Qld) s 442), form 4 <http://www.justice.qld.gov.au/2254.htm> at 31 October 2009.

606 *Powers of Attorney Act 1998* (Qld) s 33(4).

607 *Powers of Attorney Act 1998* (Qld) s 33(1)–(3).

- if no time or circumstance is specified, once the enduring power is made; or

- if the adult has impaired capacity for the matter before the time or circumstance specified in the enduring power of attorney, during any or every period the adult has impaired capacity.

9.14 The principal may appoint one or more attorneys and may appoint different attorneys for different matters:[608]

> **43 Appointment of 1 or more eligible attorneys**
>
> (1) Only a person who is an eligible attorney[45] may be appointed as an attorney by an enduring document.
>
> (2) A principal may appoint 1 or more of the following—
>
> (a) a single attorney for a matter or all matters;
>
> (b) different attorneys for different matters;
>
> (c) a person to act as an attorney for a matter or all matters in a circumstance stated in the enduring document;
>
> (d) alternative attorneys for a matter or all matters so power is given to a particular attorney only in a circumstance stated in the enduring document;
>
> (e) successive attorneys for a matter or all matters so power is given to a particular attorney only when power given to a previous attorney ends;
>
> (f) joint or several, or joint and several, attorneys for a matter or all matters;
>
> (g) 2 or more joint attorneys for a matter or all matters, being a number less than the total number of attorneys for the matter or all matters.
>
> 45 See section 29 (Meaning of *eligible attorney*).

9.15 Jointly appointed attorneys must exercise their power unanimously unless the enduring power of attorney provides otherwise.[609] If two or more attorneys are appointed and the enduring power of attorney does not specify how power is to be shared between them, the appointment is taken to be a joint appointment.[610]

608 *Powers of Attorney Act 1998* (Qld) s 43.

609 *Powers of Attorney Act 1998* (Qld) s 80(1).

610 *Powers of Attorney Act 1998* (Qld) s 78.

9.16 The legislation imposes eligibility requirements for the appointment of attorneys.[611] For example, an attorney must be at least 18 years old. It also imposes other formal requirements for the execution of an enduring power of attorney in relation to the principal's capacity, the use of a prescribed form, and witnessing.[612]

9.17 An enduring power of attorney may be revoked. For example, an enduring power of attorney may be revoked in writing by the principal or by operation of law, such as where the principal dies or makes another enduring power of attorney that is inconsistent with the first.[613] An enduring power of attorney may also be revoked to the extent that it relates to a particular attorney if the attorney resigns, dies, loses capacity or becomes bankrupt.[614] However, the principal cannot revoke an enduring power of attorney if he or she no longer has capacity.[615]

9.18 The legislation imposes certain duties on the exercise of an attorney's power. These are generally reflective of the principles of the law of agency. For example, attorneys must act honestly and with reasonable diligence to protect the principal's interests, and must exercise power subject to the terms of the appointing document.[616]

9.19 Attorneys must also apply the General Principles and the Health Care Principle, consult with any other attorneys or any guardians or administrators for the principal, and maintain confidential information.[617]

9.20 Other duties apply specifically to attorneys appointed for financial matters. For example, attorneys must keep accurate records and accounts, must keep the attorney's property separate from the principal's property, and must not, unless authorised by the principal, enter into conflict transactions.[618] There are also limitations on the types of investments and gifts an attorney may

---

611 *Powers of Attorney Act 1998* (Qld) ss 29(1), 43(1).

612 *Powers of Attorney Act 1998* (Qld) ss 32(1), 41, 44. The capacity and witnessing requirements are examined in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 7.

613 *Powers of Attorney Act 1998* (Qld) ss 47, 49, 50–54. An attorney must not exercise a power if he or she knows it has been revoked: s 71. The maximum penalty for breach of this provision is 200 penalty units.

614 *Powers of Attorney Act 1998* (Qld) ss 55–59AA. As to when an attorney may resign, see ss 72, 82.

615 *Powers of Attorney Act 1998* (Qld) s 47.

616 *Powers of Attorney Act 1998* (Qld) ss 66(1), 67.

617 *Powers of Attorney Act 1998* (Qld) ss 76, 79, 74. The General Principles and the Health Care Principle are examined in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 4, 5. The general duty of confidentiality was the subject of recommendations in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1, ch 8.

618 *Powers of Attorney Act 1998* (Qld) ss 85, 86, 73(1). A conflict transaction is one which may involve conflict between the duty of the attorney toward the principal and either the interests of the attorney or a relation, business associate or close friend of the attorney, or another of the attorney's duties: s 73(2).

make and the extent to which an attorney may provide for the needs of a dependant of the principal.[619]

9.21 The *Powers of Attorney Act 1998* (Qld) contains provisions addressing the extent to which attorneys will be held liable for breaching their duties[620] and includes provisions to protect third parties who rely on the actions of an attorney in certain circumstances.[621]

9.22 Provisions for the proof and registration of enduring powers of attorney and the recognition of similar instruments made in other jurisdictions are also included in the *Powers of Attorney Act 1998* (Qld).[622] These matters are considered below.

THE LAW IN OTHER JURISDICTIONS

9.23 Each of the other Australian jurisdictions makes provision for enduring powers of attorney in relation to a person's financial matters.[623]

9.24 In the ACT, a principal may also appoint an attorney for personal care or health care matters.[624] Provision is also made in South Australia and Victoria for special enduring powers of attorney for medical treatment decisions.[625]

9.25 In addition, the legislation in New South Wales, South Australia, Tasmania and Victoria allows a person to appoint an 'enduring guardian' to act as the person's guardian for personal and health matters if he or she loses decision-making capacity.[626] Similar provision has recently been made in Western Australia.[627] These measures correspond to the provisions in Queensland allowing the appointment of an attorney for health matters in an enduring document.

---

619 *Powers of Attorney Act 1998* (Qld) ss 84, 88, 89.

620 *Powers of Attorney Act 1998* (Qld) ss 97, 98, 105. See also *Guardianship and Administration Act 2000* (Qld) s 24(1).

621 *Powers of Attorney Act 1998* (Qld) ss 99, 100, 101. See also *Guardianship and Administration Act 2000* (Qld) ss 24(2), 77.

622 *Powers of Attorney Act 1998* (Qld) ss 34, 45, 60.

623 *Powers of Attorney Act 2006* (ACT) ss 8, 13(2); *Powers of Attorney Act 2003* (NSW) s 19; *Powers of Attorney Act* (NT) s 13; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) ss 30(1), 31(1); *Instruments Act 1958* (Vic) s 115; *Guardianship and Administration Act 1990* (WA) s 104.

624 *Powers of Attorney Act 2006* (ACT) s 13(2).

625 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(1), (7); *Medical Treatment Act 1988* (Vic) s 5A(1)(a), (aa), (2).

626 *Guardianship Act 1987* (NSW) ss 6, 6E(1); *Guardianship and Administration Act 1993* (SA) s 25(1), (5); *Guardianship and Administration Act 1995* (Tas) s 32(1), (5); *Guardianship and Administration Act 1986* (Vic) ss 35A(1), 35B.

627 The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 11 amends the *Guardianship and Administration Act 1990* (WA) to insert new provisions for enduring guardians. The Act was assented to on 19 June 2008 and will commence on a date to be proclaimed.

9.26 While there are rudimentary similarities between the jurisdictions on some matters, such as the minimum formal requirements for the making of enduring powers of attorney[628] and the primary duties of attorneys,[629] there is greater divergence on other issues such as the registration of enduring powers of attorney and recognition of interstate instruments.

9.27 Where relevant, the legislation in other jurisdictions is referred to throughout the chapter.

ISSUES FOR CONSIDERATION

Achieving the right balance

9.28 Enduring powers of attorney are intended to provide people with a simple, inexpensive means to plan for their future. They are consistent with the principles of autonomy and least restrictive intervention in the lives of adults with impaired capacity by recognising private arrangements made in advance and minimising the need to resort to public guardianship and administration procedures. The importance of autonomy and least restrictive means is recognised in the *Convention on the Rights of Persons with Disabilities* (the 'United Nations Convention').[630]

9.29 Enduring powers of attorney can also be a useful preventive strategy against future abuse, neglect or exploitation by allowing people to appoint someone they trust to take care of their affairs should they become unable to do so themselves. Because adults can stipulate when power for a financial matter is exercisable, an enduring power of attorney can also assist adults who, although they retain capacity, are otherwise vulnerable and need assistance.

9.30 To minimise the risk of misuse of enduring powers of attorney, however, there is a need for safeguards to be included in the scheme. For example, an adult may be pressured or lulled into making an enduring power of attorney without really understanding the significance of doing so.[631] Alternatively, an attorney might fail to use the power appropriately — either

628 For example, the requirement for an enduring power of attorney to be executed in the prescribed manner, signed by the principal, witnessed, and signed by the appointee: see eg, *Powers of Attorney Act 2006* (ACT) ss 13(1), 19, 23; *Powers of Attorney Act 2003* (NSW) ss 8, 19(1)(b), (c), 20, sch 2; *Powers of Attorney Act* (NT) ss 6(2), (4), 13(b), 14. The precise details of those requirements differ between the jurisdictions.

629 In particular, the obligation to protect the principal's interests or act in the principal's best interests: see eg, *Powers of Attorney and Agency Act 1984* (SA) s 7; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(8); *Powers of Attorney Act 2000* (Tas) s 32(1) and elsewhere.

630 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 3(a), 12(4). The Convention is discussed in a separate Discussion Paper: Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 3.

631 Eg L Willmott and L Windle, 'Witnessing EPAs: Empirical Research' (2007) 27 *Queensland Lawyer* 238, 242 in which it was reported that enduring documents are sometimes executed by principals who do not have capacity. See also L Willmott and B White, 'Solicitors and enduring documents: Current practice and best practice' (2008) 16 *Journal of Law and Medicine* 466, 485.

deliberately or out of ignorance of his or her duties.[632] It has been said, for example, that:[633]

> the potential for abuse may arise due to the limited understanding of the provisions by those who had arranged an Enduring Power of Attorney, the complete trust placed in families or professionals to act in their best interests, and the processes involved in using an Enduring Power of Attorney.

9.31 The South African Law Commission has identified a fourfold purpose for safeguards to address these issues:[634]

- First, to provide sufficient evidence that an enduring power has been granted.
- Second, to protect the principal against fraud and undue influence when signing the enduring power. Because a person may execute an enduring power while in a vulnerable state, measures must be provided for to protect the principal from pressure to appoint a self-interested agent.
- Third, to ensure that principals granting enduring powers properly understand the full implications of granting such powers. Lack of knowledge and understanding of the effect of an enduring power is apparently one of the greatest problems faced by other jurisdictions with regard to enduring powers.
- Fourth, to deal with the risk of mismanagement (whether negligent or fraudulent) by the agent after the principal has become incapacitated. Unlike the position under an ordinary power of attorney, the principal under an enduring power can no longer supervise decision-making by the agent and scrutinise the actions of the agent in the way that a person with full capacity can. Protective devices are thus necessary to guard against exploitation.

9.32 Protection of adults with impaired capacity from abuse, neglect and exploitation is expressly recognised in the United Nations Convention[635] and in the General Principles of the guardianship legislation.[636]

9.33 It is also important to balance the need for safeguards with the availability of enduring powers of attorney as a convenient means of advance

---

632 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.47], [3.48].

633 D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 4.

634 South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.49].

635 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 16.

636 The General Principles are discussed in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 4.

planning. The Alberta Law Reform Institute has stated, for example, that:[637]

> It is necessary to recognize that, short of a comprehensive and completely state-administered and state-guaranteed system of administration of the property of incapacitated persons, there is no way to give a 100% guarantee that no person who administers the affairs of an incapacitated person, including an attorney appointed by an EPA, will abuse the powers given to that person. Reasonable safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of cases in which it is utilized.

9.34 An issue for consideration is whether the current legislative scheme achieves the right balance between appropriate safeguards and providing an accessible form of advance planning. The key features of the legislative scheme are described at [9.10]–[9.22] above and safeguards include:

- execution safeguards such as a requirement for writing, a witness's certificate as to the principal's capacity,[638] a formal acceptance of the appointment by the attorney, and the use of a prescribed form;
- eligibility and termination safeguards such as the prohibition on a person who is bankrupt from acting as an attorney for financial matters, and the ability for the principal to revoke the enduring power of attorney while he or she retains capacity;
- the imposition of a number of duties on attorneys including the obligation to exercise power honestly and with reasonable diligence to protect the principal's interests, to take account of the adult's views and wishes, and to consult with other appointees for the adult; and
- supervisory and accounting safeguards such as the obligation on attorneys for financial matters to keep accurate records of all transactions and dealings, and the Adult Guardian's power to instigate an audit of accounts and to suspend an attorney's power in certain circumstances. (noted added)

9.35 Despite the existing measures taken in the legislation to guard against misuse, there is some evidence to suggest that enduring powers of attorney may contribute to, or fail to protect against, abuse in some cases. The Public Trustee, for example, has identified enduring powers of attorney 'as the main source of financial abuse' of older people[639] and the Adult Guardian reports that 'most complaints made to the Adult Guardian are about financial abuse by

---

637 Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Report No 88 (2003) [23]. See also Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [12].

638 The witnessing requirements are examined in a separate Discussion Paper: Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 7.

639 Public Advocate Queensland, Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law (5 December 2006) 6.

attorneys under an enduring power of attorney'.[640] An analysis of Tribunal case files has also suggested that older people with enduring powers of attorney are not always protected from financial abuse.[641]

9.36 That research involved an analysis of 234 cases heard between November 2002 and June 2003 involving adults with impaired capacity aged 65 years and older and in respect of whom an administration order was made. The cases were classified as either non-financial abuse cases or suspected financial abuse cases. Cases were classified as suspected financial abuse cases if there were concerns about the current asset management arrangements for the older person but only if there was substantial data in the files to classify them in this way.[642] The researcher used the following definition of abuse in nominating cases as either non-financial abuse or suspected financial abuse cases:[643]

> any act, or failure to act, which results in a significant breach of a vulnerable person's rights, civil liberties, bodily integrity, dignity or well-being, whether intended or inadvertent, including … financial transactions to which the person has not or cannot validly consent or which are deliberately exploitative.

9.37 Suspected financial abuse cases comprised approximately 26 per cent of the total sample with a mixture of both intentional and inadvertent suspected financial abuse:[644]

> In the majority of SFA [suspected financial abuse] cases, the older person with impaired capacity was subject to 'asset stripping' (77%: n=46). In other cases (23%: n=14), the abuser was more likely to financially abuse through ignorance of expected asset management procedures or the fact that they too, like the older person for whom they were asset managing, had some personal decision-making disability. An example of this would be where the older person with impaired capacity is being asset managed by their partner who is also suspected of having failing capacity.

9.38 In the majority (79 per cent) of the case files analysed, the older person did not have, or was not known to have, an enduring power of attorney.[645] This was consistent with the fact that the applications were often made to the Tribunal because of concerns that financial management arrangements had not been put in place or because there were no family members available to assist

---

640 Adult Guardian Queensland, 'Concerns about abuse' <http://www.justice.qld.gov.au/1331.htm> at 31 October 2009.

641 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.

642 Ibid 25.

643 Ibid.

644 Ibid 26.

645 Ibid 27.

the adult.[646] However, in 65 per cent of the cases identified as suspected financial abuse cases, the adult had given an enduring power of attorney:[647]

> Enduring powers of attorney were almost twice as likely to occur within SFA [suspected financial abuse] cases (65%) as within NFA [non-financial abuse] cases (35%). The greater presence of EPAs in SFA cases suggests that having an attorney did not protect the older person with impaired capacity from financial abuse. In some cases, EPAs were not directly used to access the older person's assets for financial abuse. However, if the EPA was donated and the attorney was aware of financial abuse or irregularities, then a lack of intervention by the attorney in such cases was considered abusive for the purposes of the research because it clearly contravened the obligations of the attorney to safeguard the older person's assets.

9.39 The researcher concluded that proactive measures with respect to education, monitoring and intervention are required to address financial abuse:[648]

> It is not argued here that all people who are attorneys are dishonest. Neither is it suggested that all older people and their assets need monitoring. Particular focus is needed upon those with impaired capacity. Families are managing the assets of older people with impaired capacity and most are doing so in a capable fashion. However, there are some who are using their formal and semi-formal mechanisms in abusive ways either through ignorance of legal requirements or an intentional decision to take over the older person's assets. Best practice would ensure that the family members are supported and monitored in their asset management. The tension in such situations is ensuring that the older person with impaired capacity is safeguarded against financial abuse whilst not making the task of supporting the older person so onerous that a family is not willing to undertake the task.

9.40 The researcher also acknowledged that the results of that study are not generalisable to the whole population of older people with impaired capacity.[649] The research was limited to a sample of Tribunal case files of older adults who had an administration order made by the Tribunal. In addition, in considering an application for administration, the Tribunal is not required to make a specific finding about financial abuse, but must instead apply a set of more general criteria focusing on whether an appointment is necessary to meet the adult's needs or protect the adult's interests with respect to a particular decision or decisions.[650] As a consequence, the classification of particular cases as involving suspected financial abuse was made on the researcher's interpretation of the case files. Further, applications are usually made to the Tribunal only if there is a concern about the inadequacy or inappropriateness of existing decision-making arrangements; it is to be expected that those cases in

646 Ibid.

647 Ibid 28.

648 Ibid 30.

649 Ibid 25.

650 *Guardianship and Administration Act 2000* (Qld) s 12(1).

which enduring powers of attorney are working well would not ordinarily find their way to the Tribunal.

9.41 Caxton Legal Centre Inc has explained, for example, that 'while we sometimes encounter abuse of EPAs, we tend to see even more problematic cases where people have never made an EPA'.[651] Also, in a study by the Australian Institute of Criminology of older people's knowledge and experiences of substitute decision-making processes and abuse most participants whose relatives used an enduring power of attorney on their behalf reported positive experiences.[652] Research conducted in Queensland has also suggested, however, that older people have a limited understanding of the law relating to enduring powers of attorney making them more vulnerable to financial abuse.[653]

9.42 An issue for general consideration therefore is whether the current legislative scheme achieves the right balance. It is also important to consider the role of non-legislative measures, such as continued community education, in preventing misuse of enduring powers of attorney.

9-1 Does the current scheme for enduring powers of attorney under the *Powers of Attorney Act 1998* (Qld) achieve the right balance between the utility of an advance planning mechanism and the need for safeguards against abuse? If no, how should the balance be improved?

Eligible attorneys

9.43 Section 29 of the *Powers of Attorney Act 1998* (Qld) sets out the eligibility requirements for an attorney appointed under an enduring power of attorney (and under an advance health directive):

> **29 Meaning of eligible attorney**
>
> (1) An eligible attorney, for a matter under an enduring power of attorney, means—
>
> (a) a person who is—

651 Caxton Legal Centre Inc, Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law (February 2007) 22 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub112.pdf> at 31 October 2009.

652 D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 4.

653 D Setterlund, C Tilse and J Wilson, 'Older people and substitute decision making legislation: limits to informed choice' (2002) 21(3) *Australasian Journal on Ageing* 128. That research involved interviews and focus groups with a sample of 377 people comprised of older people and their families living in Brisbane and South West rural Queensland and residents living in aged care facilities and retirement villages and their family carers in Brisbane.

(i) at least 18 years; and

(ii) not a paid carer, or health provider, for the principal;[28] and

(iii) not a service provider for a residential service where the principal is a resident; and

(iv) if the person would be given power for a financial matter—not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or

(b) the public trustee; or

(c) a trustee company under the *Trustee Companies Act 1968*; or

(d) for a personal matter only—the adult guardian.

(2) An eligible attorney, for a matter under an advance health directive, means—

(a) a person who has capacity for the matter who is—

(i) at least 18 years; and

(ii) not a paid carer, or health provider, for the principal;[29] or

(b) the public trustee; or

(c) the adult guardian.

28 *Paid carer* and *health provider* are defined in schedule 3 (Dictionary).

29 *Paid carer* and *health provider* are defined in schedule 3 (Dictionary).

Capacity for appointment as an attorney

9.44 Section 29(2)(a) of the *Powers of Attorney Act 1998* (Qld) provides that an eligible attorney for a matter under an advance health directive is a person who, in addition to other specified requirements, 'has capacity for the matter'. However, section 29(1)(a), which sets out the requirements for an eligible attorney for a matter under an enduring power of attorney, does not include a similar requirement. This would appear to be a drafting oversight,[654] which should be corrected to ensure consistency between section 29(1) and (2).

654 There is no suggestion in the *Powers of Attorney Act 1998* (Qld) that a person may be appointed as an attorney for a matter under an enduring power of attorney if the person has impaired capacity for the matter. On the contrary, s 56 of the Act, which applies to both enduring powers of attorney and advance health directives, provides that, if an attorney for a matter becomes a person who has impaired capacity for the matter, the enduring document is revoked to the extent that it gives power to the attorney for the matter.

General requirements for eligibility

9.45 The eligibility requirements are designed to ensure a minimum degree of competency in undertaking the responsibilities conferred on an attorney, for example, in relation to financial transactions.

9.46 The restrictions on eligibility are also intended to minimise conflicts between the interests of the attorney and the interests of the principal:[655]

> The general rule is that attorneys' decisions must be in the best interests of the principal. This is called a fiduciary obligation or obligation of good faith and is the prime obligation imposed by law on attorneys. It follows that attorneys must not be people with interests which conflict with those of the principal. Thus someone like a Director of Nursing, or the superintendent of a hostel, or person in charge of supported accommodation should never be appointed as attorney. Such a person has financial interests which conflict with those of the principal.

9.47 While the tenor of the eligibility requirements in section 29 therefore appears generally appropriate, an issue to consider is whether any additional eligibility requirements should be imposed. The eligibility requirements for an attorney under section 29 are largely consistent with those for the appointment of a guardian or administrator.[656] Sections 14 and 15 of the *Guardianship and Administration Act 2000* (Qld) additionally provide, however, that when deciding whether a person is appropriate for appointment as a guardian or administrator, the Tribunal must have regard, among other things, to:[657]

> (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
>
> (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else.

9.48 In the application form, the proposed guardian or administrator must sign a statutory declaration with respect to a number of issues, including that he or she does not have 'any criminal history, in Queensland or elsewhere' and has not been 'refused or removed from an appointment as a guardian, administrator, attorney or other person making a decision for someone else' in Queensland or elsewhere.[658]

---

655 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 103.

656 *Guardianship and Administration Act 2000* (Qld) s 14(1) provides that a person is not eligible for appointment as a guardian or administrator unless the person is at least 18 years, not a health provider or a paid carer for the adult and, for appointment as an administrator, is not bankrupt or taking advantage of the laws of bankruptcy. This issue is discussed in Chapter 5.

657 *Guardianship and Administration Act 2000* (Qld) s 15(4)(a), (b). See ss 14(1)(c), 15(1)(g).

658 Guardianship and Administration Tribunal Queensland, *Application for Administration, Guardianship Appointment or Review* 23, 31 <http://www.qaat.qld.gov.au/327.htm> at 31 October 2009.

9.49 An issue to consider is whether a person with a relevant criminal or other history should be ineligible for appointment as a person's attorney.[659] This may help protect adults against abuse or exploitation by unscrupulous attorneys. For example, a person with a history of family violence or abuse may be unsuitable for appointment as attorney for a family member. Similarly, a person convicted of fraud may be unsuitable for appointment as a financial attorney.

9.50 The Manitoba Law Reform Commission has recently recommended the inclusion of provisions disqualifying certain persons from acting as financial attorneys under an enduring power of attorney. That Commission recommended, like the Queensland eligibility requirements, the disqualification of a person who provides personal care or health care services to the principal for compensation or who is an employee at a facility in which the principal resides and through which he or she receives personal care or health care services. It also recommended disqualification of:[660]

> an individual who has been convicted within the previous 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust, unless the individual has been pardoned or the donor, in writing, acknowledges the conviction and consents to the individual acting.

9.51 That Commission considered such provisions an important safeguard in the context of financial decision-making where 'the potential for a conflict of interest is high'.[661]

9.52 A similar provision may be useful in Queensland. An issue to consider is how to define the type of past conduct or findings on which ineligibility should depend. For example, not all criminal convictions will indicate unsuitability for appointment. If the net is cast too wide, it may unnecessarily exclude from eligibility persons who are otherwise appropriate and competent. Conviction for traffic offences, for example, may have little bearing on the person's competence as an attorney. In addition, there may be circumstances where there has been no criminal conviction but there is a history of behaviour that undermines the person's appropriateness as an attorney. For example, a person may have had a domestic violence order made against him or her on the application of the principal or someone in the principal's family, or may have

---

659 Eg Submission 46. If a person who is not eligible for appointment is nevertheless appointed as an attorney, the enduring power of attorney may be held invalid. The Supreme Court or the Tribunal may declare a document invalid if satisfied it does not comply with the formal requirements for making the document; that an invalid enduring document is taken to be void from the start: *Powers of Attorney Act 1998* (Qld) ss 109A, 113(2)(b). If an attorney's ineligibility comes to light only after the attorney has begun acting and the principal has lost capacity, the principal will be unable to execute a new enduring document. See also ss 98, 99 with respect to the protection of attorneys and third parties who act on the basis of an invalid enduring document without knowing of the invalidity.

660 Manitoba Law Reform Commission, *Enduring Powers of Attorney: Areas for Reform, Supplementary Report*, Report No 117 (2008) 20.

661 Ibid.

been removed as someone's attorney or administrator because of a failure to act appropriately.

9.53 Another issue to consider is how to implement the ineligibility criteria. It raises the question of how the principal and the witness are to be satisfied of such matters — for example, what inquiries would need to be made and what additional burden and expense this would add. Information about an attorney's past conduct will be peculiarly within the knowledge of the proposed attorney. It may be more appropriate, therefore, to require the attorney to sign a statutory declaration to the effect that he or she does not have a relevant criminal history, for example, and is eligible for appointment. This would be consistent with the approach taken with respect to applications for the appointment of a guardian or administrator.

9.54 Unlike a proposed guardian or administrator, however, an attorney is given authority without the oversight of the Tribunal. While a proposed guardian or administrator must declare that he or she does not have a criminal history, the Tribunal has a discretion to decide whether the person is appropriate and should be appointed, having regard to all the circumstances and available evidence. This is a key difference in the appointments of attorneys on the one hand, and guardians and administrators on the other.

9-2 Are there any difficulties with the eligibility requirements in section 29(1) of the *Powers of Attorney Act 1998* (Qld) for the appointment of an attorney under an enduring power of attorney? If so, how could they be addressed?

9-3 Should section 29 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a person is not eligible for appointment as an attorney under an enduring power of attorney (or under an advance health directive) if he or she has a relevant criminal history or history of other conduct that may undermine his or her competence to act as attorney?

9-4 If yes to Question 9-3, what type of criminal or other history or conduct should be relevant:

(a) a conviction for a criminal offence involving violence or dishonesty;

(b) being named as a respondent to a domestic violence protection order;

(c) removal by a court or tribunal as an adult's attorney, administrator or guardian;

(d) anything else?

Appointment of the Public Trustee or a trustee company as an attorney under an enduring power of attorney

9.55 Although section 29(1)(d) of the *Powers of Attorney Act 1998* (Qld) provides that the Adult Guardian is eligible for appointment as an attorney under an enduring power for personal matters only, section 29(1)(b)–(c) of the Act does not limit the matters in respect of which the Public Trustee or a trustee company is an eligible attorney for a matter under an enduring power of attorney.

9.56 This means that the Public Trustee and trustee companies are eligible attorneys not only for financial matters but also for personal matters. As a result, they may be given power to make decisions under an enduring power of attorney about matters, other than special personal matters or special health matters, relating to the principal's care (including the principal's health care) or welfare, including for example:[662]

- where the principal lives;
- with whom the principal lives;
- whether the principal works and, if so, the kind and place of work and the employer;
- what education or training the principal undertakes;
- whether the principal applies for a licence or permit;
- day-to-day issues, including, for example, diet and dress;
- whether to consent to a forensic examination of the principal;[663]
- health care of the principal;
- a legal matter not relating to the principal's financial or property matters.

9.57 The scope of the matters for which the Public Trustee or a trustee company may be appointed as an eligible attorney under an enduring power of attorney is inconsistent with the scope of their powers under the *Guardianship and Administration Act 2000* (Qld). Under that Act, the Public Trustee or a

662 *Powers of Attorney Act 1998* (Qld) sch 2 s 2.

663 A forensic examination of a principal means 'a medical or dental procedure for the principal that is carried out for forensic purposes, other than because the principal is suspected of having committed a criminal offence': *Powers of Attorney Act 1998* (Qld) sch 3.

trustee company may be appointed as an administrator to make financial decisions for an adult,[664] but may not be appointed as a guardian to make personal decisions (including decisions about health matters) for an adult.[665]

9.58 The current provision is also inconsistent with the recommendation of this Commission in its original 1996 report. In that report, the Commission recommended that:[666]

> the authority of the Public Trustee or a trustee company to act under an enduring power of attorney should be limited to exclude decisions about the personal care and welfare of the person who made the enduring power of attorney.

9.59 The Commission envisaged that decisions about personal matters would be made by either a person who was close to the adult and familiar with the adult's lifestyle and values or the Adult Guardian.[667]

9.60 Although section 29(1)(b) of the *Powers of Attorney Act 1998* (Qld) provides, without any limitation, that the Public Trustee is an eligible attorney 'for a matter under an enduring power of attorney', the Commission has been informed that it is not the practice of the Public Trustee to accept an appointment as an attorney for personal matters under an enduring power of attorney.[668]

9.61 The Commission notes that, in the ACT, a principal may not, in an enduring power of attorney, appoint a corporation as an attorney for a personal care or health matter.[669]

9-5 Should section 29(1)(b)–(c) of the *Powers of Attorney Act 1998* (Qld) be amended to provide that, for a matter under an enduring power of attorney:

(a) the Public Trustee is an eligible attorney for a financial matter only; and

---

664 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

665 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a).

666 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 115. That recommendation was implemented in the draft legislation contained in vol 2 of that report: see Draft Assisted and Substituted Decision Making Bill 1996 cl 37.

667 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 115.

668 Information provided by the Public Trust Office 18 September 2009.

669 *Powers of Attorney Act 2006* (ACT) s 14(2).

(b) a trustee company is an eligible attorney for a financial matter only?

The number of attorneys

9.62 Section 43 of the *Powers of Attorney Act 1998* (Qld) provides for the appointment of one or more attorneys in an enduring power of attorney (or an advance health directive). Different attorneys may be appointed for different matters, or attorneys may be appointed to act jointly or as alternative or successive attorneys. The legislation does not impose a limit on the number of attorneys who may be appointed. This flexibility is important in maximising the extent to which an adult's advance planning can be put into effect.

9.63 Joint appointment of several attorneys may, however, pose practical difficulties.[670] Jointly appointed attorneys can benefit from consultation with each other and each can act as a check on the other, but:[671]

> The arrangement also has a disadvantage. It may become cumbersome to obtain joint consent or signatures when the two people do not live in the same town or city or even the same State or Territory. Further, if the attorneys disagree an application may need to be made to a guardianship board or tribunal, or a court, for a ruling.

9.64 The latter situation may occur, for example, if an ageing parent appoints each of his or her several children as joint attorneys who, in the event the parent loses capacity, are unable to agree on decisions. The possibility of disagreement and family dispute might be reduced if there were a limit on the maximum number of attorneys who could be jointly appointed. On the other hand, the appointment of a number of joint attorneys may act as a safeguard by requiring agreement between several parties.

9.65 A limitation on the number of attorneys who may be jointly appointed under an enduring power of attorney would, however, be consistent with the position under the *Trusts Act 1973* (Qld). Under that Act, the maximum number of trustees of any property is four.[672]

---

670 Jointly appointed attorneys must exercise their power unanimously unless the enduring document provides otherwise: *Powers of Attorney Act 1998* (Qld) s 80(1). The appointment of two or more attorneys is taken to be a joint appointment if the enduring document does not specify how power is to be shared between them: s 78.

671 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 105.

672 *Trusts Act 1973* (Qld) s 11(1)–(2). There are some limited exceptions to this: s 11(3). The maximum limitation of four trustees was recommended by the Queensland Law Reform Commission in its Report on the law relating to trusts and was based on the position in England which had also been adopted in Victoria: see Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) [11]. The Commission commented:

9-6 Should there be a limit on the number of joint attorneys a principal may appoint in an enduring power of attorney? If so, what should the maximum number of joint attorneys be?

The approved form

9.66 Section 44(1) of the *Powers of Attorney Act 1998* (Qld) provides that an enduring power of attorney must be executed in the approved form. Two approved forms are provided: Form 2 (Enduring power of attorney short form) and Form 3 (Enduring power of attorney long form).[673] The existing forms raise a number of issues for consideration.

9.67 First, as noted above, there are two approved forms. The long form is to be used if the principal wishes to appoint different attorneys for financial matters and for personal or health matters. The short form is used if the principal wishes to appoint the same attorney for financial and personal matters, or to appoint an attorney for certain matters only. The forms need to be flexible enough to allow for the different types of appointment a person wishes to make. However, it may be more confusing to do this through the provision of separate forms, rather than by having one form that can accommodate multiple options.

9.68 Secondly, the substantial length of the forms may be intimidating. The short form totals 18 pages, the long form 24. This is compared with the much simpler and shorter form that was used for an enduring power of attorney under the *Property Law Act 1974* (Qld).[674] Part of the reason for the length of the forms is the inclusion of several pages of explanatory information. Such explanation is of critical importance in assisting both principals and attorneys in understanding the import of the document.[675] However, the execution form itself may be more user-friendly if the explanatory information were instead included in an accompanying booklet.[676] On the other hand, it is likely to provide greater assurance that principals will see the explanatory information if it continues to be incorporated into the form rather than being contained in a separate document. This is consistent with consumer protection legislation that

---

> As the law now stands in Queensland there is no upper limit on the permissible number of trustees who may be appointed, and in practice a multiplicity of trustees is productive of considerable expense, delay and inconvenience, particularly where conveyancing is involved and where re-vesting of trust property is necessitated by successive deaths of trustees.

673 Department of Justice and Attorney-General <http://www.justice.qld.gov.au/2254.htm> at 31 October 2009.

674 *Property Law Act 1974* (Qld) sch 2 Form 16A, reprint No 1.

675 R Creyke, 'Privatising Guardianship — The EPA Alternative' (1993) 15 *Adelaide Law Review* 79, 90.

676 Eg South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.81].

prescribes, for particular contracts, particular information that is to be included in the contract itself.[677]

9.69 Thirdly, despite including substantial explanatory information, the existing forms may not necessarily include sufficient explanation or warning of particularly important matters.[678] For example, it is not necessarily obvious from the form that the attorney is not to sign the document, by way of accepting his or her appointment, before the principal has signed. Doing so may, however, render the document invalid. Similarly, the forms do not explain to the principal that an attorney cannot enter a conflict transaction without authority[679] and that a principal should consider whether to authorise particular transactions.[680] In the absence of a requirement to receive legal advice when making an enduring power of attorney, the form (or accompanying explanatory notes) should, arguably, include examples or explanations of such matters.[681]

9.70 Fourthly, the forms may give rise to significant interpretative difficulties in relation to the trigger for a financial power.[682] As noted above, power for a financial matter is exercisable either immediately on making the document, on a particular date specified in the document, or on a particular occasion specified in the document. If the principal intends the power to commence upon the happening of a particular event, such as the principal's loss of capacity, the form of words to be used is left entirely to the individual. The forms do not provide any guidance in this respect, so that it is left to the principal, with whatever assistance is given by the witness or others, to set out with sufficient clarity and specificity the occasion on which the power is to commence.

---

677 Eg Consumer Credit Code (Qld) ss 15(O), 16 and *Consumer Credit Regulation 1995* (Qld) s 15(3)(b); *Retirement Villages Act 1999* (Qld) s 45 and *Retirement Villages Regulation 2000* (Qld) s 4; *Residential Services (Accommodation) Act 2002* (Qld) ss 12, 16 and *Residential Services (Accommodation) Regulation 2002* (Qld) s 3; *Residential Tenancies Act 1994* (Qld) s 38 and *Residential Tenancies Regulation 2005* (Qld) s 6, sch 1 pt 2.

678 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.67], [3.71].

679 *Powers of Attorney Act 1998* (Qld) s 73. A warning about conflict transactions is included in the approved form as part of the explanation specifically addressed to attorneys. This is discussed at [9.134] below.

680 It has also been suggested, for example, that specific authorisation may need to be given to an attorney to deal with the principal's binding death benefit nominations under superannuation funds: Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 3] (Brian Herd).

681 Eg University of Queensland School of Social Work and Applied Human Sciences, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (27 November 2006) 5 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub26.pdf> at 31 October 2009 in which it is noted that the ease with which forms can be obtained and executed, and the absence of a requirement for, and availability of, appropriate legal advice significantly contributes to the potential for financial abuse.

682 Eg University of Queensland School of Social Work and Applied Human Sciences, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (27 November 2006) 4 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub26.pdf> at 31 October 2009 in which it is noted that older people tend to mistakenly believe that the financial power will automatically become exercisable only when the person loses capacity.

9-7 Are there any difficulties with the use of the approved forms for making an enduring power of attorney? If so, how could they be addressed?

9-8 Should there be one approved form that could be used for all types of appointment, rather than two separate forms for different types of appointments?

9-9 Should explanatory information be provided in a separate booklet rather than as part of the form itself?

9-10 Are there any matters that should be explained that are not currently explained in the form? Are there any matters that should be better, or more fully, explained in the form? For example, should the form include a more detailed explanation and warning about conflict transactions?

9-11 Should the forms include a set of standard words for the commencement of power for a financial matter on the principal's loss of capacity?

Copies and proof

9.71 Section 45 of the *Powers of Attorney Act 1998* (Qld) deals with proof of enduring documents, including enduring powers of attorney. It provides that, without limiting the ways in which an enduring power of attorney may be proved, it may be proved by a copy certified in the prescribed manner as a true and complete copy of the original.[683] An enduring power of attorney may also be proved by a certified copy of a certified copy.

9.72 New South Wales, the Northern Territory and Victoria also provide for proof of enduring powers of attorney by certified copy.[684]

9.73 An issue to consider is whether the current provision in Queensland provides sufficient certainty for third parties. While it sets out a procedure for certification of a copy, section 45 does not limit the ways in which an enduring power of attorney may be proved. An issue arises as to the circumstances in which a third party can safely rely on a copy of an enduring power of attorney that is not certified in accordance with the provision.[685] While flexibility is

683 The certification, which must appear on every page, must be given by the principal, a justice of the peace, a commissioner for declarations, a notary public, a lawyer, a trustee company or a stockbroker: *Powers of Attorney Act 1998* (Qld) s 45(4).

684 *Powers of Attorney Act 2003* (NSW) s 44; *Powers of Attorney Act* (NT) s 12; *Instruments Act 1958* (Vic) ss 125ZG–125ZK.

685 This issue was raised in the context of advance health directives in B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 49.

important, additional clarification under the legislation may be warranted. It may be useful, for example, for the legislation to include examples of other ways in which an enduring power of attorney may be proved.

9.74 It might also be appropriate for the approved forms for making an enduring power of attorney to alert principals to the provision in section 45.[686] At present, the explanatory notes at the start of the approved forms advise principals to give a copy of their completed enduring power of attorney to people such as their attorney, doctor, accountant, solicitor or stockbroker. It does not mention, however, the provision for certified copies.

9.75 Issues in relation to the authenticity of an enduring power of attorney might also be addressed by provisions for registration. This is discussed below.

9-12 Should section 45 of the *Powers of Attorney Act 1998* (Qld) clarify the ways in which a copy of an enduring power of attorney may be proved? If so, what ways do you think a copy of an enduring power of attorney could be proved?

9-13 Should the explanatory information provided in the approved forms for making an enduring power of attorney advise the principal to provide certified copies of the document to relevant third parties?

Registration

9.76 Section 60 of the *Powers of Attorney Act 1998* (Qld) provides for the registration of enduring powers of attorney and instruments revoking an enduring power of attorney. While registration is not generally required, if an attorney undertakes land transactions under the authority of an enduring power of attorney, it will need to be registered for the transactions to be valid.[687]

9.77 This is also the position in the ACT and New South Wales.[688]

686 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 51 in the context of advance health directives.

687 *Land Title Act 1994* (Qld) s 132. An attorney's authority to deal with land under a registered enduring power of attorney will not cease until a revocation is also registered, unless a different intention appears from the enduring power of attorney: *Powers of Attorney Act 1998* (Qld) s 60(3); *Land Title Act 1994* (Qld) s 135. A registered power of attorney is evidence of the attorney's authority: *Land Title Act 1994* (Qld) s 134(2).

688 *Powers of Attorney Act 2006* (ACT) s 29(1); *Registration of Deeds Act 1957* (ACT) s 4; *Land Titles Act 1925* (ACT) s 130; *Powers of Attorney Act 2003* (NSW) ss 51, 52. South Australia also provides for voluntary registration of medical powers of attorney: *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14.

9.78 In contrast, the Northern Territory and Tasmanian legislation requires all enduring powers of attorney to be registered[689] and also provides for the registration of interstate enduring powers of attorney.[690] Similarly, the legislation in the United Kingdom requires lasting powers of attorney to be registered.[691]

9.79 Financial and other institutions and service providers are often reluctant to recognise power of attorney arrangements.[692] The federal parliament's Standing Committee on Legal and Constitutional Affairs considered that this lack of recognition could be addressed by:[693]

> the harmonisation of legislation on the instruments and the establishment of a national system of registration that could easily verify substitute decision making arrangements and detect cases where instruments have been revoked, and principals no longer have capacity.

9.80 This reflected the views expressed in a number of submissions made to that Committee's inquiry.[694] Carers Queensland submitted, for example, that:[695]

> Even when people do go to the trouble to arrange formal appointments, they are not always acknowledged by entities such as banks. This is particularly true of EPAs. Instead, older people and their families are sometimes asked to complete additional 'semi-formal' processes for the organisation's own use. This places additional demands on the older person and the carer and negates the purpose of establishing a legal appointment.
>
> It would appear that those organisations who do not acknowledge EPAs do so out of concerns concerning their authenticity. In particular, concerns over whether the person had capacity when they signed the EPA, if it is the most recent EPA, if the EPA has been revoked, etc. Registration of EPAs may improve acceptance of the attorney's authority on relevant matters.

9.81 An issue remaining for consideration in relation to the Queensland legislation is whether any improvements could be made to the existing provision for registration of enduring powers of attorney. One issue to consider is

---

689 *Powers of Attorney Act* (NT) ss 7, 8, 13(c); *Powers of Attorney Act 2000* (Tas) ss 9(1)(i), 16. In Tasmania, an instrument appointing an enduring guardian must also be registered with the Tribunal: *Guardianship and Administration Act 1995* (Tas) s 32(2)(d).

690 *Powers of Attorney Act* (NT) s 7(1)(a); *Powers of Attorney Act 2000* (Tas) s 43.

691 *Mental Capacity Act 2005* (UK) s 9(2)(b), sch 1 pt 2.

692 See Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.117]–[3.143], and submissions made to the Committee.

693 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.142]. See also at [3.134].

694 Eg submissions from University of Queensland School of Social Work and Applied Human Sciences (27 November 2006); Caxton Legal Centre Inc (February 2007); and Alzheimer's Australia (30 November 2006) available from <http://www.aph.gov.au/house/committee/laca/olderpeople/subs.htm> at 31 October 2009.

695 Carers Queensland, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (December 2006) 5 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub81.pdf> at 31 October 2009.

whether registration should be mandatory or optional. This involves a consideration of both the perceived benefits and likely costs and limitations of a registration system.

Verifying the existence and validity of an enduring power of attorney

9.82 There is a need to balance expedient recognition of an attorney's authority, and the care that must be taken by third parties to ensure the validity of that authority to minimise the potential for fraud or abuse. Registration could provide some comfort regarding the existence and validity of an enduring power of attorney and could help prevent abuse.[696] The Law Commission of England and Wales commented, for example, that:[697]

> A straightforward administrative registration procedure can have the merit of bringing a document into the pubic domain and establishing its formal validity. A mark of validity can be of benefit to both donor and donee. A process of registration involving a public body will undoubtedly discourage some people who might abuse powers which remain in the private domain and will provide a point of reference for those who have queries or concerns about the status of a particular document. Registration can also serve to distinguish [continuing powers of attorney] from ordinary powers of attorney.

9.83 There are likely to be limitations, however, on the extent to which a registration system can ensure the validity of a registered instrument. It is doubtful, for example, whether the administrative task of verifying the formal requirements for a valid instrument would permit of any serious consideration of whether or not the principal had the requisite capacity to execute the document, or whether it was executed under duress or undue influence.[698] Reliance would probably be placed on the witness's certificate in this regard, pointing to the concomitant need for sufficiently rigorous witnessing requirements.[699] At present, a power of attorney is registered by the land titles office if it is signed, witnessed and otherwise in the correct format.[700]

9.84 There are also likely to be limitations on the extent to which a registration system can adequately record the status of an enduring instrument. By what means, for example, could the registration authority verify that the power has in fact come into operation, particularly if the power is one that begins only on the principal's loss of capacity? Would it require, for example,

---

696 Eg A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *Journal of Adult Protection* 20 in which it is suggested that the registration of enduring powers of attorney and/or monitoring of enduring powers of attorney through enhanced accountability procedures could improve the proactive responses to financial abuse of older people.

697 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.30].

698 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 151.

699 The witnessing requirements for enduring documents are considered in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 7.

700 Information provided by Land Officer, Department of Natural Resources (19 February 2009).

the registration of a medical certificate? Similarly, there may be serious consequences for a principal who has revoked an enduring power of attorney but not yet had time to register the revocation[701] (particularly in relation to financial transactions).

9.85 An advantage of mandatory registration is that third parties can verify the existence of an enduring power of attorney. An issue to consider in this respect is the extent to which the register should be searchable. Such a facility may address concerns about proving copies of documents.

9.86 At present, the land titles register, on which enduring powers of attorney may be registered, is searchable. A general inquiry, by name of the principal or attorney, can be made as to whether or not a power of attorney is registered. In addition, a copy of the instrument can be obtained on payment of a fee. Such information is important with respect to land transactions.

9.87 However, the ability to search a register of enduring powers of attorney raises serious privacy implications for enduring powers of attorney involving other matters, especially given that such instruments may contain quite sensitive personal information. It also has significant resource implications given that access to such information would require case-by-case assessment and monitoring.[702]

Encouraging reliance on an attorney's authority

9.88 As noted above, service providers and other institutions are often reluctant to recognise power of attorney arrangements. In particular, such difficulties have been noted with respect to Centrelink, the Australian Government agency responsible for delivering Commonwealth services and benefits.[703]

9.89 The Federal Parliament's Standing Committee on Legal and Constitutional Affairs considered that a national system of registration of powers of attorney 'should have the benefit of facilitating the recognition of substitute decision making instruments by Commonwealth instrumentalities'.[704] It is unclear, however, whether a system of registration would encourage greater reliance by Centrelink on an attorney's authority. While registration may allow Centrelink to verify the existence of a power of attorney and to obtain a copy of the instrument itself, there is nothing in the relevant Commonwealth legislation requiring Centrelink to recognise the authority of an attorney.

---

701 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 157.

702 Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [40]; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 152.

703 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 7.

704 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.134].

9.90 At present, Commonwealth legislation makes provision for people's dealings with Centrelink to be managed by a 'nominee' on their behalf.[705] Under the *Social Security (Administration) Act 1999* (Cth), a 'payment nominee' can be appointed to receive payments on behalf of the recipient, or a 'correspondence nominee' can be appointed to deal with Centrelink on the recipient's behalf, for example, by making an application or claim for the recipient.[706] The same person may be appointed as both the payment and correspondence nominee for the recipient.[707]

9.91 A person must not be appointed as nominee except with the appointee's written consent and after taking into account the recipient's wishes (if any) with respect to such an appointment.[708]

9.92 A recipient can authorise the appointment of a nominee by lodging a form.[709] The form requires the recipient to stipulate the reason for making the nominee arrangement. If it is because of a power of attorney or a court, Tribunal or guardianship or administration order, supporting documents must be attached. If the recipient is 'unable to sign due to physical, psychiatric or intellectual disability', the form may be signed by someone else on the recipient's behalf. However, that person must not be the person being authorised as nominee. Evidence of the recipient's inability to sign the form must also be attached.

9.93 The Centrelink nominee provisions were intended to facilitate family arrangements:[710]

> It is reasonably common for children of an elderly person who can no longer manage their own affairs to manage the financial affairs of their parent and to handle their correspondence relating to their age pension. It is also common for parents of children with a disability to manage the financial affairs of their children and to handle their correspondence relating to disability support pension. The new provision facilitates such arrangements.

9.94 The Federal Parliament's Standing Committee on Legal and Constitutional Affairs noted that, in determining nominee arrangements, powers

---

705 *Social Security (Administration) Act 1999* (Cth) pt 3A.

706 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C, 123F, 123H. Australian Government, Centrelink also makes provision for a recipient to authorise a 'person permitted to inquire' who may make enquiries of Centrelink on the recipient's behalf: Centrelink, *Someone to deal with Centrelink for you* <http://www.centrelink.gov.au/internet/internet.nsf/services/nominee.htm> at 31 October 2009.

707 *Social Security (Administration) Act 1999* (Cth) s 123D(1).

708 *Social Security (Administration) Act 1999* (Cth) s 123D(2).

709 Australian Government, Centrelink, Authorising a person or organisation to enquire or act on your behalf <http://www.centrelink.gov.au/internet/internet.nsf/forms/ss313.htm> at 31 October 2009.

710 Explanatory Memorandum, Family and Community Services Legislation Amendment (Budget Initiatives and Other Measures) Bill 2002 (Cth) 3.

of attorney will be taken into account:[711]

> Representatives from Centrelink advised the Committee that, in making nominee arrangements, they 'take into account any current arrangements that may exist, such as a power of attorney', and 'in the normal course of events such an arrangement would be sufficient'.[712] In a further appearance before the Committee, Centrelink added that whether a power of attorney is accepted for a nominee arrangement 'depends on what is contained in the… agreement'.[713] (notes in original)

9.95 In evidence to the Standing Committee, a Centrelink representative gave the following explanation of the policy on recognition of powers of attorney:[714]

> We do not seek to override any powers of attorney or any state based arrangements. We do have, though, an arrangement in place under the Social Security Act to establish nominee arrangements for either correspondence or payment. Of course, we take into account current arrangements that are in place—powers of attorney or otherwise—in making that determination. With the variation of arrangements state by state—there is quite a degree of difference—we run a national universal comprehensive welfare system that needs a national consistent method of dealing with issues, and this is one of the issues. The nominee arrangements are specific to and quite explicit in the *Social Security Act* and, when we are making judgements on establishing those nominee arrangements, we take into account any current arrangement that may exist, such as a power of attorney.

9.96 While power of attorney arrangements are taken into account in determining Centrelink nominee arrangements, the Commonwealth legislation does not expressly require a person who is relevantly authorised under a power of attorney made under State legislation to be recognised as a nominee. Concerns have been raised that 'powers of attorney are not automatically recognised as authorisation for a nominee where the principal has lost capacity'.[715] In the absence of legislative recognition, the role of registration in encouraging greater reliance on power of attorney arrangements remains questionable.

Resource and privacy implications

9.97 It is also important to bear in mind that any system of compulsory registration is likely to have significant resource implications and to add an additional, burdensome layer of complexity and expense to the process of

---

711 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.125].

712 Mr Paul Cowan, Centrelink, *Transcript of Evidence*, 23 March 2007, 5, 6.

713 Mr Roy Chell, Centrelink, *Transcript of Evidence*, 17 August 2007, 32.

714 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 23 March 2007 [LCA 5] (Paul Cowan).

715 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 3] (Brian Herd).

advance planning for adults and their families.[716] It also raises the question of who should be responsible for administering such a registration system.

9.98 At present, general and enduring powers of attorney are registrable on the land titles register maintained by the Department of Environment and Resource Management. Registration involves a minimum fee of $124.20.[717] If registration were to become mandatory, the number of lodgements would likely increase and would need to be met by increased funding.

9.99 The responsibility for operating a compulsory registration system would be a considerable administrative burden. If the register were to track information about the validity of the instruments, there may be an advantage in transferring responsibility to an agency that is familiar with the guardianship legislation, such as the Public Advocate, the Adult Guardian or the Public Trustee. However, this would represent a considerable expansion of the functions of that agency, may detract from core functions and would need to be met by an increase in staffing and resources.[718] It might also involve an undesirable perception of conflict of interest.

9.100 It is also important to remember that enduring powers of attorney may bear on land transactions such that their continued registration in the land titles register seems entirely appropriate.

9.101 A final consideration is that the imposition of a system of mandatory registration would add to the already large list of agencies with whom adults and their families and carers are required to interact to facilitate day-to-day transactions.

9-14 Should the *Powers of Attorney Act 1998* (Qld) provide for registration of enduring powers of attorney, and why or why not?

9-15 If yes to Question 9-14:

(a) should registration be mandatory or optional; and

(b) what other features should the registration system have?

716 Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [40]; Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report, Enduring Powers of Attorney*, Report No 47 (1988) [30].

717 *Land Title Regulation 2005* (Qld) sch 2 item 2(m).

718 In the late 1980s, for example, the Australian Law Reform Commission considered whether the Public Trustee should act as a registration authority in the ACT. It recommended against this, however, partly on the basis that the Public Trustee would have insufficient resources to properly scrutinise enduring powers of attorney and that this could in fact hinder the Public Trustee's ability to perform its more general supervisory and advice role: Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report, Enduring Powers of Attorney*, Report No 47 (1988) [29]–[30].

Notice provisions

9.102 Some overseas jurisdictions include, or have considered, mandatory notice requirements in relation to the execution, registration or commencement of an enduring power of attorney. These provisions are designed to inform interested parties about an enduring power of attorney that has come into existence so that any objections to it can be ventilated at an early stage. At present, similar provisions are not included in the *Powers of Attorney Act 1998* (Qld) nor in the legislation in other Australian jurisdictions.

9.103 The legislation in Ireland, for example, provides a two-tier system of notice.

9.104 First, notice must be given of the execution of the enduring power of attorney to at least two persons who are named by the principal in the enduring power as persons to whom notice must be given, one of whom must be the principal's spouse, child or relative.[719]

9.105 Secondly, notice must be given prior to registration. An attorney under an enduring power of attorney who 'has reason to believe that the donor is or is becoming mentally incapable' must apply to the court to register the instrument.[720] Before making the application, the attorney must give notice of his or her intention to apply for registration to the principal, the persons notified of the execution of the instrument, and any joint attorneys.[721] A notified person then has a period of five weeks from the date of the notice to lodge a written objection to the registration with the court on one or more of the following grounds:[722]

(a) that the power purported to have been created by the instrument was not valid;

(b) that the power created by the instrument is no longer a valid and subsisting power;

(c) that the donor is not or is not becoming mentally incapable;

(d) that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney;

(e) that fraud or undue pressure was used to induce the donor to create the power.

---

719 *Powers of Attorney Act 1996* (Ireland) s 5(2); *Enduring Powers of Attorney Regulations 1996* (Ireland) s 7.

720 *Powers of Attorney Act 1996* (Ireland) s 9(1).

721 *Powers of Attorney Act 1996* (Ireland) s 9(2), sch 1 cll 1, 2, 8. The Act also makes provision to identify the persons entitled to receive notice if notice cannot be given to the persons who received notice of the execution of the document.

722 *Powers of Attorney Act 1996* (Ireland) ss 9(2), 10(3), sch 1 cl 6. This does not apply to the principal.

9.106 The *Mental Capacity Act 2005* (UK) also requires pre-registration notice to be given to the persons named in the instrument and, once the application for registration is made, to the principal or the attorney (depending on who has made the application).[723] Notified persons have five weeks from the date of the notice within which to object to the registration.[724]

9.107 The Law Commission of England and Wales considered that notice to the principal of the intention to register is especially important:[725]

> It may be some time since the document was executed and, in any event, the act of registration will significantly alter matters by triggering the attorney's power to act. The donor must be warned that this is in prospect and be given an opportunity to prevent registration.

9.108 An alternative mechanism, which is not dependent on a system of registration, is to require the attorney to give notice of his or her intention to begin exercising power under the enduring power of attorney. The Western Canada Law Reform Agencies have recently recommended such a system.[726] Under their proposal, an attorney would be under a statutory duty to give a 'Notice of Attorney Acting' to:

- the principal; and
- the persons named in the enduring power of attorney as persons who are to receive the notice; or
- where no such designation is made in the instrument, the principal's immediate family members.

9.109 If there is no person to whom the attorney can give the notice, the attorney must give the notice to the appropriate public official, such as the Public Guardian. The notice would need to be given 'within a reasonable period after the donor becomes incapacitated and the attorney assumes exclusive responsibility for managing the donor's financial affairs'.[727]

---

723 *Mental Capacity Act 2005* (UK) s 9, sch 1 cll 6–8. The principal may name up to five persons who are to receive notice in the lasting power of attorney: *Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) s 6.

724 *Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) ss 14, 15.

725 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.34].

726 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008) 63, rec 12. The Western Canada Law Reform Agencies comprises the Alberta Law Reform Institute, the British Columbia Law Institute, the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan. See also Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Report No 88 (2003) [29]–[41].

727 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008) [158].

9.110 In recommending the duty to notify, the Western Canada Law Reform Agencies noted that:[728]

> The point in time when the donor is declared to lack capacity to manage financial affairs and the attorney begins acting without the donor's supervision is a good point at which to let family members, and possibly other persons, know that the attorney is now acting independently. Doing so will place the attorney's actions under the scrutiny of a select group of persons.

9.111 An issue to consider is whether the *Powers of Attorney Act 1998* (Qld) should make provision for any similar notice requirements. Such provisions may serve to ensure some measure of scrutiny in relation to the actions of an attorney. This will be particularly important when the principal has impaired capacity and cannot supervise the attorney's actions. It has been noted, for example, that:[729]

> In many cases, these are secretive processes kept away from the other members of the family who only discover what has been going on once the worst has happened. A form of notification and registration is a way of reducing potential misuse of these documents as well.

9.112 It is also important, however, not to unjustifiably infringe the adult's privacy. Mandatory notice to family members, irrespective of the principal's wishes, 'conflicts with the autonomy principle'.[730] Similarly, it is necessary to consider how notice requirements, such as a 'Notice of Attorney Acting', would operate with respect to a principal who experiences fluctuating or intermittent periods of impaired capacity. For example, a notice requirement may necessitate a large number of notices regarding the periods when the principal does and does not have capacity. Such a requirement is also likely to impose significant costs on the parties.

9-16 Should the *Powers of Attorney Act 1998* (Qld) include any notice requirements in relation to the execution or commencement of an enduring power of attorney?

9-17 If yes to Question 9-16, what sort of notice should be required:

(a) notice of the execution of an enduring power of attorney;

(b) notice of the attorney's intention to begin exercising power under the enduring power of attorney;

728 Ibid [145].

729 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007, [LCA 9] (Brian Herd).

730 Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [7.37].

(c) some other notice?

9-18 If yes to Question 9-17, to whom should notice be given:

(a) the principal;

(b) the persons named in the enduring power of attorney by the principal as persons who are to receive notice;

(c) members of the principal's family;

(d) members of the principal's 'support network' (defined as including members of the adult's family, close friends of the adult, and any other people the Tribunal decides provide support to the adult);

(e) 'interested persons' (defined as persons with a sufficient and continuing interest in the adult);

(e) to some other person?

Declaration of impaired capacity

9.113 Section 33(5) of the *Powers of Attorney Act 1998* (Qld) provides that:

> (5) If an attorney's power for a matter depends on the principal having impaired capacity for a matter, a person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has the impaired capacity.

9.114 Under section 110 of the *Powers of Attorney Act 1998* (Qld), a person may also apply to the Supreme Court[731] or the Tribunal[732] for a declaration in relation to an enduring power of attorney. Section 115 provides:

> **115 Declaration about commencement of power**
>
> The court may make a declaration that—
>
> (a) a power, under a power of attorney, enduring power of attorney or advance health directive, has begun; or
>
> (b) the principal has impaired capacity for a matter or all matters.

731 *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'court').

732 *Powers of Attorney Act 1998* (Qld) s 109A.

9.115 The persons who may apply for a declaration include the principal, an attorney, a member of the principal's family, the Adult Guardian, the Public Trustee and an 'interested person'.[733]

9.116 Sections 33(5) and 115 provide for a measure of certainty about the commencement of an enduring power.[734] They also provide a flexible procedure in that a medical certificate or declaration is not required in all cases, but may be sought in those circumstances where there is some doubt or dispute.

9.117 An alternative procedure has been adopted, and considered, in some other jurisdictions. In the Canadian provinces of Alberta, Manitoba and Saskatchewan, for example, a written declaration as to the principal's loss of capacity is required for powers that begin only if the principal has impaired capacity.[735] Section 6(1)–(5) of Manitoba's *Powers of Attorney Act* is typical:

> **Power in force at future time**
>
> 6(1) A donor may provide in the power of attorney that it comes into force at a specified future date or on the occurrence of a specified contingency.
>
> **Donor may appoint declarant**
>
> 6(2) The donor may in the power of attorney name one or more persons from whom the attorney may request a written declaration that the date or contingency has occurred.
>
> **Attorney may be declarant**
>
> 6(3) The donor may in the power of attorney name the attorney as the declarant or one of the declarants.
>
> **Doctors may declare mental incompetence**
>
> 6(4) Where a power of attorney provides that it comes into force on the mental incompetence of the donor, two duly qualified medical practitioners may act as the declarant if the donor does not name a declarant in the power of attorney or if the named declarant is unable or unwilling to provide a declaration.
>
> **Release of confidential information**
>
> 6(5) Despite any statutory or other restriction relating to the disclosure of information, if a power of attorney provides that it comes into force on the mental incompetence of the donor, information respecting the donor's health may be disclosed to the extent necessary for a

733 *Powers of Attorney Act 1998* (Qld) s 110(3). An interested person is defined in sch 3 of the Act as a person with a sufficient and continuing interest in the other person.

734 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 124.

735 *Powers of Attorney Act,* RSA 2000, c P-20, s 5; *Powers of Attorney Act,* CCSM c P97, s 6(1)–(4); *Powers of Attorney Act,* 2002, SS 2002 c P-20.3 ss 9.1, 9.2.

> declarant, a duly qualified medical practitioner or the court to determine whether the specified contingency has occurred.

9.118 The Law Commission of New Zealand recommended the adoption of a similar requirement. It suggested that a certificate from a registered medical practitioner that the principal has become 'mentally incapable' should be required before the attorney can act under the power.[736] It considered that the requirement would help protect principals from having power exercised before they have lost capacity and, by establishing the attorney's authority to act, would also protect attorneys and third parties. It acknowledged, however, that:[737]

> The wording of section 98(3) suggests that the attorney's powers cease if the donor should recover capacity, so that a relapse will require a new certificate. It will be necessary to protect innocent third parties who rely on a certificate unaware of a subsequent recovery of capacity.

9.119 The South African Law Commission noted that a declaration may not reflect a 'correct' determination of the principal's capacity.[738] It proposed, instead, that an affidavit as to the principal's loss of capacity be filed with the application for registration of the enduring power of attorney and that the registering authority be able to call for further evidence as to the principal's mental capacity before registering the instrument.[739]

9.120 An issue to consider is whether any similar provision should be made in Queensland. It may be desirable, for example, to require a medical certificate or declaration from the Tribunal for the power to commence. This may help prevent misuse of enduring powers of attorney and may give the principal, the principal's family members and other interested parties an opportunity to scrutinise the enduring power before it comes into effect. Such a preventative approach may be useful.

9.121 On the other hand, it may be more appropriate to retain the flexibility of the existing provisions, whereby a medical certificate or declaration may, but need not, be sought. A mandatory requirement would add further formality to what is intended to be a simple, inexpensive method of advance planning. It may also lead to an unwarranted intrusion into private affairs. The possible delay involved in seeking a medical certificate or declaration may also have deleterious consequences for the adult, for example, if the onset of impaired capacity is sudden and a decision needs to be made quickly. It is also likely to present significant difficulties for a person with fluctuating capacity.

---

736 Law Commission (New Zealand), *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) [30].

737 Ibid [31].

738 South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.89].

739 Ibid [7.103].

9.122 An alternative measure may be to inform people about the opportunity to seek a medical certificate or a declaration. For example, it may be useful to include information about the ability to seek a declaration from the Supreme Court or the Tribunal in the approved forms for making an enduring document. The approved forms might state, for example, that, if the attorney is in some doubt about whether he or she can commence acting under the power, it is advisable to seek a declaration from the Tribunal. This approach has the advantage that it puts people on notice about the procedure but does not arbitrarily impose a formal procedure in all cases.

9-19 Should the *Powers of Attorney Act 1998* (Qld) require a medical certificate or a declaration from the Tribunal before an attorney can act under an enduring power of attorney, and why or why not?

9-20 Alternatively, should the approved forms for making an enduring power of attorney explain a person's ability to seek a medical certificate as to the principal's capacity or a declaration from the Tribunal or the Supreme Court if there is some doubt about whether an attorney's authority has commenced?

Interstate recognition

9.123 Under section 34 of the *Powers of Attorney Act 1998* (Qld), an enduring power of attorney that was validly made in another Australian jurisdiction is to be recognised in Queensland 'to the extent the powers it gives could validly have been given by an enduring power of attorney made under [the] Act'.

9.124 In the ACT, New South Wales, the Northern Territory and Victoria, the legislation recognises an enduring power of attorney made in another Australian jurisdiction 'to the extent that the powers it gives could validly have been given' by an enduring power of attorney in the recognising jurisdiction.[740]

9.125 In Victoria, an interstate instrument will be recognised only if it complies with the requirements of the interstate jurisdiction in which it was made. Similarly, in Tasmania, an instrument made in another State, Territory or other place that is of the same, or substantially the same, effect as an enduring power of attorney made in Tasmania may be registered, but only if it was executed in accordance with the law of the other jurisdiction.[741]

740 *Powers of Attorney Act 2006* (ACT) s 89; *Powers of Attorney Act 2003* (NSW) s 25; *Powers of Attorney Act* (NT) s 6A(4), (5); *Instruments Act 1958* (Vic) s 116. In relation to instruments appointing enduring guardians see *Guardianship Act 1987* (NSW) s 6O; *Guardianship Regulation 2005* (NSW) s 7; *Guardianship and Administration Act 1995* (Tas) s 81A.

741 *Powers of Attorney Act 2000* (Tas) ss 43, 47(1).

9.126 In contrast, under recent amendments made in Western Australia, an attorney appointed under a power of attorney made in another Australian State or Territory or another country may apply to the State Administrative Tribunal for an order recognising the instrument as an enduring power of attorney.[742] The Tribunal may make the order if it is satisfied that the power of attorney sufficiently corresponds in form and effect to an enduring power of attorney created under the Western Australian legislation and that it is appropriate to do so.[743]

9.127 The South Australian legislation is silent on the issue of interstate recognition.

9.128 The key problems with the recognition of enduring powers of attorney were recently summarised by the Western Canada Law Reform Agencies:[744]

> The non-recognition of EPAs from one province to another impinges on the mobility rights of persons who rely on EPAs. Because the formalities and content of EPAs are not uniform across provinces, an attorney may encounter difficulties dealing with the donor's affairs when the donor owns property in, or moves to, a province other than the province where the EPA was made. Persons or institutions with whom the attorney needs to transact business may refuse to recognize the foreign EPA. Some donors may have the foresight to prepare two separate EPAs — one that complies with the formalities of the originating jurisdiction and one that complies with the formalities of the jurisdiction they will end up in. However, this precaution is unlikely to be carried out unless a lawyer has been involved in the preparation of the initial EPA and knows that the donor has property in another jurisdiction or anticipates that the donor is likely to move to another jurisdiction. Unlike the donor of a non-enduring power of attorney, a donor who is incapacitated cannot cure the defect by making a new EPA.

9.129 This echoes the tenor of the concerns expressed in Australia.[745]

9.130 The recognition of interstate powers of attorney has been on the agenda of the Standing Committee of Attorneys-General ('SCAG') since 2000 when it recommended the implementation of draft mutual recognition

---

742 *Guardianship and Administration Act 1990* (WA) s 104A(1).

743 *Guardianship and Administration Act 1990* (WA) s 104A(2). Similar provision is made for the recognition of an instrument appointing an enduring guardian: s 110O. Section 110O of the *Guardianship and Administration Act 1990* (WA) will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

744 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Report (2008) [26]. See also South African Law Commission, *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity*, Discussion Paper No 105 (2004) [7.161]:

> The most pressing problem usually relates to the possible non-validity of an enduring power because of differences in execution formalities of enduring powers in different jurisdictions.

745 See eg Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.17]–[3.18], [3.26]–[3.43].

provisions.[746] While many jurisdictions have implemented such provisions, the approach is not uniform and difficulties persist.[747] In 2007, the Federal Parliament's Standing Committee on Legal and Constitutional Affairs recommended that SCAG encourage the States and Territories to amend legislation to maximise the recognition of enduring powers of attorney.[748] SCAG is continuing to examine the issue as part of its national harmonisation agenda and has 'agreed to undertake a project to improve the effectiveness of mutual recognition of powers of attorney between jurisdictions'.[749]

9.131 An issue to consider is whether section 34 of the *Powers of Attorney Act 1998* (Qld), which deals with the recognition of interstate enduring powers of attorney, might be improved.

9.132 First, unlike some of the other Australian jurisdictions, Queensland's provision does not extend to New Zealand or, indeed, to any other foreign jurisdictions.

9.133 Secondly, the provision requires interpretation of individual documents; it does not provide automatic recognition.[750] In particular, an attorney seeking to rely on a power given under an interstate document would need to satisfy third parties that the document was validly made in the other jurisdiction and that the powers are compatible with those that may be granted under the Queensland legislation. Without detailed legal knowledge, this would seem to present a significant hurdle.[751] In Western Australia, this is addressed by requiring an application to the Tribunal.

9-21 Are there any difficulties with section 34 of the *Powers of Attorney Act 1998* (Qld), which deals with the recognition of interstate enduring powers of attorney? If so, how could they be addressed?

---

746 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.34]–[3.35]. SCAG comprises the Attorneys General of the Commonwealth, States and Territories of Australia and the Attorney General of New Zealand. It provides a forum for discussion of matters of mutual interest with a view to achieving uniform or harmonised action within the portfolio responsibilities of its members: Lawlink New South Wales, 'Standing Committee of Attorneys General (SCAG)' <http://www.scag.gov.au/> at 31 October 2009.

747 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.37]–[3.46].

748 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.46] rec 17.

749 Standing Committee of Attorneys General, Summary of Decisions November 2008 <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_6-7_November_2008_FINAL.DOC/$file/SCAG_Communique_6-7_November_2008_FINAL.DOC> at 31 October 2009.

750 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 2]–[LCA 3] (Brian Herd).

751 It has been suggested, for example, that banks 'are loathe to recognise an enduring power of attorney made in another state': Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 3] (Brian Herd).

9-22 Should the *Powers of Attorney Act 1998* (Qld) provide for recognition of enduring powers of attorney made in New Zealand or in any other foreign jurisdictions?

9-23 Should recognition of interstate enduring powers of attorney:

(a) depend on the instrument having been validly made in the other jurisdiction;

(b) depend on the instrument conferring powers compatible with those that could be conferred by an enduring power of attorney in Queensland;

(c) require a declaration from the Tribunal;

(d) depend on some other requirement?

Conflict transactions

9.134 As noted earlier, the *Powers of Attorney Act 1998* (Qld) makes provision for attorneys to comply with a number of specific duties. These provisions are intended to set out the rules for an attorney's conduct given that an attorney will, ordinarily, be acting when the principal has impaired capacity and therefore without the principal's supervision.[752]

9.135 The primary statutory duty of an attorney appointed under an enduring document is to 'exercise power honestly and with reasonable diligence to protect the principal's interests'.[753] This reflects the standard of responsibility ordinarily expected from a person who acts as another's agent and is consistent with the position of an attorney as a fiduciary of the principal.[754]

9.136 Many of the other obligations imposed on attorneys can be seen as specific expressions of this more general duty. These include the obligations imposed on financial attorneys to keep the principal's property separate from the attorney's[755] and to make gifts of the principal's property in certain

752 See the Second Reading Speech for the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3688 (Denver Beanland, Attorney-General and Minister for Justice).

753 *Powers of Attorney Act 1998* (Qld) s 66(1).

754 Eg *Re BAB* [2007] QGAAT 19, [50]; *Re JK* [2005] QGAAT 58, [48]–[53]. See also Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [4.68].

755 *Powers of Attorney Act 1998* (Qld) s 86. Similar provision applies to administrators: *Guardianship and Administration Act 2000* (Qld) s 50.

circumstances only.[756] It also includes the obligation to avoid 'conflict transactions'. This is dealt with in section 73 of the *Powers of Attorney Act 1998* (Qld):[757]

> **73 Avoid conflict transaction**
>
> (1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.[67]
>
> (2) A conflict transaction is a transaction in which there may be conflict, or which results in conflict, between—
>
> (a) the duty of an attorney towards the principal; and
>
> (b) either—
>
> (i) the interests of the attorney, or a relation, business associate or close friend of the attorney;[758] or
>
> (ii) another duty of the attorney.
>
> *Examples—*
>
> 1 A conflict transaction happens if an attorney for a financial matter buys the principal's car.
>
> 2 A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.
>
> (3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—
>
> (a) deals with an interest in property jointly held; or
>
> (b) acquires a joint interest in property; or
>
> (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

---

756 *Powers of Attorney Act 1998* (Qld) s 88. Section 89 also provides that an attorney for financial matters is authorised to provide from the principal's estate for the needs of a dependant of the principal but only with respect to what is reasonable in the circumstances. Similar provisions apply to administrators: *Guardianship and Administration Act 2000* (Qld) ss 54, 55.

757 *Powers of Attorney Act 1998* (Qld) s 73 was based on recommendations made by the Queensland Law Reform Commission in its original 1996 Report and on the existing provision dealing with conflict transactions in s 175E of the *Property Law Act 1974* (Qld), reprint 4A. That provision was repealed by s 181 of the *Powers of Attorney Act 1998* (Qld). As to the draft provision proposed by the Commission see Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 2, Draft Assisted and Substituted Decision Making Bill 1996 cl 188.

758 A relation is defined as '(a) a spouse of the first person; (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; (c) a person on whom the first person is completely or mainly dependent; (d) a person who is completely or mainly dependent on the first person; or (e) a person who is a member of the same household as the first person'; a close friend is defined as 'another person who has a close personal relationship with the first person and a personal interest in the first person's welfare': *Powers of Attorney Act 1998* (Qld) sch 3. 'Business associate' is not defined in the legislation.

(4) In this section—

joint interest includes an interest as a joint tenant or tenant in common. (note added)

67 However, see section 105 (Relief from personal liability).

9.137 A similar provision, which applies to administrators, is included in section 37 of the *Guardianship and Administration Act 2000* (Qld).[759] Under that provision, an administrator may enter into a conflict transaction only if it is authorised by the Tribunal. A provision in virtually identical terms to section 73 of the *Powers of Attorney Act 1998* (Qld) is also included in the ACT legislation.[760]

9.138 Although a failure to comply with section 73 does not appear to amount to an offence against the Act,[761] an attorney may be ordered to compensate the principal, or the principal's estate, for a loss caused by his or her failure to comply with legislation.[762] The Court or the Tribunal may, however, excuse an attorney from liability for a breach of the Act if it considers that the attorney 'has acted honestly and reasonably and ought fairly to be excused for the breach'.[763] A breach of section 73 might also be relevant in the Tribunal's consideration of whether or not an attorney's power should be removed.[764]

9.139 Because they are seen as putting other interests or duties ahead of the adult's interests, conflict transactions may involve, or amount to, financial abuse. Of course, some attorneys may deliberately disregard the rights and interests of the adult, but even if an attorney considers that his or her actions

---

759 Under the *Guardianship and Administration Act 2000* (Qld) s 37(2)(b)(i), a conflict transaction includes a transaction in which there may be a conflict, or which results in conflict, between the administrator's duty towards the adult and the interests of the administrator 'or a person in a close personal or business relationship with the administrator'. This wording differs from the wording used in *Powers of Attorney Act 1998* (Qld) s 73(2)(b)(i). The application of these provisions to transactions involving a conflict between the adult's interests and the interests of a relation or close associate of the decision-maker was based on the recommendation of the Queensland Law Reform Commission in its Report in the 1990s: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 296. Section 37 of the *Guardianship and Administration Act 2000* (Qld) is set out at [6.19] above.

760 *Powers of Attorney Act 2006* (ACT) s 46. In addition the legislation in the ACT provides that an enduring power of attorney does not authorise the attorney to give a benefit to himself or herself unless it is expressly authorised: s 34.

761 This is in contrast to some of the other duties imposed under the *Powers of Attorney Act 1998* (Qld). For example, s 66 provides for a fine of up to 200 penalty units if an attorney does not exercise power honestly and with reasonable diligence to protect the adult's interests and s 86 provides for a fine of up to 300 penalty units for failure to keep the attorney's property separate from the principal's. No penalty is stipulated with respect to s 73.

762 *Powers of Attorney Act 1998* (Qld) s 106.

763 *Powers of Attorney Act 1998* (Qld) s 105. See eg *Ede v Ede* [2007] 2 Qd R 323. The wording used in s 105 differs from that in s 106 of the Act. Under s 106, an attorney may be ordered to pay compensation with respect to a 'failure to comply with this Act', whereas s 105 provides for an attorney to be relieved of personal liability 'for a breach of this Act'.

764 Under *Powers of Attorney Act 1998* (Qld) s 116, the Court or Tribunal has power to remove an attorney or change the terms of an enduring power of attorney. That section does not stipulate or limit the circumstances in which that power may be exercised.

are appropriate, conflict transactions may have a detrimental effect on the adult's wellbeing. Research in Queensland, for example, has shown that, while some Tribunal cases that were identified as involving suspected financial abuse concerned the person's ignorance of expected asset management procedures, the majority involved 'asset stripping' where the older person lost assets:[765]

> through such mechanisms as mixing monies in one account, mortgaging the older person's house or giving a loan or using his/her property without paying rent or outgoings.

9.140 The loss of assets, or the loss of even small amounts of money, can have significant detrimental consequences for the adult.[766] It may affect the adult's general standard of living and quality of life, and markedly restrict the adult's independence. Inappropriate financial decision-making might also contribute to other forms of abuse or neglect. Use of the adult's money or property for personal gain and at the detriment of the adult is a serious abuse of an attorney's position of trust, even if the attorney is not conscious of the wrongdoing.[767]

9.141 While the protection of the adult's interests is fundamental, it is also important to consider the ability of attorneys — who are often appointed in their capacity as family members or close friends of the adult and not as professional attorneys — to comply with the duties imposed on them. If those duties are confusing or too wide in their scope, attorneys may be found in breach of the law in unreasonable circumstances.

9.142 An issue to consider, therefore, is whether the scope and operation of section 73 is appropriate or should be clarified in some way.

Conflict transactions in a family context

9.143 The line between well-meaning and unscrupulous transactions may easily be blurred in family scenarios. The very notion of a conflict of interest in dealing with what are seen as family matters may be absent. The position of a family attorney differs from that of an agent appointed in a commercial setting to act on behalf of a principal, such as an employer or business associate. As a generalisation, in the latter scenario, the relationship between the agent and principal is typically one of arm's length dealings. In the case of a family attorney, however, such arrangements may be made with the idea that the attorney will step into the adult's shoes and that decisions will be made in accordance with what the adult would have wanted or done.

---

765 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, 26.

766 Eg Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 8; Alzheimer's Australia, *Decision making in advance: Reducing barriers and improving access to advance directives for people with dementia*, Discussion Paper No 8 (2006) [4.4.4].

767 Eg *Ede v Ede* [2007] 2 Qd R 32; *Re OAC* [2008] QGAAT 72, [49]–[55].

9.144 This may occur, for example, when an adult child is made attorney for a parent who has ordinarily taken care of the family's finances and made provision for other family members. The attorney may consider that his or her role, in accordance with the adult's intention in appointing him or her as an attorney, is to carry on where the adult left off. This might involve the transfer of property to other family members or the transfer of money to maintain the adult's spouse or other dependants. However, depending on the circumstances, such transactions may fall foul of the rule against conflict transactions despite the attorney's supposed good intentions. It has been noted, for example, that the position of a spouse may be particularly difficult. While it is usual for many spouses to make financial decisions 'between themselves over the kitchen table', the relationship alters when one spouse begins to act for the other under an enduring power of attorney:[768]

> The best way to explain it is with an example:
>
> - Mr and Mrs Jones were both in their mid-70s and took their marriage vows some 57 years ago;
> - They own their own home as joint tenants and have lived in it for over 45 years;
> - They have appointed each other as their Enduring Power of Attorney;
> - One day Mr Jones has an adverse medical event and has to be admitted to a hostel and they require him to pay an accommodation bond of $150,000.00, money, of course, they don't have;
> - Mr Jones has also lost the capacity to make his own decisions and Mrs Jones now has to perform her role as Mr Jones' Enduring Attorney;
> - She decides to sell their joint home for $600,000.00 and, from the proceeds, she pays the accommodation bond for Mr Jones and he moves into the hostel;
> - She then uses the rest of the money from the sale ($450,000.00) to buy another home just in her name.
>
> … almost without exception, most people cannot see a problem with what Mrs Jones did. The trouble with what she did, however, is that she has breached the law. In acting in her capacity as Mr Jones' Enduring Attorney she had a duty to avoid what are known as conflict transactions. As Mr Jones was a half owner of the home, half the money from the sale was his. By using it as she has, Mrs Jones has taken some of Mr Jones's money.

9.145 Well-meaning attorneys may thus be unwittingly caught by the prohibition against conflict transactions. Breaches might also be a symptom, however, of more unacceptable attitudes. It has been noted more generally, for

768 B Herd, 'A marriage mutated', *National Seniors Magazine* (February/March 2008) 20.

example, that financial abuse of older people may occur, in part, because of stereotypical misconceptions about older people:[769]

> For instance common assumptions drawn about older people are that: they have large amounts of disposable cash and easily liquidated assets; their relatives or close family friends are entitled to those assets; they do not contribute to society; and they have no real need for money. These assumptions are instrumental in creating a particular perception of older people and may serve to provide current or potential perpetrators with a much needed justification for committing the abuse. (notes omitted).

9.146 Research in Queensland has demonstrated the operation of such assumptions in some cases:[770]

> The societal attitude that 'money is a family matter' has been suggested in the literature to promote misunderstanding and provide excuses for financial abuse. In some cases, there is a clear conflict of interest between the rights of the older person with impaired capacity to have their money and to use it for their benefit until they die and the belief of their children and relatives about the same assets as a form of inheritance or shared asset. … in some cases, the analysis of the Tribunal data seemed to support a presumption by some adult children that the older person with impaired capacity would not mind if they used the assets of the older person even if that use meant that the older person had little money left to support their own care or the older person suffered a detriment. (note omitted)
>
> …
>
> In most cases where the family was suspected of financially abusing the older person with impaired capacity and statements of the abuser were available on the Tribunal file, the abuser argued that the abuse was a form of early inheritance. For example, in one such case, the proceeds from the sale of the older person's house were distributed between the two children by the daughter who was the Attorney under the EPA. In other cases, statements made also expressed a clear sense of entitlement within the family in relation to assets.

Interaction with other duties

9.147 In addition to the duty to avoid conflict transactions, attorneys must comply with a number of other obligations when exercising their powers. The General Principles of the legislation are a source of a number of those obligations.[771] General Principle 7 provides, for example, that the adult's views and wishes are to be sought and taken into account and that 'if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be', those views and wishes are to be taken into account (ie

769 Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 8.

770 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, 29. The parameters and findings of this research are discussed at [9.36]–[9.40] above.

771 The General Principles are examined in detail in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 4.

'substituted judgment').[772] In addition, the adult's right to make his or her own decisions, to the greatest extent practicable, is to be recognised.[773] General Principle 7 also provides, however, that an attorney must exercise power in a way that is consistent with the adult's care and protection.[774] This requires a balance between giving effect to the adult's views and wishes and ensuring decisions protect the adult's welfare and interests.

9.148 It may be that attorneys are guided in their decision-making by these more general obligations than by specific duties such as the duty to avoid conflict transactions. It may also be that in seeking to achieve the balance between meeting the adult's wishes and protecting the adult's interests, an attorney does not recognise that particular transactions involve a 'conflict' and are therefore inappropriate. Attorneys may enter a transaction believing, in good faith, that it is what the adult would have wanted or that it is what is required to protect the adult's interests or welfare. (An errant attorney might also seek to justify a conflict transaction retrospectively by claiming that it gave effect to the adult's wishes.)

9.149 An attorney seeking to do the right thing might also feel somewhat confounded by the interaction of the prohibition on conflict transactions with the provisions for making gifts and maintaining the adult's dependants. Section 88 of the *Powers of Attorney Act 1998* (Qld) authorises an attorney to give away the principal's property in certain circumstances:[775]

> **88 Gifts**
>
> (1) Unless there is a contrary intention expressed in the enduring power of attorney, an attorney for financial matters for an individual may give away the principal's property only if—
>
> (a) the gift is—
>
> (i) to a relation or close friend of the principal; and
>
> (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or
>
> (b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make;
>
> and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.

772 *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(b), (4).

773 *Powers of Attorney Act 1998* (Qld) sch 1 s 7(2).

774 *Powers of Attorney Act 1998* (Qld) sch 1 s 7(5).

775 Similar provision is made in the ACT, Tasmania and the United Kingdom: *Powers of Attorney Act 2006* (ACT) ss 38, 39; *Powers of Attorney Act 2000* (Tas) s 31(3)–(5); *Mental Capacity Act 2005* (UK) s 12.

> (2) The attorney or a charity with which the attorney has a connection is not precluded from receiving a gift under subsection (1).

9.150 Similarly, section 89 of the Act provides that an attorney may provide from the principal's estate for the needs of a dependant of the principal providing it is no more than what is reasonable in the circumstances.[776] These provisions relax the strict obligation of an attorney to act only in the adult's interests, recognising that provision from the adult's property for the benefit others is appropriate in some circumstances.[777] While an example to section 73 provides that a conflict transaction 'does not happen' if an attorney is acting to maintain the adult's dependants under section 89, a similar example with respect to gifts is not included.

9.151 When the attorney is a relation of the adult, the legislation would seem to allow transfers of money or property to another family member on the one hand, but prohibit them, on the other, as conflict transactions.

9.152 Attorneys, although well-meaning and otherwise diligent, may also find themselves in breach of section 73 because they have misunderstood its operation by virtue of the explanation given in the approved form. Section 73 includes the following example of what constitutes a conflict transaction:[778]

> A conflict transaction happens if an attorney for a financial matter buys the principal's car.

9.153 In contrast, the approved form for making an enduring power of attorney contains the following warning with respect to conflict transactions:[779]

> **Duty to avoid transactions that involve conflict of interest.** You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value.
>
> However, you may enter into such a transaction if it has been authorised in this document or by the Court, or if the transaction provides for the needs of someone that the principal could reasonably be expected to provide for, such as his/her child. (emphasis added)

9.154 An attorney may be more likely to read the explanation in the approved form than the relevant legislative provisions. That explanation suggests,

---

776 A dependant is defined as 'a person who is completely or mainly dependant on the principal': *Powers of Attorney Act 1998* (Qld) sch 3. Similar provision for provision for the adult's dependants is made in the ACT: *Powers of Attorney Act 2006* (ACT) ss 40–41.

777 Eg *Re OAC* [2008] QGAAT 72, [23].

778 *Powers of Attorney Act 1998* (Qld) s 73(2).

779 *Powers of Attorney Act 1998* (Qld) s 44(1), Department of Justice and Attorney-General, Forms <http://www.justice.qld.gov.au/2254.htm> at 31 October 2009.

despite section 73, that certain transactions are permissible provided they are made at market value.[780]

Authorisation by the Tribunal

9.155 In addition to authorisation by the principal,[781] conflict transactions, either generally or in a specific case, may be authorised by the Tribunal or the Supreme Court if it is in the best interests of the principal.[782]

9.156 The Act does not stipulate factors that the Tribunal or the Supreme Court must consider in deciding whether to authorise a conflict transaction in the adult's best interests. However, in deciding whether to authorise a conflict transaction, the Tribunal has taken into account various factors including whether the transaction reflected the adult's known views and wishes[783] and/or would be detrimental to the adult or the adult's financial position, having regard to the extent of the adult's assets and resources.[784]

9.157 In *Re BAB*,[785] the Tribunal refused the application for authorisation having regard to the extent of the expenditure of the adult's funds as a proportion of the adult's total assets and to the limited benefit to the adult of the expenditure. That case involved a proposal for up to $30 000 from the proceeds of the sale of the adult's house to be used to renovate the attorney's home to accommodate the adult while waiting for a place to become available at a nursing home. The Tribunal was not satisfied that the expenditure was in the adult's best interests:[786]

> taking into account the absence of evidence about the impact of such payment on her financial situation, the time for which it is anticipated she would reside at WB's home, the cost of such renovations in comparison to the total of BAB's assets, the permanent nature of the benefits to WB and the temporary nature of the benefits to BAB.

---

780 See also, for example, *Ede v Ede* [2007] 2 Qd R 323 in which the attorney sold the principal's property to the attorney's daughter below market value and was ordered to compensate the principal for the loss caused by the breach of s 73 of the *Powers of Attorney Act 1998* (Qld). In that case, even though the Court found that the attorney had acted honestly and reasonably in seeking and relying on both legal advice and property valuations, the attorney was nevertheless required to account for the profit made in consequence of his breach.

781 In *Re MV* [2005] QGAAT 46, [61]–[63], [69] the Tribunal held that the adult did not understand the 'full nature and effect' of the enduring power of attorney because of his 'inability to understand an essential clause in the document namely the clause authorising conflict transactions'.

782 *Powers of Attorney Act 1998* (Qld) ss 109A, 118(2). See, in relation to the Tribunal's power to authorise a conflict transaction or to approve an investment, *Guardianship and Administration Act 2000* (Qld) s 152. Section 152 is discussed at [15.96]–[15.99] in vol 2 of this Discussion Paper.

783 Eg *Re FAA* [2008] QGAAT 3, [107]–[114]; *Re CMB* [2004] QGAAT 20, [26] (in relation to conflict transactions by an administrator).

784 Eg *Re KPL* [2003] QGAAT 12, [24]–[25], [33]; *Re CMB* [2004] QGAAT 20, [28]–[29].

785 *Re BAB* [2007] QGAAT 19.

786 Ibid [69].

9.158 In that case, the Tribunal also commented that the market value of the property concerned, for example, where an attorney purchases an adult's property, will also be relevant.[787]

9.159 Some consideration has been given to whether or not a conflict transaction may be authorised retrospectively. With respect to the equivalent provision that applies to administrators,[788] the Supreme Court has held that the Tribunal's power to authorise conflict transactions includes the power to give retrospective authorisation.[789] Following that decision, the Tribunal, in *Re TAD*,[790] stated that:[791]

> It follows in the opinion of the Tribunal that an administrator who enters into a conflict transaction is not in contravention of section 37 until authorisation of the transaction by the Tribunal is refused or has been rendered futile by subsequent events. This conclusion is consistent with the comments of Justice Mullins "If s 37 is construed so as not to preclude retrospective authorisation by the Tribunal, the right of an adult to compensation under s 59 of the GAA for the administrator's failure to comply with the GAA is not complete in respect of the failure of an administrator to obtain the authorisation of the Tribunal to a conflict transaction, until the possibility of retrospective authorisation has been exhausted."[792] (note in original)

9.160 The impact of such a finding, if it also applies to attorneys, is potentially wide. It may have the effect of giving de facto validity to transactions for which approval has not been sought. As noted above, there may be many scenarios in which an attorney fails to recognise the impropriety of a transaction and would therefore be unlikely to seek approval for it.

Clarifying the attorney's obligations

9.161 An issue to consider is whether the provision in section 73 of the *Powers of Attorney Act 1998* (Qld) should be modified in some way to clarify the extent of the prohibition.

9.162 One of the difficulties in dealing with types of financial abuse is in defining what constitutes abuse and what does not. The difficulty in arriving at a functional definition of what constitutes abusive behaviour is a prevailing debate within discussions of 'elder abuse'. Based on research conducted in relation to

---

787 Ibid [54], [56].

788 *Guardianship and Administration Act 2000* (Qld) s 37(1) provides that an administrator may enter a conflict transaction only if the Tribunal authorises the transaction.

789 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] 2 Qd R 323, 340 (Mullins J).

790 [2008] QGAAT 76.

791 Ibid [125].

792 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited and ors* BS6519 of 2007 at paragraph 76. (See now [2008] 2 Qd R 323, 340 (Mullins J).)

the abuse of older people with dementia, Alzheimer's Australia concluded that:[793]

> it is perhaps more useful to think of abuse in terms of a continuum. At one end of the continuum lies poor practice, poor relationships, evidence of lack of respect and so on. At the other end is unambiguous abuse: evidence of bruising, malnutrition, total neglect and so on. …
>
> It is not sufficient to define abuse as situations where abuse is intended: abuse often results from ignorance not intent. Nor is it appropriate to define abuse as situations where the victim feels abused: the older person may be extremely demanding and regard any departure from their expectations as abuse. Alternatively, for many reasons including learned helplessness, poor self esteem, vulnerability and gratitude, a 'victim' may not define what they are experiencing as abuse even when an objective assessment by any reasonable person would say it is.
>
> No one definition of abuse would cover all situations. What is required it seems is an assessment that always takes account of:
>
> - the experiences and perceptions of the victim;
> - the experiences and perceptions of the perpetrator; and
> - the contemporary norms and values of society.
>
> It is clear that abuse can take many forms including those previously identified: physical, sexual, psychological or financial, and may be mediated by environmental, systemic, spiritual and cultural issues. How abuse is perceived by those affected is influenced by relationship issues, the severity of injuries sustained and the intent of the perpetrator on a continuum from ignorance to malice.

9.163 Such comments would seem apt to apply to the difficulties of identifying inappropriate conflict transactions by attorneys and should be kept in mind. While some attorneys may enter into conflict transactions with deliberate or reckless disregard for the adult's rights and interests, others may be acting on the basis of socially unacceptable attitudes, and yet others may be acting in what they perceive are the adult's best interests and in ways that would, in an informal setting, be considered appropriate.

Beneficiaries and relations

9.164 It may be important to recognise that, while certain transactions give rise to a prima facie presumption that there is a conflict, something more is required before the transaction is considered improper. This may be particularly important in the context of transactions by family attorneys.

9.165 When it recommended the inclusion of a provision like section 73 in the guardianship legislation, the Queensland Law Reform Commission also

793 Alzheimer's Australia, *Decision making in advance: Reducing barriers and improving access to advance directives for people with dementia*, Discussion Paper No 8 (2006) [4.1.3].

recommended the inclusion of two clarifying provisions. First, it considered that the legislation should provide that the fact that the decision-maker might be a beneficiary of the principal's estate on the principal's death does not, of itself, create a conflict of interest. The Commission considered this important because:[794]

> in many instances, a financial decision-maker for a person with impaired decision-making capacity would be a friend or relative who may be a beneficiary under the person's will or entitled to a share of the person's estate if the person died intestate. In such a case, almost every transaction which involved spending the person's money could create a conflict of interest because it would result in a depletion of the available estate.

9.166 Secondly, the Commission recommended a provision to the effect that the fact a person is a relation of the adult does not of itself create a conflict between decision-maker's duty to the adult and the decision-maker's interests.[795]

9.167 Provisions to this effect do not appear in the *Powers of Attorney Act 1998* (Qld).[796] However, the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to take account of these matters when considering the appropriateness of a person for appointment as an administrator. Under section 15(1)(c) of that Act, the Tribunal must consider the extent to which the adult's and person's interests are likely to conflict. Section 15(2)–(3) then provides:

> (2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.
>
> (3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.

9.168 It may be appropriate for similar provisions to be included in section 73 of the *Powers of Attorney Act 1998* (Qld).

Gifts and dependants

9.169 It might also be useful for the legislation to further clarify the interaction between section 73 and the provision in sections 88 and 89 for making gifts and maintaining the adult's dependants. It might be appropriate, for example, for section 73 to exclude gifts made in accordance with section 88 as a type of conflict transaction. This might be done by adding another example to section 73(2).

---

794 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 295.

795 Ibid 298.

796 Nor does s 37 of the *Guardianship and Administration Act 2000* (Qld) make such provision with respect to administrators.

Authorised transactions

9.170 While the Tribunal and the Supreme Court may be in a good position to evaluate the surrounding circumstances in order to make a judgment about whether a transaction should be authorised, this course leaves attorneys with some uncertainty about the particular transactions that may be appropriate.

9.171 As noted above, the Tribunal has tended to look at such factors as whether or not the transaction resulted in a detriment to the adult's financial interests and whether the transaction was consistent with the adult's known views and wishes. Consistently with this, it may be desirable for the legislation to provide, for example, that a transaction is not a conflict transaction unless it results in a detriment to the adult or harms the adult's financial interests. On the other hand, such an exception may be too wide. Alternatively, it may be useful for the legislation to stipulate certain matters to which the Tribunal may, or must, have regard in deciding whether to authorise a transaction.

9.172 Alternatively, or in addition, the explanation given in the approved form for making an enduring power of attorney might usefully be modified and expanded.

Education

9.173 Financial abuse by attorneys is part of a much wider social problem that involves challenges to social attitudes and stereotypes; it cannot be addressed solely through legislative reform. It may be appropriate for further efforts at community education to be made through the guardianship system or for other measures to be taken to assist attorneys in understanding the scope of their duties with respect to financial transactions.

9.174 For example, it might be appropriate for attorneys to be offered a training course or given a specific information package or code of practice dealing with conflict transactions. Attorneys may benefit, for example, from a variety of practical examples of the sorts of transactions that are to be avoided. As noted above, it may be helpful for such information to be appended to the approved forms for making an enduring power of attorney.

9-24 Are there any difficulties with the operation of the prohibition on unauthorised conflict transactions by attorneys under section 73 of the *Powers of Attorney Act 1998* (Qld)? If so, how could they be addressed?

9-25 Should section 73 of the *Powers of Attorney Act 1998* (Qld) include a provision to the effect that:

(a) the fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict; or

(b) the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean that the adult's and person's interests are likely to conflict.

9-26 Should section 73 of the *Powers of Attorney Act 1998* (Qld) clarify how the prohibition on unauthorised conflict transactions relates to the provision in sections 88 of the *Powers of Attorney Act 1998* (Qld) allowing an attorney to make gifts in certain circumstances? If so, should transactions made under section 88 be excluded from the definition of 'conflict transaction'?

9-27 Should section 73 of the *Powers of Attorney Act 1998* (Qld) include further examples of what are, or are not, considered to be prohibited conflict transactions?

9-28 Should the *Powers of Attorney Act 1998* (Qld) stipulate certain matters to which the Tribunal may, or must, have regard in deciding whether to authorise a conflict transaction? If so, what matters should be included:

(a) whether the transaction accords with the adult's known views and wishes;

(b) whether the transaction would be detrimental to the adult's financial or other interests;

(c) some other matter?

9-29 Should further steps be taken to provide attorneys with greater assistance in understanding their obligation to avoid conflict transactions? If so, what sort of assistance should be provided:

(a) additional explanation in the approved form for making an enduring power of attorney;

(b) an information package or code of practice;

(c) other?

Complaints and investigations of an attorney's wrongdoing

9.175 Financial abuse has been identified as one of many forms of 'elder abuse' that occur in Australia.[797] The Public Advocate has also noted the particular vulnerability of adults with impaired capacity to financial abuse,[798] much of which may occur through the misuse of enduring powers of attorney. Indeed, most investigations conducted by the Adult Guardian relate to financial abuse by attorneys under enduring powers of attorney.[799]

9.176 It has been suggested that 'the fundamental problem with financial abuse is the lack of detection'.[800] Adults with impaired capacity may not be aware of abuse or of their options for seeking help, and third parties may be reluctant to report abuse. For example:[801]

> they may be unaware of the reporting options open to them or they may feel that the older person with dementia would have intended for their family members to inherit their assets anyway.

9.177 People may also fear that the consequences of reporting abuse may place the adult in a worse position, such as being removed from his or her home.[802] Continuing community and professional education, for example, for staff at banking institutions, is an important part of addressing these concerns.[803] Auditing requirements and measures to encourage reporting of abuse might also be appropriate.

Audits of accounts

9.178 In its recent report on Older People and the Law, the federal parliament's Standing Committee on Legal and Constitutional Affairs suggested

---

797 Eg Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 15; Department of Human Services Victoria, Alzheimer's Association Victoria and La Trobe University School of Nursing, *Overcoming Abuse of Older People with Dementia and Their Carers*, Discussion Paper (2000) [4.4.4].

798 Public Advocate, *Annual Report 2006–07* (2007) 68. In the year 2007–08, the Elder Abuse Prevention Unit Helpline in Queensland received 834 calls; of those, 30% reported financial abuse and 134 calls (16%) identified the abused person as having dementia, mental illness or intellectual disability: Elder Abuse Prevention Unit, *Annual Report 2007–2008* (2008) 7, 8, 13.

799 Office of the Adult Guardian, *Annual Report 2006–07* (2007) 18. See also [9.35]–[9.41] above.

800 J Gardner, Public Advocate Victoria, 'Uncovering elder abuse: powers of attorney, administration orders and other issues for banks' (Paper presented at the Banking and Financial Services Ombudsman Annual Conference, 25 November 2005).

801 Elder Abuse Prevention Unit (L Sanders), *Financial Abuse of Older People: A Queensland Perspective* (2005) 15.

802 Law and Justice Foundation of New South Wales (S Ellison et al), *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (2004) vol 1, 284.

803 Eg J Gardner, Public Advocate Victoria, 'Uncovering elder abuse: powers of attorney, administration orders and other issues for banks' (Paper presented at the Banking and Financial Services Ombudsman Annual Conference, 25 November 2005).

the introduction of a system of random audits of enduring powers of attorney to assist in detecting financial abuse. It noted that:[804]

> Guardianship agencies can require attorneys to produce their records when reviewing a power of attorney once a concern has been raised. However, these agencies do not have a monitoring function. It is difficult to assist older people being abused through enduring powers of attorney if they do not have family and friends that are aware of the abuse and willing to notify authorities.

9.179 It considered, therefore, that 'there is potential value in establishing a system of periodic random audit to identify abuse of powers of attorney'.[805]

9.180 An issue to consider is whether the current system for auditing attorneys' accounts in Queensland could be improved.

9.181 Under section 180 of the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian has power to investigate complaints that an adult is being or has been neglected, exploited or abused, or has inappropriate or inadequate decision-making arrangements.[806] Referrals for investigation about abuse or inappropriate decision-making arrangements can be made to the Adult Guardian by any person, such as family members, service providers, friends and neighbours.[807]

9.182 Both the Adult Guardian and the Tribunal also have power to initiate an audit of an attorney's accounts.[808] Section 182 of the *Guardianship and Administration Act 2000* (Qld) provides:

> **182 Records and audit**
>
> (1) The adult guardian may, by written notice to an attorney for an adult under an enduring power of attorney who has power for a financial matter or to an administrator for an adult, require that by the date stated in the notice the attorney or administrator file with the adult guardian a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, for the adult for a specified period.
>
> (2) The date by which the summary or accounts must be filed must be a date that the adult guardian considers gives the attorney or administrator reasonable time to comply with the notice.
>
> (3) The attorney or administrator must comply with the notice, unless the attorney or administrator has a reasonable excuse.

---

804 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.100].

805 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.106].

806 See also *Guardianship and Administration Act 2000* (Qld) s 174(2)(b).

807 Office of the Adult Guardian, *Adult Guardian Annual Report 2006–07* (2007) 18.

808 The functions and powers of the Adult Guardian and the Tribunal are examined in more detail in Chapters 18 and 15 of this Discussion Paper.

Maximum penalty—100 penalty units.

(4) The summary or accounts filed may be audited by an auditor appointed by the adult guardian. (note omitted)

9.183 Section 122 of the *Powers of Attorney Act 1998* (Qld) provides:

122 Records and audit

(1) For an attorney for a financial matter under an enduring power of attorney, the court may make an order that—

(a) the attorney files in the court, and serves on the applicant, a summary of receipts and expenditure under the power for a specified period; or

(b) the attorney files in the court, and serves on the applicant, more detailed accounts of dealings and transactions under the power for a specified period; or

(c) the accounts be audited by an auditor appointed by the court and that a copy of the auditor's report be given to the court and the applicant; or

(d) the attorney present a plan of management for approval.

(2) The court may make the order on its own initiative or on the application of the principal or another interested person.[809]

(3) The court may make an order about payment of the auditor's costs, including security for the costs. (note added)

9.184 The guardianship legislation therefore permits auditing of accounts either by the Adult Guardian or the Tribunal. It does not, however, require that random audits be conducted. Nor is there any requirement for periodic review by the Tribunal, or the Adult Guardian, of an attorney's activities. This is in contrast to the appointment of an administrator, which must be reviewed by the Tribunal at least once every five years and may be reviewed at any other time on the Tribunal's own initiative.[810] Arguably, periodic review of an attorney's actions is an important safeguard once the principal has lost capacity and is unable to supervise the attorney's actions personally.

9.185 Such measures, however, may be 'unnecessarily complex and onerous for the attorney, and costly for the State' especially if misuse of enduring powers of attorney occurs infrequently.[811] Alzheimer's Australia has noted, for example, that the percentage of abuse is not high in relation to the number of

809 An interested person is defined as a person who has a sufficient and continuing interest in the other person: *Powers of Attorney Act 1998* (Qld) sch 3.

810 *Guardianship and Administration Act 2000* (Qld) ss 28, 29.

811 Law and Justice Foundation of New South Wales (S Ellison et al), *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (2004) vol 1, 319.

appointments made.[812] It may be that the flexibility of the present system strikes an appropriate balance by providing for review of an attorney's actions when it appears necessary, but not otherwise burdening attorneys with time-consuming procedures that are likely to involve significant costs for the State.

9-30 Should the *Powers of Attorney Act 1998* (Qld) provide for mandatory, periodic auditing of attorneys' accounts or review of attorneys' activities, and why or why not?

9-31 If yes, should periodic auditing or review be required in respect of every attorney or should it occur randomly?

812 Alzheimer's Australia, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (30 November 2006) 11 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub55.pdf> at 31 October 2009. Also Caxton Legal Centre Inc has noted that '[w]hile we sometimes encounter abuse of EPAs, we tend to see even more problematic cases where people have never made an EPA': Caxton Legal Centre Inc, Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law (February 2007) 22 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub112.pdf> at 31 October 2009. Also, in a study by the Australian Institute of Criminology of older people's knowledge and experiences of substitute decision-making processes and abuse most participants whose relatives used an enduring power of attorney on their behalf reported positive experiences: D Setterlund, C Tilse and J Wilson, 'Substitute Decision Making and Older People' (1999) *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*, No 139, 4.

Chapter 10

Statutory health attorneys

INTRODUCTION

10.1 As part of its review of the law relating to decisions about health matters under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), the Commission's terms of reference specifically direct it to review 'the scope of the decision-making power of statutory health attorneys'.[813] The terms of reference also direct the Commission to have regard, among other things, to 'the need to ensure that adults are not deprived of necessary health care because they have impaired capacity'.

10.2 A statutory health attorney has automatic authority under the *Powers of Attorney Act 1998* (Qld) to make health care decisions for the adult when there is no guardian or attorney with authority to do so. The role of statutory health attorney is conferred on spouses, carers, close friends and relations of the adult and, as a last resort, the Adult Guardian.

10.3 This chapter gives an overview of the role of statutory health attorneys in Queensland and outlines similar provisions in other jurisdictions. It then discusses some of the concerns that have been raised about the current provision for statutory health attorneys and raises some specific issues for consideration.

BACKGROUND

10.4 As discussed in Chapter 10, medical treatment ordinarily requires consent from the patient. If an adult lacks capacity, health care decisions will

---

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

need to be made for the adult by someone else, such as an attorney appointed under an enduring document,[814] a guardian appointed by the Tribunal or the Court.[815] These are formal mechanisms for the giving or refusal of consent to health care for an adult with impaired capacity.

10.5 Although health care 'is an area in which informal decision-making is commonplace',[816] the common law does not recognise informal consent from next of kin.[817] In *Re T*, for example, Lord Donaldson MR stated:[818]

> There seems to be a view in the medical profession that in such emergency circumstances the next of kin should be asked to consent on behalf of the patient and that, if possible, treatment should be postponed until that consent has been obtained. This is a misconception because the next of kin has no legal right either to consent or to refuse consent.

10.6 Legislative provisions in Queensland for statutory health attorneys, and similar provisions in other jurisdictions, have sought to overcome this obstacle by empowering next of kin and others in close relationships with the adult to make health care decisions in certain circumstances.[819] In Queensland, the legislation gives automatic statutory power for health care decisions to spouses, carers, close friends and relations of the adult, in descending order of priority. The provision applies automatically when there is no formally appointed substitute decision-maker to make the decision. The role of statutory health attorney is therefore not a formal appointment but operates as a default measure. If there is no-one in the statutory list who is readily available and culturally appropriate, the Adult Guardian becomes the adult's statutory health attorney.[820]

10.7 There are a number of advantages to the statutory recognition of health care decisions by next of kin and others in close relationships with the adult. First, it minimises the need for resort to Court or Tribunal decisions or

---

814 An enduring document, made by the adult, means an enduring power of attorney or an advance health directive: *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4 Dictionary (definition of 'enduring document'). Enduring powers of attorney are considered in Chapter 9 of this Discussion Paper and advance health directives are considered in Chapter 11.

815 Consent from a substitute decision-maker is not required, however, if the adult has made a valid and applicable advance health directive.

816 R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 272.

817 Generally C Stewart, 'Who decides when I can die? Problems concerning proxy decisions to forego medical treatment' (1997) 4 *Journal of Law and Medicine* 386, 387–8.

818 *Re T* [1992] 4 All ER 649, 653.

819 See the second reading speech of the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 1997, 3688 (Denver Beanland, Attorney-General and Minister for Justice). Also the legislation empowers the Tribunal to ratify or approve the exercise of power by an informal decision-maker upon application by an interested person: *Guardianship and Administration Act 2000* (Qld) ss 82(1)(e), 115.

820 In the financial year 2006–07, most (298 or approximately 61 percent) of the 487 consents given to health care for an adult by the Adult Guardian were provided in the Adult Guardian's role as statutory health attorney: Adult Guardian, *Annual Report 2006–07* (2007) 35.

appointments which may involve considerable expense, delay and intrusion.[821] In this way, the legislation is more 'attuned to the informal environment of everyday life'.[822] Secondly, it is consistent with the 'socially accepted tradition'[823] of conferring authority on those who have 'a close and long-standing relationship' with, and intimate knowledge of, the adult.[824] Thirdly, it fills the gap when the adult has not made an advance health directive or appointed an attorney for health matters under an enduring document. Fourthly, it enhances the flexibility of the guardianship legislation and provides a least restrictive option so that the appointment of a guardian can be an option of last resort rather than the only option.[825]

10.8 There are also, however, some potential disadvantages to the conferral of decision-making authority on next of kin. The primary concern is that the informality of automatic recognition reduces the scope for scrutiny of the substitute decision-maker. While family members are often in the best position to understand the adult and his or her health care needs, this is not universal. Family members may be 'well-meaning, but not qualitatively good at decision-making', or they may have difficulty keeping their own interests separate from the adult's.[826]

10.9 Many aspects of the legislative scheme for statutory health attorneys are intended to address these matters. For example, the legislation imposes particular obligations on the way in which statutory health attorneys make decisions for the adult and makes provision for oversight by the Tribunal on application by an interested person. The key features of the statutory health attorney provisions are described below.

THE LAW IN QUEENSLAND

10.10 Section 66 of the *Guardianship and Administration Act 2000* (Qld) sets out the order of priority for dealing with an adult's health matter for which

821 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, 333–4.

822 T Carney and P Keyzer, 'Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Capacity' (2007) 7 *Queensland University of Technology Law and Justice Journal* 255, 273.

823 DW Meyers, 'Letting doctor and patient decide: The wisdom of Scots law' in *Comparative and Historical Essays in Scots Law* (1992) 101, quoted in C Stewart, 'Who decides when I can die? Problems concerning proxy decisions to forego medical treatment' (1997) 4 *Journal of Law and Medicine* 386, 387. Also Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 332.

824 C Stewart, 'Who decides when I can die? Problems concerning proxy decisions to forego medical treatment' (1997) 4 *Journal of Law and Medicine* 386, 389; 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, 334.

825 T Carney and P Keyzer, 'Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Capacity' (2007) 7 *Queensland University of Technology Law and Justice Journal* 255, 273.

826 P Bartlett and R Sandland, *Mental Health Law Policy and Practice* (2000) 374.

consent is required.[827] If the matter is not dealt with by an advance health directive, and if there is no guardian or attorney appointed under an enduring power of attorney with authority to make decisions on the matter, consent may be given by the adult's statutory health attorney.

10.11 The role of statutory health attorney is created in Chapter 4 of the *Powers of Attorney Act 1998* (Qld). A person becomes the adult's statutory health attorney by operation of section 63 of that Act, and not by formal appointment.

10.12 Section 63 provides a hierarchical order of persons in particular relationships with the adult who will be the adult's statutory health attorney for the specific health matter in question. It also provides for the Adult Guardian to act as an adult's statutory health attorney when none of those persons is readily available or culturally appropriate. Section 63 provides:

> **63 Who is the statutory health attorney**
>
> (1) For a health matter, an adult's ***statutory health attorney*** is the first, in listed order, of the following people who is readily available and culturally appropriate to exercise power for the matter—
>
> (a) a spouse of the adult if the relationship between the adult and the spouse is close and continuing;
>
> (b) a person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult;
>
> (c) a person who is 18 years or more and who is a close friend or relation of the adult and is not a paid carer for the adult.[62]
>
> (2) If no-one listed in subsection (1) is readily available and culturally appropriate to exercise power for a matter, the adult guardian is the adult's ***statutory health attorney*** for the matter.
>
> (3) Without limiting who is a ***person who has the care of the adult***, for this section, a person has the care of an adult if the person—
>
> (a) provides domestic services and support to the adult; or
>
> (b) arranges for the adult to be provided with domestic services and support.

827 *Guardianship and Administration Act 2000* (Qld) s 66 is considered in Chapter 12 of this Discussion Paper. See also s 70 of the *Powers of Attorney Act 1998* (Qld), which provides that, if a guardian has been appointed for the adult, a statutory health attorney may exercise power only to the extent authorised by the Tribunal; and s 24 of the *Guardianship and Administration Act 2000* (Qld), which protects a statutory health attorney from liability if the attorney purports to exercise power for a matter without knowing that the power has been given by the Tribunal to a guardian.

Not all health care requires consent. In certain circumstances, urgently required health care and health care that is minor and uncontroversial can be given without consent: *Guardianship and Administration Act 2000* (Qld) ss 63, 64. In addition, first aid treatment, non-intrusive examination for diagnostic purposes, and administration of certain non-prescription pharmaceutical drugs are not characterised as 'health care' for which consent is required under the legislation: *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(3).

(4) If an adult resides in an institution (for example, a hospital, nursing home, group home, boarding-house or hostel) at which the adult is cared for by another person, the adult—

(a) is not, merely because of this fact, to be regarded as being in the care of the other person; and

(b) remains in the care of the person in whose care the adult was immediately before residing in the institution.

62 If there is a disagreement about which of 2 or more eligible people should be the statutory health attorney or how the power should be exercised, see the *Guardianship and Administration Act 2000*, section 42 (Disagreement about health matter).

10.13 The first category under section 63(1) is a spouse of the adult if the relationship between the adult and the spouse is close and continuing. The term 'spouse' is defined in the *Acts Interpretation Act 1954* (Qld) to include a de facto partner.[828]

10.14 Under section 62 of the *Powers of Attorney Act 1998* (Qld), a statutory health attorney has authority, if the adult has impaired capacity for the health matter, to make any decision about the matter that the adult could lawfully make if he or she had capacity for the matter. Consent given by a statutory health attorney has the same effect as if the consent had been given by the adult and the adult had capacity to do so.[829]

10.15 When making a decision about the adult's health care, the statutory health attorney has a right to the information necessary to make informed decisions for the adult[830] and must apply the General Principles and the Health Care Principle.[831] The Health Care Principle provides, for example, that power for an adult's health matters should be exercised in the way that is least restrictive of the adult's rights, and only if it is either necessary and appropriate to maintain or promote the adult's health or wellbeing, or if it is in the adult's best interests.[832] It also requires the adult's views and wishes, and information from the health provider, to be taken into account. The Health Care Principle is examined in a separate Discussion Paper.[833]

828 *Acts Interpretation Act 1954* (Qld) s 36. Under section 32DA of that Act, a reference to 'de facto partner' means a reference to either one of two persons living together as a couple on a genuine domestic basis but who are not married to each other or related by family. Gender is irrelevant.

829 *Powers of Attorney Act 1998* (Qld) s 101; *Guardianship and Administration Act 2000* (Qld) s 80.

830 *Powers of Attorney Act 1998* (Qld) s 81; *Guardianship and Administration Act 2000* (Qld) s 76(2). This issue is examined in Chapter 9 of this Discussion Paper.

831 *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1). The General Principles and the Health Care Principle are examined in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 4, 5.

832 *Powers of Attorney Act 1998* (Qld) sch 1 s 12.

833 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 5.

10.16 Statutory health attorneys are also under an obligation to maintain confidential information,[834] and to consult with any guardian, administrator or other attorney for the adult.[835]

10.17 The guardianship legislation also contains provisions addressing the extent to which statutory health attorneys will be held liable for a breach of the legislation[836] and includes provisions to protect health providers who rely on consent given by a statutory health attorney, or a purported consent, in certain circumstances.[837]

10.18 In addition, the legislation enables the adult or any interested person[838] to make an application to the Tribunal for a declaration, order, direction, recommendation or advice in relation to a statutory health attorney.[839]

THE LAW IN OTHER JURISDICTIONS

10.19 A number of the other Australian jurisdictions include provisions equivalent to those in Queensland for statutory health attorneys. In New South Wales, Tasmania, Victoria and Western Australia, the legislation makes provision for a hierarchy of 'persons responsible' for medical or dental treatment decisions.[840] In South Australia, the legislation provides for an 'appropriate authority' to give consent to medical or dental treatment.[841]

10.20 There are differences between the provisions, but, in general terms, the legislation in each of those jurisdictions gives authority to people in specified

---

834 *Powers of Attorney Act 1998* (Qld) s 74. The confidentiality provisions of the legislation were the subject of recommendations in stage one of the Commission's review: Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) vol 1.

835 *Powers of Attorney Act 1998* (Qld) s 79.

836 *Powers of Attorney Act 1998* (Qld) s 105 (Relief from personal liability); *Guardianship and Administration Act 2000* (Qld) s 24 (Protection if unaware of appointment). Also *Guardianship and Administration Act 2000* (Qld) s 78 (Offence to exercise power for adult if no right to do so).

837 *Powers of Attorney Act 1998* (Qld) ss 101 (No less protection than if adult gave health consent), 104 (Protection for person carrying out forensic examination with consent); *Guardianship and Administration Act 2000* (Qld) ss 77 (Protection of health provider); 80 (No less protection than if adult gave health consent).

838 An interested person is defined as a person with a sufficient and continuing interest in the adult: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 Dictionary; *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 Dictionary.

839 *Powers of Attorney Act 1998* (Qld) ss 109A, 110(1), (2); *Guardianship and Administration Act 2000* (Qld) ss 82(1)(d)(ii), (3), 115. The monitoring role of the Tribunal was supported as an important safeguard in the context of substitute decision-making by statutory health attorneys: eg Queensland Advocacy Inc, *Newsletter July 1998*, 10, 15 <http://www.qai.org.au/documents/doc_82.doc> at 31 October 2009. See also s 97 (Protection if court advice, directions or recommendations).

840 *Guardianship Act 1987* (NSW) ss 33A(4), 36; *Guardianship and Administration Act 1995* (Tas) ss 4(1)(c), 39; *Guardianship and Administration Act 1986* (Vic) ss 37, 39; *Guardianship and Administration Act 1990* (WA) s 110ZD, which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

841 *Guardianship and Administration Act 1993* (SA) ss 3 (definition of 'relative'), 59.

relationships with the adult when there is no formally appointed decision-maker with authority to decide. This is consistent with the position in Queensland.

10.21 For example, in South Australia, if there is no medical agent for the adult (the equivalent of an attorney appointed under an enduring power of attorney for medical matters), medical decisions are to be made by the adult's guardian or, if there is no guardian, a relative of the adult or the Tribunal.

10.22 The equivalent decision-makers recognised by the legislation in New South Wales and Tasmania are the same as Queensland. Authority is given to the adult's spouse, carer or close friend or relative, in that order, when there is no formally appointed decision-maker for the matter.

10.23 The position in Victoria and Western Australia is also similar to Queensland. In Victoria, the person responsible when there is no appointed decision-maker is, in order of priority, the adult's spouse or domestic partner, the adult's primary carer, or the adult's nearest relative. In Western Australia, authority is given, in the listed order, to the adult's spouse or de facto partner, the nearest relative of the adult who is in a close personal relationship with the adult, the adult's primary carer, or another person in a close personal relationship with the adult.

10.24 The legislation in South Australia differs. When there is no appointed decision-maker, authority is conferred on a relative of the adult or the Tribunal. A relative is defined as the adult's spouse or domestic partner, a parent, a person charged with overseeing the ongoing day-to-day supervision, care and well-being of the person, an adult sibling or an adult child. Unlike the other jurisdictions, however, there is no order of priority or hierarchy specified as between any of those persons.

10.25 Most of these jurisdictions also provide for the way in which decisions about medical treatment are to be made by persons responsible. In Tasmania and Victoria, the person responsible must act in the adult's best interests.[842] In South Australia, paramount consideration is to be given to the adult's wishes.[843] In New South Wales, the person responsible must take into account the adult's views, the information provided by the health provider and the objects of Part 5 of the legislation, namely, to ensure that the adult is not deprived of necessary medical or dental treatment and that treatment is carried out to promote and maintain the adult's health and wellbeing.[844]

842 *Guardianship and Administration Act 1995* (Tas) s 43; *Guardianship and Administration Act 1986* (Vic) s 38, 42H(2). In the other jurisdictions see *Guardianship Act 1987* (NSW) ss 32, 40(3); *Guardianship and Administration Act 1993* (SA) s 5.

843 *Guardianship and Administration Act 1993* (SA) s 5.

844 *Guardianship Act 1987* (NSW) s 40(3).

10.26 In each of the jurisdictions, consent given by the person responsible has effect as if the adult had been capable of giving consent and the treatment had been carried out with the adult's consent.[845]

10.27 The legislation in Victoria also allows the person responsible to apply to the Tribunal for directions, orders or advisory opinions about the scope or exercise of his or her authority to give consent.[846] In Western Australia, a person may apply to the Tribunal for a declaration about who the person responsible for the adult is.[847]

10.28 The approach of the Australian jurisdictions is similar to that taken in a number of Canadian provinces. For example, the legislation in Ontario provides a list of persons, in order of priority, who may give or refuse consent for an adult: the adult's guardian, attorney, representative, spouse or partner, child or parent, sibling or any other relative of the adult.[848] If no person in that list meets the requirements of the legislation, the Public Guardian and Trustee shall make the decision.

10.29 This approach differs substantially, however, from the approach adopted in the United Kingdom and Scotland. In those jurisdictions, the legislation confers general authority on the health provider to do what he or she considers is in the adult's best interests.[849]

ISSUES FOR CONSIDERATION

Achieving the right balance and understanding the role

10.30 The role of statutory health attorney was created to fill a gap in the scheme for consent to health care for adults with impaired capacity when there is no formally appointed decision-maker. The role operates without a formal appointment or order. Statutory health attorneys are authorised under the legislation to make health care decisions as the need arises.

---

845 *Guardianship Act 1987* (NSW) s 46(1); *Guardianship and Administration Act 1993* (SA) s 59(1); *Guardianship and Administration Act 1995* (Tas) s 47; *Guardianship and Administration Act 1986* (Vic) s 40; *Guardianship and Administration Act 1990* (WA) s 110ZK(2), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

846 *Guardianship and Administration Act 1986* (Vic) ss 42I, 42N.

847 *Guardianship and Administration Act 1990* (WA) s 110ZG, which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

848 *Health Care Consent Act*, SO 1996, c 2, Sch A, s 20. Similar provision is made in British Columbia and Manitoba: *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, s 16; *Mental Health Act*, CCSM, c M110, s 28.

849 Under s 5 of the *Mental Capacity Act 2005* (UK), a person may do an act 'in connection with the care or treatment' of an adult without incurring liability if the person reasonably believes that the adult lacks capacity in relation to the matter and that it will be in the adult's best interests to do the act. Under s 47 of the *Adults with Incapacity (Scotland) Act 2000*, the medical practitioner with primary responsibility for the adult's medical treatment has general authority 'to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult'.

10.31 Conferral of automatic statutory authority minimises the need for applications to the Tribunal or the Court, allows decisions to be made in a timely manner, and helps ensure adults are not deprived of necessary health care. The legislation also includes safeguards against abuse, neglect and exploitation. For example, it requires statutory health attorneys to apply the General Principles and the Health Care Principle when making decisions for the adult.[850] The statutory health attorney provisions are thus generally consistent with the principles enunciated in the *Convention on the Rights of Persons with Disabilities*.[851]

10.32 An issue for general consideration is whether the current scheme for the exercise of power by statutory health attorneys achieves the right balance. Flexibility and timeliness is important, but safeguards against inappropriate substitute decision-making are also important.

10.33 It has been suggested that the name 'statutory health attorney' may be confusing since the word 'attorney' is used to describe a person who is appointed under an enduring power of attorney.[852] An issue to consider is whether the name 'statutory health attorney' should be changed to something else which better reflects the operation of the role as one that is automatically conferred, rather than the subject of a specific appointment.

10-1 Does the current scheme for statutory health attorneys under the *Powers of Attorney Act 1998* (Qld) achieve the right balance between the flexibility and timeliness of a means for providing substitute consent to health care, and the need for safeguards against abuse? If not, how could the balance be improved?

10-2 Should the name 'statutory health attorney' be changed? If so, what name should be used?

Identifying the statutory health attorney

10.34 At present, section 63 of the *Powers of Attorney Act 1998* (Qld) provides that the statutory health attorney for the adult is the first person who is readily available and culturally appropriate to exercise power for the matter in

850 The General Principles and the Health Care Principle are examined in a separate Discussion Paper: Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 4, 5.

851 The United Nations Convention provides, among other things, that measures to support the exercise of an adult's capacity should be proportional and tailored to the person's circumstances and should apply for the shortest time possible. It also recognises the right of persons with disabilities to enjoy the highest attainable standard of health without discrimination on the basis of disability. The Convention also recognises the need for people with disabilities to be protected from neglect, abuse or exploitation. See United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 12(4), 25, 16.

852 Submission C87B.

the listed order of the adult's spouse, a person who has the care of the adult, and a close friend or relation of the adult. If no-one in that list is readily available and culturally appropriate, the Adult Guardian is the statutory health attorney.

10.35 The list of persons set out in section 63 may raise a number of issues for consideration. In particular, complex family dynamics and cultural differences may mean there are difficulties in identifying the statutory health attorney. The terms used in section 63 may require further clarification. This may be important since the provisions, which are intended to operate automatically, need to be easily comprehended by health providers, family members and others in the community.

Spouse

10.36 The first person listed in section 63(1) of the *Powers of Attorney Act 1998* (Qld) is the adult's spouse. As explained earlier, by virtue of the *Acts Interpretation Act 1954* (Qld), a spouse includes a de facto partner, including a same-sex partner.[853] By way of clarification, it may be useful for a reference to this to be included in a footnote to section 63.

10.37 The Act limits the circumstances in which a spouse will be considered the statutory health attorney under section 63(1)(a). It includes a spouse 'if the relationship between the adult and the spouse is close and continuing'. This restriction also appears in the legislation of most of the other jurisdictions.[854] In contrast, the Western Australian legislation specifies that the spouse must be 'living with the patient'.[855]

10.38 The requirements for a 'close and continuing' relationship are not defined in the legislation and the Tribunal has given its meaning only limited consideration. *Re MV*[856] appears to be one of the few cases in which the Tribunal has specifically considered whether a spouse had a close and continuing relationship with the adult in deciding whether the spouse should act as the adult's statutory health attorney. In that case, the Tribunal declared that the adult's daughter was the statutory health attorney, finding that the adult's wife did not have a close and continuing relationship with him:[857]

---

853 *Acts Interpretation Act 1954* (Qld) s 36. See n 828 above.

854 *Guardianship Act 1987* (NSW) s 33A(4)(c); *Guardianship and Administration Act 1995* (Tas) s 4(5)(a); *Guardianship and Administration Act 1986* (Vic) s 37(4). Also in British Columbia and Manitoba, the person is not qualified to give consent unless he or she has been in contact with the adult in the preceding 12 months: *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, s 16(2); *Mental Health Act*, CCSM, c M110, s 28(3).

855 *Guardianship and Administration Act 1990* (WA) s 110ZD(3)(a), (5), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

856 [2005] QGAAT 46.

857 *Re MV* [2005] QGAAT 46, [1], [83]–[85]. Also see, for example, *ZS and ZT v Public Guardian* [2007] NSWADT 57, [10] in which weight was given to the wife's 'frequent and long visits' with the adult.

> [Mr MV] has been married for 37 years to Mrs M who is eighty. Mr MV has been suffering from Parkinson's Disease for at least ten years and has been in the care of Dr Silburn a specialist neurologist for the last seven years. He now resides at a Home for the Aged having lived at his home until late 2004 with his wife. Mr MV has a daughter Mrs TR from his first marriage and Mrs M has one daughter from her first marriage, Mrs TN.
>
> …
>
> The *Powers of Attorney Act 1998* actually sets up a regime allowing informal decision makers, called statutory health attorneys, to make decisions for adults when they have lost capacity. However, for this regime to successfully operate it is necessary for the Tribunal to declare who is Mr MV's statutory health attorney because under section 63 of that Act, Mr MV's statutory health attorney would normally be his spouse. However this priority to the spouse is defeated if the relationship is not a close and continuing relationship.
>
> In this regard therefore the Tribunal makes the following findings:
>
> (a) Mrs M and Mr MV have been physically separated since November 2004.
>
> (b) Mrs M has only had infrequent contact with Mr MV during this time.
>
> (c) Mr MV's expressed wish is that he does not want contact with Mrs M and he does not want her to make any decisions for him.
>
> (d) There is continuing conflict between Mrs M and Mrs TR as to who should be making health decisions for Mr MV.
>
> (e) The decision as to where Mr MV should receive high care assistance is a health decision which a statutory health attorney may make once Mr MV has lost capacity.
>
> **Conclusion**
>
> The Tribunal therefore declares that Mrs TR is Mr MV's statutory health attorney and she should be the one who makes decisions for Mr MV when he is no longer able to make health decisions for himself.

10.39 From this decision, it appears that the frequency of contact, how recently contact had occurred, and the adult's expressed wishes about contact, were important factors in determining whether the relationship is close and continuing. This is consistent with comments made by the Tribunal in different contexts. For example, in *Re EJC*, the Tribunal was satisfied that the adult's daughter was appropriate for appointment as administrator partly on the basis that she had a 'close and continuing relationship' with the adult:[858]

858 *Re EJC* [2000] QGAAT 3, [35]. Also see *Re HG* [2006] QGAAT 26, [72] in which the Tribunal described the adult's paid carer as having a 'close and continuing relationship' with the adult when considering the carer's evidence with respect to whether or not the adult would have wanted the life-sustaining treatment to be withdrawn:

> SG has been a paid carer with the support service five days a week for the past five years and she has developed a close and continuing relationship with HG which goes beyond the provision of paid services. HG has become a friend and part of her family.

by living with her for some 20 years, continuing to visit her regularly in the nursing home and by their liquid assets being jointly held in bank accounts.

10.40 An issue to consider is whether the legislation should specify what a 'close and continuing' relationship means.

10-3 Should section 63 of the *Powers of Attorney Act 1998* (Qld) attempt to define the term 'close and continuing relationship', or is that term sufficiently flexible to cover the range of people to whom it is intended to apply? If the Act should include a definition, how should that be framed?

Carer

10.41 The second person recognised under section 63(1) of the *Powers of Attorney Act 1998* (Qld) is a person, 18 years or older, who has the care of the adult and is not a paid carer[859] for the adult. This is consistent with the legislation in the other jurisdictions.[860]

10.42 Section 63(3)–(4) clarifies when a person is taken to have the care of an adult:

> (3) Without limiting who is a ***person who has the care of the adult***, for this section, a person has the care of an adult if the person—
>
> (a) provides domestic services and support to the adult; or
>
> (b) arranges for the adult to be provided with domestic services and support.
>
> (4) If an adult resides in an institution (for example, a hospital, nursing home, group home, boarding-house or hostel) at which the adult is cared for by another person, the adult—
>
> (a) is not, merely because of this fact, to be regarded as being in the care of the other person; and
>
> (b) remains in the care of the person in whose care the adult was immediately before residing in the institution.

859 A 'paid carer' is defined in the legislation as someone who performs services for the adult's care and receives remuneration for the services, other than from a Commonwealth or State carer payment or benefit or remuneration attributable to the adult that damages may be awarded by a court for voluntary services performed for the adult: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 Dictionary.

860 *Guardianship Act 1987* (NSW) s 33A(4)(c); *Guardianship and Administration Act 1993* (SA) ss 59(2)(b)(i), 3(c)(ii) (definition of 'relative'); *Guardianship and Administration Act 1995* (Tas) s 4(1)(c)(iii); *Guardianship and Administration Act 1986* (Vic) s 37(1)(g); *Guardianship and Administration Act 1990* (WA) s 110ZD(3)(c), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

10.43 The legislation in New South Wales, Tasmania and Victoria includes similar provisions as to when a person is considered a carer for the adult.[861] However, each of those jurisdictions provides that a carer is someone who *regularly* provides or arranges domestic services and support for the adult. An issue to consider is whether a similar condition should be included in the Queensland definition. This may help ensure that authority is conferred on a carer only when he or she has an ongoing involvement with the adult.[862]

10-4 Should the definition of unpaid carer in section 63(3) of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a carer is someone who *regularly* provides or arranges domestic services and support for the adult?

Close friend or relation

10.44 The final category of persons recognised under section 63(1) of the *Powers of Attorney Act 1998* (Qld) is 'a close friend or relation of the adult who is not a paid carer[863] for the adult'.[864]

Relation

10.45 The *Powers of Attorney Act 1998* (Qld) includes the following definition of 'relation':[865]

> ***relation***, of a person, means—
>
> (a) a spouse of the first person; or
>
> (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; or
>
> *Example of legal arrangement—*
>
> 1 court order for custody
>
> 2 trust arrangement between trustee and beneficiary

---

861 *Guardianship Act 1987* (NSW) s 3D; *Guardianship and Administration Act 1995* (Tas) s 4(3), (4); *Guardianship and Administration Act 1986* (Vic) s 37(2), (3).

862 Carers are not separately included in the equivalent scheme for health care consent in British Columbia, Ontario or Manitoba. In those jurisdictions, the decision-makers are limited to spouses and family members and relatives. In British Columbia and Manitoba, those persons cannot make a health care decision unless, among other things, they have been in contact with the adult in the preceding 12 months: *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, s 16(2); *Mental Health Act*, CCSM, c M110, s 28(3).

863 'Paid carer' is defined in the legislation. See n 859 above.

864 *Powers of Attorney Act 1998* (Qld) s 63(1)(c).

865 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 Dictionary.

(c) a person on whom the first person is completely or mainly dependent; or

(d) a person who is completely or mainly dependent on the first person; or

(e) a person who is a member of the same household as the first person.

10.46 This definition is not specific to section 63 of the Act but also applies in relation to a number of other provisions. For example, it applies for the purpose of section 44(7) of the Act under which a doctor is excluded from attesting to the principal's capacity to make an advance health directive if he or she is a relation of the principal or of an attorney of the principal. It also applies for the purpose of section 73 of the Act in relation to an attorney's duty to avoid conflict transactions.[866]

10.47 An issue to consider is whether the current definition of 'relation' is appropriate for the purpose of section 63(1)(c) of the *Powers of Attorney Act 1998* (Qld).[867]

10.48 For example, 'relation' of a person is defined to include a spouse of that person. As explained earlier, section 63(1)(a) of that Act lists as the first category of statutory health attorney 'a spouse of the adult if the relationship between the adult and the spouse is close and continuing'. The effect of also including a spouse in the definition of 'relation' for section 63(1)(c) is that, if there is not a close and continuing relationship between the adult and his or her spouse (for example, where the adult and his or her spouse have separated), the spouse may nevertheless be a statutory health attorney for the adult.

10.49 Another issue is whether it is appropriate for a trustee or beneficiary in relation to property of the adult to have authority to make health care decisions for the adult on the basis solely of that legal relationship. Further, a person who is completely or mainly dependent on the adult may not necessarily be suitable for the role of statutory health attorney.

10.50 Another issue to consider is whether the definition of 'relation' under section 63(1) of the *Powers of Attorney Act 1998* (Qld) should be consistent with the definition of 'senior available next of kin' under the *Transplantation and Anatomy Act 1979* (Qld). Under that Act, authority to consent to the removal of tissue from the body of a deceased person for donation is conferred on the

866 Also *Powers of Attorney Act 1998* (Qld) ss 31 (Meaning of eligible witness), 87 (Presumption of undue influence), 88 (Gifts).

867 Also the reference in paragraph (b) of the definition to a 'court order for custody' does not reflect the contemporary nomenclature of the *Family Law Act 1975* (Cth).

senior available next of kin.[868] For an adult, the senior available next of kin is defined as:[869]

> (b) … the first of the following persons who, in the following order of priority, is reasonably available—
>
> (i) the spouse of the person;
>
> (ii) a son or daughter, who has attained the age of 18 years, of the person;
>
> (iii) a parent of the person;
>
> (iv) a brother or sister, who has attained the age of 18 years, of the person.

10.51 However, the hierarchy of 'senior available next-of-kin' under the *Transplantation and Anatomy Act 1979* (Qld) is a rigid hierarchy, reflecting the difference between the nature of decisions made under that Act and decisions made by a statutory health attorney. In the case of the *Transplantation and Anatomy Act 1979* (Qld), a decision is usually a one-off decision that has to be made quickly close to the time of an adult's death. In the context of the guardianship legislation, however, it may be more appropriate to ensure that a decision about the adult's health care is made by a person who has a close relationship with the adult, and who is therefore likely to know if the adult has any views and wishes in relation to the decision. Further, the inclusion of a spouse of the adult in the definition of 'relation' as is provided for in the definition of 'senior available next-of-kin' under the *Transplantation and Anatomy Act 1979* (Qld), would have the same effect as noted above in [10.48].

Close friend

10.52 The *Powers of Attorney Act 1998* (Qld) also includes a definition of 'close friend':[870]

> ***close friend***, of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person's welfare.

10.53 As with the definition of 'relation', this definition applies to section 63 as well as to several other provisions in the Act.[871]

---

868 *Transplantation and Anatomy Act 1979* (Qld) ss 22, 23. The guardianship legislation makes specific provision for consent to certain types of special health care, including removal of tissue from an adult while alive for donation to someone else: *Powers of Attorney Act 1998* (Qld) sch 2 s 7. A statutory health attorney does not, however, have authority to give consent to special health care: s 62.

869 *Transplantation and Anatomy Act 1979* (Qld) s 4.

870 *Powers of Attorney Act 1998* (Qld) s 3, sch 3 Dictionary.

871 *Powers of Attorney Act 1998* (Qld) ss 73 (Avoid conflict transaction), 87 (Presumption of undue influence), 88 (Gifts).

10.54 An issue to consider is whether the current definition of 'close friend' is sufficient for the purpose of section 63(1)(c). The legislation in New South Wales and Tasmania, for example, includes a similar, but more detailed, definition. Section 4(5)(b)–(e) of the *Guardianship and Administration Act 1995* (Tas) provides, for example:

> (5) For the purposes of this section—
>
> …
>
> (b) a person is taken to be a close friend or relative of another person if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare; and
>
> (c) a person is taken not to be a close friend or relative if the person is receiving remuneration (whether from the person or some other source) for any services that he or she performs for the other person in relation to the person's care; and
>
> (d) a reference to remuneration is to be read as not including a reference to a carer's pension; and
>
> (e) the President may issue guidelines, not inconsistent with this section, specifying the circumstances in which a person is to be regarded as a close friend or relative of another person.

10.55 This definition stipulates the requirements of frequent personal contact and the absence of remuneration for services performed for the adult's care. An issue to consider is whether similar provision should be made in Queensland.

10-5 Should the definition of 'relation' in schedule 3 of the *Powers of Attorney Act 1998* (Qld) apply to the reference to a 'close friend or relation' in section 63 of the Act?

10-6 Alternatively, should any categories of persons in the definition of 'relation' be excluded for the purpose of section 63:

(a) a spouse of the first person;

(b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement such a parenting order or a trust arrangement between trustee and beneficiary;

(c) a person on whom the first person is completely or mainly dependent;

(d) a person who is completely or mainly dependent on the first person;

(e) a person who is a member of the same household as the first person?

10-7 Alternatively, should a new definition of 'relation', based on the definition of 'senior available next of kin' in the *Transplantation and Anatomy Act 1979* (Qld), apply to section 63 of the *Powers of Attorney Act 1998* (Qld)? If so, should the definition be modified to exclude the reference to a spouse?

10-8 Is the definition of 'close friend' in schedule 3 of the *Powers of Attorney Act 1998* (Qld) sufficient for the purpose of section 63 of the Act? If not, how should the definition, to the extent it applies to section 63, be modified?

Exclusions and limitations

10.56 Section 63(1) of the *Powers of Attorney Act 1998* (Qld) imposes some restrictions on the persons who may be recognised as a statutory health attorney. For example, a spouse is not recognised unless he or she has a close and continuing relationship with the adult,[872] and a carer or close friend or relation must be at least 18 years old and must not be a paid carer for the adult.

10.57 In the majority of cases, decision-making by family members and others in personal relationships with the adult will be preferable to decision-making by a statutory agency. Restrictions on who can be a statutory health attorney are, however, an important safeguard against potential conflicts of interest and abuse. Care should also be taken that the provisions are not so restrictive as to significantly limit their utility. An issue to consider is whether the current restrictions are appropriate.

10.58 In Queensland, a carer or a close friend or relation will be recognised as a statutory health attorney only if he or she is at least 18 years old. This does not apply to a spouse under section 63(1)(a). An issue to consider is whether a spouse should be recognised only if he or she is at least 18 years old. This would be consistent with the position in Western Australia[873] and with

872 Unless he or she is recognised as a close friend or relation under *Powers of Attorney Act 1998* (Qld) s 63(1)(c).

873 *Guardianship and Administration Act 1990* (WA) s 110ZD(3), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

the provisions for the appointment of an attorney under an enduring document[874] which require the attorney to be at least 18 years old.[875]

10.59 A number of jurisdictions also recognise the spouse only if he or she is not a person under guardianship.[876] Similarly, in Western Australia the legislation specifies that the person responsible must be 'of full legal capacity'.[877] An issue to consider is whether the legislation in Queensland should provide that a person is not a statutory health attorney if he or she has a guardian appointed for his or her personal matters, or, although the person does not have a guardian for personal matters, the person nevertheless has impaired capacity for the health care decision.

10.60 Section 29 of the *Powers of Attorney Act 1998* (Qld) imposes limitations on the eligibility of a person for appointment as an adult's attorney under an enduring document. For example, a health provider is precluded from being an attorney under an enduring document, and a service provider for a residential service at which the adult resides is excluded from being an attorney under an advance health directive.

10.61 An issue to consider is whether similar exclusions should apply in relation to statutory health attorneys. At present, nothing in section 63 prevents a health provider for the adult from being recognised as a statutory health attorney if he or she is the adult's spouse, carer or close friend or relation, provided he or she is not a paid carer. While section 63(4) of the Act does limit the circumstances in which a residential service provider can be recognised as the adult's carer, the legislation does not prevent such a person being recognised as a close friend or relation.

10-9 Should section 63 of the *Powers of Attorney Act 1998* (Qld) be amended to clarify that:

(a) the adult's spouse will be recognised as the statutory health attorney only if he or she is at least 18 years old;

(b) a person will not be recognised as the statutory health attorney if he or she is a health provider for the adult;

874 An enduring document means an enduring power of attorney or an advance health directive: *Powers of Attorney Act 1998* (Qld) s 28.

875 *Powers of Attorney Act 1998* (Qld) s 29(1)(a), (2)(a)(i).

876 *Guardianship Act 1987* (NSW) s 33A(4)(b); *Guardianship and Administration Act 1995* (Tas) s 4(5)(a); *Guardianship and Administration Act 1986* (Vic) s 37(4).

877 *Guardianship and Administration Act 1990* (WA) s 110ZD(2)(a), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

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

Readily available and culturally appropriate

10.62 Section 63(1) of the *Powers of Attorney Act 1998* (Qld) provides that the statutory health attorney is the first person in the list who is 'readily available and culturally appropriate to exercise power for the matter'.

10.63 Similar provisions are included in some of the other jurisdictions. In Victoria, the person responsible is the first person in the listed order who is 'responsible for the patient and who, in the circumstances, is reasonably available and willing and able to make a decision'.[878] In Western Australia, the legislation nominates the first person in the list who is 'reasonably available' and is 'willing to make a treatment decision in respect of the treatment'.[879]

10.64 An issue to consider is whether the legislation in Queensland should also include a requirement that the person is not just available but is also *willing* to exercise power for the matter. Making decisions about an adult's health care is an important and serious responsibility. It may be helpful to clarify that a person is not required to accept decision-making authority if he or she is not willing to assume the responsibility.[880]

10.65 Section 63(1) of the Act also provides that the statutory health attorney must be 'culturally appropriate' to exercise power. None of the other jurisdictions include a similar specification.

10.66 Cultural differences may have a significant impact on the persons who are considered appropriate substitute decision-makers for an adult. Recent research in the Northern Territory has found, for example, that for Indigenous Australians, the focus is on family and community rather than the individual

878 *Guardianship and Administration Act 1986* (Vic) s 37(1).

879 *Guardianship and Administration Act 1990* (WA) s 110ZD(2), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.. Similarly, the legislation in Ontario provides that the person must be capable with respect to the treatment and available and willing to assume responsibility for giving or refusing consent: *Health Care Consent Act*, SO 1996, c 2, Sch A, s 20(2). A requirement of willingness is also included in British Columbia and Manitoba: *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, s 16(2); *Mental Health Act*, CCSM, c M110, s 28(3).

880 In *Re RAA* [2007] QGAAT 17, [38], for example, the Tribunal appointed a guardian for health matters on the basis that the family member did not want to be involved in the adult's health matters:

> As RAA's brother does not wish to be RAA's statutory health attorney, as there are no other family members who are statutory health attorneys, and as RAA has ongoing medical issues in respect of which decisions need to be made, the Tribunal considers that there is a need for an appointment of a guardian for health care decisions.

In that case, the Adult Guardian was appointed as guardian for accommodation, health and service provision matters.

when consent to health care is sought.[881] Consent may need to be sought from appropriate people in the extended family or the community. Failure to follow this course may lead to hostility or conflict.

10.67 While section 63(1) provides that the statutory health attorney is the first person in the list who is culturally appropriate, an issue to consider is whether the current list of persons is wide enough to include those who would be culturally appropriate in the given circumstances, for example, members of the extended family or persons in a position of tribal authority.[882]

10-10 Should section 63(1) of the *Powers of Attorney Act 1998* (Qld) be amended to provide that the statutory health attorney is the first person in the listed order who is readily available *and willing* to exercise power for the matter?

10-11 Does section 63(1) of the *Powers of Attorney Act 1998* (Qld) adequately provide for the complexities of Indigenous family and community relationships? If not, how could this be addressed?

10-12 Does section 63(1) of the *Powers of Attorney Act 1998* (Qld) adequately provide for the range of relationships of importance in different cultural contexts? If not, how could this be addressed?

An order of priority

10.68 Section 63(1) of the *Powers of Attorney Act 1998* (Qld) provides that the statutory health attorney for the adult is the first person in the listed order who is readily available and culturally appropriate. It thus establishes an order of priority so that the first person in the list who is readily available and culturally appropriate is taken to be the statutory health attorney even if there is another person later in the list who is also available and appropriate.

10.69 This is consistent with the legislation in most of the other jurisdictions.[883]

881 P McGrath and E Phillips, 'Western Notions of Informed Consent and Indigenous Cultures: Australian Findings at the Interface' (2008) 5 *Bioethical Inquiry* 21.

882 This issue was noted in the parliamentary debate accompanying the Powers of Attorney Bill 1997: Queensland, *Parliamentary Debates*, Legislative Assembly, 22 April 1998 (Anna Bligh) 842.

883 *Guardianship Act 1987* (NSW) s 33A(4); *Guardianship and Administration Act 1995* (Tas) s 4(1)(c); *Guardianship and Administration Act 1986* (Vic) s 37(1); *Guardianship and Administration Act 1990* (WA) s 110ZD(2), (3), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences. It is also consistent with the provisions in British Columbia, Ontario and Manitoba: *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, s 16; *Health Care Consent Act*, SO 1996, c 2, Sch A, s 20; *Mental Health Act*, CCSM, c M110, s 28(1).

10.70 When it recommended a provision for statutorily authorised health care decision-makers in its original 1996 Report, the Queensland Law Reform Commission proposed that the list of decision-makers should not be hierarchical:[884]

> this approach could lead to difficulties identifying and locating the person authorised to consent and … there may also be circumstances in which the hierarchical order would not reflect the reality of the person's support networks or the person's lifestyle.

10.71 An issue to consider is whether the list of persons should be in an order of priority. On the one hand, the rigidity of a hierarchical order may mean that the most appropriate person is overlooked in favour of someone else. It might also make identification of the statutory health attorney difficult if an individual fits into more than one category. On the other hand, the absence of an order of priority may significantly increase the likelihood of disputes.

10.72 If there should continue to be an order of priority, another issue to consider is whether the current hierarchy is appropriate. It may be more appropriate, for example, for a relation to have higher priority than a close friend. It might also be appropriate for particular relatives, such as adult children or a parent, to have a higher priority than other relatives.

10.73 A related issue is the extent to which the hierarchy should be consistent with that under the *Transplantation and Anatomy Act 1979* (Qld).[885] Consistency may be of particular value to health professionals when trying to identify the appropriate person from whom to seek consent. Spouses are first in order of priority under both schemes, although the *Powers of Attorney Act 1998* (Qld) gives preference to a spouse who is in a close and continuing relationship with the adult. The remaining next of kin specified under the *Transplantation and Anatomy Act 1979* (Qld) are also eligible as statutory health attorneys under the category 'close friend or relation'. However, under the statutory health attorney provisions, an 'unpaid carer' is higher in the hierarchy than the next of kin who have the same priority as 'close friends'. In addition, there is no priority ranking between different relatives as is the case under the *Transplantation and Anatomy Act 1979* (Qld).

10-13 Should the list of persons who may be the adult's statutory health attorney under section 63 of the *Powers of Attorney Act 1998* (Qld) continue to be in an order of priority? If yes, is the current order of priority appropriate or should it be changed?

884 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, 335.

885 See [10.50] above.

Scope of statutory health attorneys' power

10.74 Section 62 of the *Powers of Attorney Act 1998* (Qld) empowers statutory health attorneys to make decisions about an adult's health matters, including the withholding or withdrawal of life-sustaining measures.[886] Statutory health attorneys do not, however, have power to make decisions about other personal matters, such as where the adult lives. Only the Tribunal has power to make decisions about special health matters, such as sterilisation or special medical research or experimental health care.[887]

10.75 This is similar to the position in the other jurisdictions. In New South Wales, South Australia, Tasmania and Victoria, the person responsible, or the appropriate authority, can give or refuse consent to medical or dental treatment, not including special or prescribed treatment such as termination of pregnancy or sterilisation.[888] In Victoria, the person responsible may also give consent to medical research procedures.[889]

10.76 In Western Australia, the person responsible can consent or refuse consent to medical or surgical treatment, including life-sustaining measures or palliative care, or dental treatment or other health care.[890] The person responsible cannot, however, consent to sterilisation.[891]

10.77 An issue to consider is whether the scope of the statutory health attorney's power requires clarification. It may not be clear, for example, whether certain activities are part of the adult's health care or are ancillary to it and therefore outside the scope of the statutory health attorney's power. This might include clinical assessments such as an aged care assessment in relation to the adult's residential or community care needs. It may be appropriate for consent to such assessments, if the adult has impaired capacity, to be sought from the adult's statutory health attorney if there is no guardian or attorney.

---

886 A health matter relates to the adult's health care. This is defined as care or treatment of, or a service or a procedure for, the adult to diagnose, maintain or treat the adult's physical or mental condition carried out by or under the supervision of a health provider. Health care does not include special health care such as sterilisation, termination of pregnancy, tissue donation, participation in special medical research or experimental health care or electroconvulsive therapy or psychosurgery. See *Powers of Attorney Act 1998* (Qld) sch 2 ss 4 (Health matter), 5 (Health care), 6 (Special health matter), 7 (Special health care). The scope of health matters and special health matters is examined in Chapter 4.

887 *Guardianship Act 1987* (NSW) s68. Under s 74 of that Act, the Tribunal may appoint 1 or more persons who are eligible for appointment as a guardian or guardians for the adult and give the guardian or guardians power to consent for the adult to continuation of the special health care or the carrying out on the adult of similar special health care.

888 *Guardianship Act 1987* (NSW) ss 33(1), 36(1); *Guardianship Regulation 2005* (NSW) s 8; *Guardianship and Administration Act 1993* (SA) ss 3(1), 59(1); *Guardianship and Administration Act 1995* (Tas) ss 3(1), 39(1); *Guardianship and Administration Act 1986* (Vic) ss 3(1), 39(1)(b), 42H(1).

889 *Guardianship and Administration Act 1986* (Vic) ss 3(1), 42S(2). This issue is considered in Chapter 13 of this Discussion Paper.

890 *Guardianship and Administration Act 1990* (WA) ss 3(1), 110ZD(1), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

891 *Guardianship and Administration Act 1990* (WA) s 110ZD(7).

10.78 It may also be appropriate for decision-making power to be given to the adult's statutory health attorney for other matters ancillary to health care. This might include personal matters such as decisions about where the adult should live. The need for decisions in relation to residential or nursing home care, for example, may often arise in the context of health care decisions.

10.79 While such decisions can be made informally for an adult, institutions and professionals may be hesitant to accept an informal decision-maker's authority. The conferral of statutory power may help minimise such difficulties and ensure timely decisions for the adult can be made without resort to public guardianship proceedings. This would be consistent with the principle of least restrictive interference with the adult's rights. On the other hand, appointment of a guardian for personal matters may ensure a greater degree of scrutiny as a safeguard against abuse, neglect or exploitation.

10-14 Should section 62 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that a statutory health attorney has power to consent to:

(a) clinical assessments such as an aged care assessment in relation to the adult's residential or community care needs;

(b) other matters ancillary to the adult's health care? If so, what matters?

Chapter 11

Advance health directives

INTRODUCTION

11.1 The Commission's terms of reference direct it to review the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including the law relating to advance health directives.[892] An advance health directive is a type of 'enduring document';[893] the other type of enduring document is an enduring power of attorney.

11.2 This chapter gives an overview of the current scheme for advance health directives in Queensland, followed by an outline of similar measures in other jurisdictions before raising some specific issues for consideration.

11.3 Some of the issues dealt with in this chapter have also been considered in the context of enduring powers of attorney in Chapter 9 of this Discussion Paper.

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

893 *Powers of Attorney Act 1998* (Qld) s 28; *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'enduring document').

BACKGROUND

11.4 Medical treatment ordinarily requires patient consent.[894] Consistent with the concept of individual autonomy, every competent adult has the right to decide whether to consent to, or refuse, medical treatment. If a patient lacks capacity to give consent, a mechanism is needed to determine whether particular treatment can be given or should be withheld.

11.5 One such mechanism is the advance health directive. Advance health directives 'are decisions made by patients about what medical treatments they would like in the future, if at some point, they cannot make decisions for themselves'.[895] Advance health directives were developed as a response to the recognition of patient autonomy and self-determination, and to concerns about the possible indignities of artificial prolongation of life by new medical technologies.[896] In some jurisdictions, they have also been used in relation to psychiatric treatment.[897]

11.6 Legislative provision for advance health directives overcame three perceived problems.[898]

11.7 First, there was some uncertainty at common law about whether advance directives would be binding on health practitioners or would simply be taken into account as evidence of the patient's wishes, and whether doctors would be protected from potential liability if they complied, or failed to comply, with such directives. A legislative scheme would provide greater certainty and minimise the need for such questions to be resolved on an individual basis by the courts.

11.8 Secondly, legislative provision for advance health directives enabled an adult to make certain health care decisions in advance where the adult did not wish to use an enduring power of attorney for that purpose. Enduring powers of attorney allow people to appoint attorneys to give or refuse consent on their behalf. However, some people might not have a trusted family member or friend to appoint as attorney or they might not wish to burden others with the

---

894 Eg *Airedale NHS Trust v Bland* [1993] AC 789, 891 (Lord Mustill); *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 232–4 (Mason CJ, Dawson, Toohey and Gaudron JJ). In Queensland, see also *Guardianship and Administration Act 2000* (Qld) s 79; *Criminal Code* (Qld) ss 245 (Definition of 'assault'), 246 (Assaults unlawful).

895 C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38.

896 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Consultation Paper No 51 (2008) [1.06]; South Australia Government, *South Australian Advance Directives Review*, Background Paper (2007) 7; R Tobin, 'The incompetent patient's right to die: time for legislation allowing advance directives?' (1993) *New Zealand Law Review* 103.

897 T Foukas, 'Psychiatric advance directives: Part 1' (1999) 8(1) *Australian Health Law Bulletin* 13.

898 Generally, 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, 346–8; D Lanham and B Fehlberg, 'Living wills and the right to die with dignity' (1991) 18(2) *Melbourne University Law Review* 329, 331–5.

difficulties of making such decisions.[899] Provision for an adult to make legally binding directions about these matters in advance provided an alternative and minimised the risk that a chosen, or default, decision-maker might make decisions at odds with the adult's wishes.

11.9 Thirdly, the scheme for advance health directives overcame the limitations of existing legislative provisions in other jurisdictions for 'living wills'. By a living will a person could direct that, in the event that the person became terminally ill and lost decision-making capacity, life-sustaining treatment be withheld.[900] Provision for living wills did not allow directions to be given about other health care or treatment. In contrast, the legislative scheme in Queensland, and in some other jurisdictions,[901] applies to a wider range of health care matters and in a wider range of circumstances, namely, in any circumstance in which the person's decision-making capacity for the relevant matter is impaired. In Queensland, the scheme also encapsulates and extends the concept of a 'Ulysses agreement' or 'advance psychiatric directive'[902] by allowing directives to be made with respect to care or treatment for a person's mental condition and special health care matters such as electroconvulsive therapy or psychosurgery and experimental health care.[903]

11.10 Importantly, the legislation in Queensland is not limited to the refusal of treatment but also enables an adult to provide advance consent to treatment. This is an especially important measure given that lack of access to treatment, rather than over-treatment, is often a more pressing concern for people with disabilities.[904]

---

899 Such concerns were raised, for example, by participants in a South Australian study: M Brown, 'Who would you choose? Appointing an agent with a medical power of attorney' (1997) 16(4) *Australasian Journal on Ageing* 147, 149–50.

900 The concept of the 'living will' was developed in the United States of America and was reflected in the statutory provision for anticipatory directions for the refusal of life-sustaining treatment in the Northern Territory and South Australia: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making for People who Need Assistance Because of Mental or Intellectual Disability*, Discussion Paper, WP No 38 (1992) 144. See *Natural Death Act* (NT); *Natural Death Act 1983* (SA), repealed by *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

901 Eg *Mental Capacity Act 2005* (UK) s 24(1); *Health Care Directives Act*, CCSM 1992 c H27 (Manitoba). See also [11.27] below.

902 Ulysses agreements and psychiatric advance directives are used to provide advance refusal or consent to psychiatric treatment that survives the person's subsequent incapacity. Eg A Macklin, 'Bound to freedom: The Ulysses contract and the psychiatric will' (1987) 45 *University of Toronto Faculty of Law Review* 37, 38:

> The first innovation, known variously as a 'Ulysses contract' or 'Odysseus transfer', transforms civil commitment and treatment into a contractual obligation between doctor and patient. The second device is the 'psychiatric will', which is a unilateral refusal of treatment made in advance by a competent declarant. It is triggered by a determination of present incompetence on the part of that declarant to make treatment decisions. (notes omitted)

See also eg JA Dunlop, 'Mental health advance directives: Having one's say?' (2000) 89(2) *Kentucky Law Journal* 327, 351–4.

903 *Powers of Attorney Act 1998* (Qld) s 35(1), sch 2 ss 4–5, 6–7.

904 Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 5 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 31 October 2009.

11.11 Advance health directives therefore have a number of advantages:[905]

> Arguably, the right now given to Queenslanders to execute an advance health directive or living will under the *Powers of Attorney Act 1998* is a right based on the principle of self-determination.
>
> Individuals are provided with a mechanism of planning for their own incapacity with respect to important health care decisions, including whether or not to withhold or withdraw life-sustaining treatment at the end of their lives.
>
> These directives have the advantage of removing the decision-making burden from the shoulders of family members and friends, who are often called on to take responsibility for, or at least be involved in, critical decisions about life-sustaining treatment.
>
> In addition, the presiding doctor's determination whether to treat or not treat the patient is settled. …
>
> Perhaps the most significant advantage of the advance health directive is that it encourages discussion between the principal, family members and health care professionals about death and dying.

11.12 However, the making of legally binding health care decisions in advance of the circumstances in which they are to apply may also involve some practical difficulties. Many aspects of the legislative scheme for advance health directives are therefore addressed to the need for safeguards.

11.13 Reliable information about the use of advance health directives is scarce. Available research suggests that they are not commonly used.[906] For example, Queensland research reported in 2002 suggests that relatively few people have executed an advance health directive compared with enduring powers of attorney.[907] This is consistent with earlier research in other Australian jurisdictions.[908]

11.14 The low uptake of advance health directives may be a consequence of a lack of awareness, although informal options may be preferred even when

---

905 G Clarke, 'Living wills and the *Powers of Attorney Act 1998*: an opportunity to die with dignity' (1999) 19(1) *Proctor* 18, 20. See also Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making for People who Need Assistance Because of Mental or Intellectual Disability*, Discussion Paper, WP No 38 (1992) 143; and, in the context of mental illness, T Foukas, 'Psychiatric advance directives: Part 1' (1999) 8(1) *Australian Health Law Bulletin* 13.

906 C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal of Ageing* S25, S28.

907 CM Cartwright et al, *Community and Health/Allied Health Professionals' Attitudes to Euthanasia: What are the Driving Forces?* Report to the National Health and Medical Research Council (August 2002), cited in Alzheimer's Australia, *Submission to the House of Representatives Legal and Constitutional Affairs Committee Inquiry into Older People and the Law* (30 November 2006) 10 <http://www.aph.gov.au/house/committee/laca/olderpeople/subs/sub55.pdf> at 31 October 2009.

908 C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal of Ageing* S25, S28.

people know about advance directives.[909] Other barriers to the uptake of advance directives include the time involved in making a directive, people's reluctance to consider end of life issues, and difficulties in predicting future scenarios.[910] It has been said, however, that even if it is not widely exercised, the right to make an advance directive remains important.[911]

THE LAW IN QUEENSLAND

11.15 Chapter 3 of the *Powers of Attorney Act 1998* (Qld) provides for the making of advance health directives. It does not affect the common law recognition of health care instructions.[912] Section 35(1) of the Act provides:

> **35 Advance health directives**
>
> (1) By an ***advance health directive***, an adult principal may—
>
> (a) give directions, about health matters and special health matters, for his or her future health care; and
>
> (b) give information about his or her directions; and
>
> (c) appoint 1 or more persons who are eligible attorneys to exercise power for a health matter[35] for the principal in the event the directions prove inadequate; and
>
> (d) provide terms or information about exercising the power.
>
> 35 Note this does not include a special health matter.

11.16 A principal may give directions in an advance health directive about health matters, such as the treatment of a physical or mental condition, or special health matters, such as tissue donation or participation in experimental health care.[913] In addition, section 35(2) of the Act provides:[914]

---

909 The results of a small study in New South Wales suggest that people prefer informal advance care planning options even after they have been informed about advance health directives: J Mador, 'Advance care planning: Should we be discussing it with our patients?' (2001) 20(2) *Australasian Journal on Ageing* 89, 91. It has also been suggested that, even with large scale education initiatives, it is possible that advance directives will be used by only a small class of adults 'such as patients with chronic conditions, or those with specific religious objections to types of treatments': C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal of Ageing* S25, S28.

910 Eg Law and Justice Foundation of New South Wales (S Ellison et al), *Access to Justice and Legal Needs: The Legal Needs of Older People in NSW* (2004) vol 1, 158–9.

911 C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal of Ageing* S25, S28.

912 *Powers of Attorney Act 1998* (Qld) s 39. Common law directives are considered at [11.119]–[11.128] below.

913 *Powers of Attorney Act 1998* (Qld) s 35(1). See [4.15], [4.18] above for the definitions of 'special health care' and 'health care'.

914 See [12.67] below for the definition of 'life-sustaining measure'.

> (2) Without limiting subsection (1), by an advance health directive the principal may give a direction—
>
> (a) consenting, in the circumstances specified, to particular future health care of the principal when necessary and despite objection by the principal when the health care is provided; and
>
> (b) requiring, in the circumstances specified, a life-sustaining measure to be withheld or withdrawn; and
>
> (c) authorising an attorney to physically restrain, move or manage the principal, or have the principal physically restrained, moved or managed, for the purpose of health care when necessary and despite objection by the principal when the restraint, movement or management is provided.

11.17 The *Powers of Attorney Act 1998* (Qld) includes limitations on the operation of a direction about the withholding or withdrawal of a life-sustaining measure.[915] These limitations are discussed in Chapter 12 of this Discussion Paper.

11.18 A direction given in an advance health directive operates only while the principal has impaired capacity for the matter covered by the direction, and is as effective as if the principal gave the direction, and had capacity for the matter, when the decisions about the matter needed to made.[916] If the adult has given a direction about the relevant health matter in an advance health directive, the health matter must be dealt with in accordance with the direction.[917] A direction in an advance health directive takes priority over a power given to an attorney.[918]

11.19 The appointment of an attorney in an advance health directive operates in a similar fashion to an appointment made in an enduring power of attorney. The attorney's power is exercisable only during a period when the principal has impaired capacity for the matter.[919] When power is exercisable, the attorney has authority to do anything in relation to the health matter that the principal could lawfully do if the principal had capacity for the matter.[920] The principal

---

915 *Powers of Attorney Act 1998* (Qld) s 36(2).

916 *Powers of Attorney Act 1998* (Qld) s 36(1). See also *Powers of Attorney Act 1998* (Qld) s 101; *Guardianship and Administration Act 2000* (Qld) s 80 (No less protection than if adult gave health consent). Not all instructions given to a health provider, whether at the time or in advance, are binding. For example, instructions in relation to the provision of life-prolonging treatment are not binding if the treatment is not clinically indicated: *R (Burke) v General Medical Council* [2006] QB 273, [50]–[57]; M Thiagarajan, J Savulescu and L Skene, 'Deciding about life-support: A perspective on the ethical and legal framework in the United Kingdom and Australia' (2007) 14 *Journal of Law and Medicine* 583. Note also that nothing in the Act authorises euthanasia or assisted suicide: *Powers of Attorney Act 1998* (Qld) s 37.

917 *Guardianship and Administration Act 2000* (Qld) s 66(1), (2). See also s 65 if the matter is a special health matter.

918 *Powers of Attorney Act 1998* (Qld) s 35(3).

919 *Powers of Attorney Act 1998* (Qld) s 36(3).

920 *Powers of Attorney Act 1998* (Qld) s 36(4).

may, however, stipulate terms for the exercise of the attorney's powers which limit the extent of the attorney's authority.[921]

11.20 The provisions that apply to attorneys generally also apply to attorneys appointed under an advance health directive.[922] Issues in relation to attorneys appointed under enduring documents are discussed in Chapter 9 of this Discussion Paper.

11.21 Similarly, the legislation imposes formal requirements on the execution of an advance health directive. The principal must have the necessary capacity to make the directive and it must be made in writing, duly signed, dated and witnessed.[923] It need not, however, be in the approved form (but may be).

11.22 An advance health directive may be revoked in the same way as an enduring power of attorney, with the exception that a revocation by the principal need not be in the approved form.[924]

11.23 The legislation also provides for proof of an advance health directive and the recognition of similar documents made in other Australian jurisdictions,[925] but does not provide for the registration of advance health directives. These issues are discussed later in the chapter.

THE LAW IN OTHER JURISDICTIONS

11.24 Statutory provision for binding advance directions about medical treatment has been made in each of the Australian jurisdictions except New South Wales and Tasmania.[926]

11.25 Provision is made for 'health directions' in the ACT, 'directions' in the Northern Territory, 'anticipatory directions' in South Australia, 'decisions to

---

921 *Powers of Attorney Act 1998* (Qld) ss 35(1)(d), 36(5). To the extent the advance health directive does not state otherwise, the attorney will be taken to have the maximum power that could be given by the document: s 77.

922 This includes the appointment of multiple attorneys, the duties imposed on attorneys and the protections given to attorneys for breach of their duties in certain circumstances. See Chapter 9 above in relation to attorneys under enduring powers of attorney. The legislation also imposes eligibility requirements for attorneys appointed under advance health directives: *Powers of Attorney Act 1998* (Qld) ss 29(2), 35(1)(c).

923 *Powers of Attorney Act 1998* (Qld) ss 42, 44(2)–(7). The capacity and witnessing requirements have been examined by this Commission: see Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 7.

924 *Powers of Attorney Act 1998* (Qld) ss 48, 49(2), 51–56, 58. See also [9.17] above.

925 *Powers of Attorney Act 1998* (Qld) ss 40, 45.

926 In these jurisdictions, the common law applies. A similar approach is taken in New Zealand: *Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996* (NZ) s 2 sch cl 2(5).

refuse treatment' in Victoria, and 'advance health directives' in Western Australia.[927] There is considerable variation between the jurisdictions.

11.26 Like Queensland, the legislation in South Australia and Western Australia allows a person to make an advance direction consenting to, or refusing, certain treatment. In contrast, advance directions in the ACT, Northern Territory and Victoria are limited to the refusal or withdrawal of particular treatment.

11.27 There are also differences in the type of treatment for which an advance direction can be made. The provisions in the ACT, South Australia and Western Australia apply in relation to medical, surgical and dental treatment, including life-sustaining measures. In Victoria, the provision applies to operations, the administration of drugs and other medical procedures. The Northern Territory provision applies, however, only in relation to 'extraordinary measures'.[928]

11.28 Other limitations also apply. In the Northern Territory and South Australia, advance directions apply only in the event the person is suffering from a terminal illness and there is no real prospect of recovery. Significantly, in Victoria, a statutory refusal of treatment can be made only in relation to a person's current condition.

11.29 The jurisdictions differ in other details as well, such as the formalities for making an advance direction, the circumstances in which a direction is revoked, and provisions for proof and registration of advance directions. For example, Western Australia recognises advance directions that are made orally, while the other jurisdictions require directions to be in writing.[929] Some of these issues are discussed in later parts of the chapter.

11.30 Although there is little uniformity between the legislative schemes of the jurisdictions, in most cases, the statutes expressly preserve, and operate alongside, the common law.[930]

---

927 *Medical Treatment (Health Directions) Act 2006* (ACT) ss 7–9; *Natural Death Act* (NT) ss 3 (definition of 'extraordinary measures'), 4; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ss 4 (definition of 'medical treatment'), 7; *Medical Treatment Act 1988* (Vic) ss 3 (definition of 'medical treatment'), 5; *Guardianship and Administration Act 1990* (WA) ss 3 (definition of 'treatment'), 110P–110S, which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

928 Extraordinary measures are defined as 'medical or surgical measures that prolong life, or are intended to prolong life, by supplanting or maintaining the operation of bodily functions that are temporarily or permanently incapable of independent operation': see n 927 above.

929 In Victoria, a person can express or indicate the decision in writing, orally or any other way, but it must then be certified in the prescribed form by the registered medical practitioner and another person to be valid: see n 927 above.

930 *Medical Treatment (Health Directions) Act 2006* (ACT) s 6; *Natural Death Act* (NT) s 5(1); *Medical Treatment Act 1988* (Vic) s 4(1); *Guardianship and Administration Act 1990* (WA) s 110ZB, which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences. Common law advance directives are examined later in the chapter.

11.31 Provision is also made in a number of jurisdictions for an adult to appoint an attorney or enduring guardian for health matters. This is discussed in Chapter 9 of this Discussion Paper.

ISSUES FOR CONSIDERATION

Achieving the right balance

11.32 Advance health directives are intended to offer an accessible, alternative source of authority for health care decisions for adults with impaired capacity. They allow adults to provide direct instructions about their health care as well as to appoint an attorney to make health care decisions for them.

11.33 Advance health directives give effect to the principles of decision-making autonomy and least restrictive interference with adults' rights. They can safeguard patients' right of choice, self-determination and dignity at times when their preferences and human rights may otherwise be overlooked.[931] Advance directives can also help prevent abuse, neglect or exploitation that might arise from inadequate decision-making arrangements; further, their statutory recognition may contribute to wider community respect for the autonomy of people with disabilities or mental illness.[932]

11.34 This is consistent with the *Convention on the Rights of Persons with Disabilities* (the 'United Nations Convention') which recognises the importance of autonomy and least restrictive means of intervention, the inherent right to life of every human being, the right of persons with disabilities to enjoy the highest attainable standard of health without discrimination on the basis of disability, and the need to protect people with disabilities from exploitation and abuse.[933]

11.35 As with enduring powers of attorney, there is always a risk that advance health directives may be misused or involve abuse. This may occur, for example, if a person executes an advance health directive under undue pressure from a family member or other person and without understanding the nature or consequences of the document. There is also a risk that over-emphasis on the use of advance directives to refuse life-sustaining treatment

931 Eg D Porter, 'Advance directives and the persistent vegetative state in Victoria: A human rights perspective' (2005) 13 *Journal of Law and Medicine* 256.

932 The preservation of decision-making autonomy for people with a mental illness, for example, is arguably of particular importance, given that psychiatry has been said to be 'an area traditionally fraught with benevolent paternalism': T Foukas, 'Psychiatric advance directives: Part 1' (1999) 8(1) *Australian Health Law Bulletin* 13, 13.

933 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Arts 3(a), 12(4), 16, 25. The Convention is considered in a separate Discussion Paper: Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 3. See also eg United Nations, *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, 17 December 1991; United Nations, *Principles for Older Persons*, GA Res 46/91, 16 December 1991.

may contribute to social pressures on people with aged-related or other disabilities 'not to be a burden'.[934]

11.36 It is important for the legislative scheme for advance health directives to balance the need for safeguards against misuse with the desirability of providing an accessible and convenient means of advance planning. It is also important to balance the need for clarity and certainty with the flexibility that is necessary to make advance health directives a workable option.

11.37 Key features of the legislative scheme include:[935]

- The ability for a principal to give or refuse consent in an advance health directive in relation to the broad range of health matters and special health matters covered under the legislation;
- The requirement for a directive to be in writing, witnessed by a justice of the peace or a lawyer, and signed by a doctor who certifies the principal's capacity to make the document;[936]
- The ability for the principal to revoke the directive in writing while he or she retains capacity;
- Health providers' ability to disregard a direction if it is uncertain, inconsistent with good medical practice or no longer appropriate because circumstances have changed;[937] and
- The ability for the principal to appoint an attorney in an advance health directive to make health care decisions in the event the directions prove inadequate.[938]

11-1 Does the current scheme for advance health directives under the *Powers of Attorney Act 1998* (Qld) achieve the right balance between the utility of an advance planning mechanism and the need for safeguards against misuse? If not, how could this be achieved?

934 See, eg, Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 12 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 31 October 2009.

935 See also generally [11.15]–[11.23] above.

936 The witnessing requirements are examined in a separate Discussion Paper: Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 7.

937 This is discussed in detail later in the chapter.

938 Issues in relation to attorneys appointed under enduring documents are considered in Chapter 9 of this Discussion Paper.

Eligibility for appointment as an attorney under an advance health directive[939]

11.38 Section 29 of the *Powers of Attorney Act 1998* (Qld) specifies those persons who are eligible for appointment as an attorney under an enduring power of attorney or an advance health directive. It provides:

> **29 Meaning of *eligible attorney***
>
> (1) An ***eligible attorney***, for a matter under an enduring power of attorney, means—
>
> (a) a person who is—
>
> (i) at least 18 years; and
>
> (ii) not a paid carer, or health provider, for the principal;[28] and
>
> (iii) not a service provider for a residential service where the principal is a resident; and
>
> (iv) if the person would be given power for a financial matter—not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
>
> (b) the public trustee; or
>
> (c) a trustee company under the *Trustee Companies Act 1968*; or
>
> (d) for a personal matter only—the adult guardian.
>
> (2) An eligible attorney, for a matter under an advance health directive, means—
>
> (a) a person who has capacity for the matter who is—
>
> (i) at least 18 years; and
>
> (ii) not a paid carer, or health provider, for the principal;[29] or
>
> (b) the public trustee; or
>
> (c) the adult guardian.
>
> 28 *Paid carer* and *health provider* are defined in schedule 3 (Dictionary).
>
> 29 *Paid carer* and *health provider* are defined in schedule 3 (Dictionary).

939 Issues relating generally to the eligibility of attorneys appointed under enduring documents, such as the relevance of a person's criminal history, are considered in Chapter 9 of this Discussion Paper.

Service provider for a residential service where the principal is a resident

11.39 Section 29(1) of the *Powers of Attorney Act 1998* (Qld), which deals with eligible attorneys for a matter under an enduring power of attorney, provides that a person is not eligible for appointment if the person is 'a service provider for a residential service where the principal is a resident'.[940] However, section 29(2) of that Act, which deals with eligible attorneys for a matter under an advance health directive, does not contain a similar exclusion.

11.40 The exclusion of a person who is a service provider for a residential service where the principal is a resident resulted from an amendment to the *Powers of Attorney Act 1998* (Qld) in 2004.[941] The Explanatory Notes for the Justice and Other Legislation Amendment Bill 2004 (Qld) state:[942]

> Clause 91 amends section 29 (Meaning of eligible attorney) to exclude residential service providers from being eligible attorneys for the purposes of the Act.

11.41 This suggests that the intention was for the exclusion to apply generally to the eligibility of a person to be an attorney under an enduring document, although the exclusion as enacted applies only to the eligibility of a person to be an attorney under an enduring power of attorney.

11.42 The *Justice and Other Legislation Amendment Act 2004* (Qld) also amended the *Powers of Attorney Act 1998* (Qld) by inserting section 59AA,[943] which provides:

> **59AA Service provider**
>
> If the attorney becomes the service provider for a residential service where the principal is a resident, the enduring document is revoked to the extent it gives power to the attorney.

11.43 In referring to 'the attorney', section 59AA appears to apply to both an attorney under an enduring power of attorney, as well as to an attorney under an advance health directive, even though, in the latter case, the service provider is not excluded from being appointed as an attorney. This would tend to suggest that the exclusion of a residential service provider from appointment as an eligible attorney under section 29(1), but not under section 29(2), was a drafting oversight. Given that an attorney under an advance health directive has similar powers to an attorney under an enduring power of attorney who is appointed for health matters, it would seem to be desirable for section 29(2) to be amended so that it is consistent with section 29(1) in this respect.

---

940 *Powers of Attorney Act 1998* (Qld) s 29(1)(a)(iii).

941 See *Justice and Other Legislation Amendment Act 2004* (Qld) s 91.

942 Explanatory Notes, Justice and Other Legislation Amendment Bill 2004 (Qld) 20.

943 *Justice and Other Legislation Amendment Act 2004* (Qld) s 92.

11-2 Should section 29(2)(a) of the *Powers of Attorney Act 1998* (Qld) be amended to provide that an eligible attorney for a matter under an advance health directive means, in addition to the matters mentioned in section 29(2)(a)(i) and (ii), a person who is not a service provider for a residential service where the principal is a resident?

Appointment of the Public Trustee as an attorney under an advance health directive

11.44 Section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) provides that the Public Trustee is an eligible attorney for a matter under an advance health directive. When so appointed, the Public Trustee may:

- exercise power for a health matter for the principal in the event that the directions contained in the advance health directive prove inadequate;[944]
- subject to the terms of the advance health directive and the *Powers of Attorney Act 1998* (Qld), 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.[945]

11.45 The inclusion of the Public Trustee as an eligible attorney for appointment under an advance health directive is inconsistent with the scope of the Public Trustee's powers under the *Guardianship and Administration Act 2000* (Qld). Under that Act, the Public Trustee may be appointed as an administrator to make financial decisions for an adult,[946] but may not be appointed as a guardian to make personal decisions (including decisions about health matters) for an adult.[947]

11.46 The current provision is also inconsistent with the draft provision recommended in the Commission's original 1996 report. Clause 80 of the draft Bill that was included in that report provided:[948]

944 *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

945 *Powers of Attorney Act 1998* (Qld) s 36(4)–(5).

946 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

947 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a).

948 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 80.

Eligibility to be chosen—health care decision

80. A person may be chosen by an advance health care directive as a chosen decision maker for a health care decision for an adult only if the person is—

(a) an individual who is at least 18 years old and not a paid carer, or health care provider, for the adult; or

(b) the adult guardian.

11.47 Although section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) provides that the Public Trustee is an eligible attorney for a matter under an advance health directive, the Commission has been informed that it is not the practice of the Public Trustee to accept an appointment as an attorney under an advance health directive. The Commission has also been informed that the drafting of advance health directives is not a service offered by the Public Trust Office.[949]

11.48 This raises an issue about whether it is appropriate for the *Powers of Attorney Act 1998* (Qld) to continue to provide that the Public Trustee is an eligible attorney for appointment under an advance health directive.

11-3 Should section 29(2)(b) of the *Powers of Attorney Act 1998* (Qld) be omitted so that the Public Trustee is not an eligible attorney for appointment under an advance health directive?

The approved form

11.49 Section 44(2) of the *Powers of Attorney Act 1998* (Qld) provides that an advance health directive must be made in writing and may be in the approved form.[950] Use of the approved form is not mandatory.[951]

11.50 The approved form for making an advance health directive is 24 pages long, and includes some four pages of explanatory information. It also includes provision for the appointment of an attorney.

---

949 Information provided by the Public Trust Office 18 September 2009.

950 The approved forms are available at Department of Justice and Attorney-General <http://www.justice.qld.gov.au/2254.htm> at 31 October 2009.

951 The Law Reform Commission of Ireland also recently recommended that the use of a prescribed form should not be required for advance care directives, noting that '[d]ue to the individuality of each advance care directive, one form will not suit all': Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Consultation Paper No 51 (2008) [4.36]–[4.37]. The Law Commission of England and Wales recommended that an advance refusal of medical treatment that is in writing, signed and witnessed should be presumed to be valid. It considered that '[m]atters of form and execution are essentially questions of evidence in any particular case': Law Commission (England and Wales), *Mental Incapacity*, Report No 231 (1995) [5.29]–[5.30].

11.51 It has been suggested that 'there is no such thing as a perfect "living will" form':[952]

> The evidence from previous research indicates that written directives (living will forms) for refusing medical treatment in advance, whether legal documents or not, are difficult to design and very few people actually use them. There is no such thing as a perfect 'living will' form that will cover all contingencies and cater to people's personal preferences. These forms are difficult to write, interpret and implement.

11.52 As noted above, different jurisdictions impose different formal requirements. The Federal Parliament's Standing Committee on Legal and Constitutional Affairs recently recommended 'the development of straightforward, nationally-consistent and user-friendly advance care directive documentation' as part of the national harmonisation of advance care planning legislation.[953]

11.53 An issue for consideration is whether the approved form for making an advance health directive in Queensland could be improved. The existing form raises a number of issues.

11.54 First, the current form may not strike an appropriate balance between the need for flexibility and specificity. While there is provision in the approved form for the principal to specify general instructions about his or her future health care, the form also directs considerable attention to specific life-sustaining treatments in specific scenarios.[954] This part of the form is set out in a 'tick-a-box' fashion, and provides for the principal to indicate the type of treatment he or she would find acceptable or unacceptable in those scenarios.

11.55 On the one hand, this may help ensure a minimum degree of clarity and specificity in the principal's instructions. However, the perceived inflexibility of the form may deter people from making an advance health directive. For example, people may not wish to give specific instructions on some matters but may think they need to answer all the questions in the form in order to properly complete it. It may also be that the instructions given by the principal, particularly in relation to the tick-a-box questions, give insufficient information

952 M Brown, 'The law and practice associated with advance directives in Canada and Australia: Similarities, differences and debates' (2003) 11(1) *Journal of Law and Medicine* 59, 72.

953 Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.179].

954 Advance Health Directive (Form 4) s 3. The section includes the following scenarios: if the principal is in the terminal phase of an incurable illness, if the principal is permanently unconscious, if the principal is in a persistent vegetative state or if the principal is so seriously ill or injured that he or she is unlikely to recover to the extent that he or she can live without the use of life-sustaining measures.

about the principal's current medical condition.[955] The specificity of the questions in the form may also limit the effectiveness of the directive, for example, if particular treatments become irrelevant or new techniques are developed.[956] It may also unduly emphasise life-sustaining treatments when directions can be given about a range of different health care and special health care matters. Striking an appropriate balance is important:[957]

> Language may be too difficult or technical for non-medical people to understand, and forms may be too general or vague to guide treatment decisions, if limited to statements of values without specific examples for guidance. On the other hand, forms may be too rigid or prescriptive, and leave no room for reasonable interpretation in unforeseen situations.

11.56 Secondly, the length and complexity of the approved form in Queensland has been criticised as a disincentive to making an advance health directive:[958]

> in Queensland the advance care plan for the elderly is significantly impeded by the legislated Queensland advance health directive, which is a complex 24-page document that does not get completed even by those who are very keen to document their wishes and to appoint a surrogate decision maker.

11.57 Thirdly, the provision in the approved form for the appointment of an attorney may be confusing. Under section 35(1)(c) of the *Powers of Attorney Act 1998* (Qld), a principal may appoint an attorney in an advance health directive for health matters:

> **35 Advance health directives**
>
> (1) By an advance health directive, an adult principal may—
>
> …
>
> (c) appoint 1 or more persons who are eligible attorneys to exercise power for a health matter for the principal in the event the directions prove inadequate; and

---

955 For example, section 3 of the Advance Health Directive Form, which deals with the situation where the principal has a terminal, incurable or irreversible condition, makes general provision for the principal to request that 'everyone responsible for my care initiate only those measures necessary to maintain my comfort and dignity, with particular emphasis on the relief of pain'. Section 3 also includes tick-a-box questions which ask whether the principal wishes, or does not wish, to receive antibiotic treatment. It may create uncertainty if the principal's responses to the general provision and the specific questions about antibiotic treatment are inconsistent.

956 South Australia Government, *South Australian Advance Directives Review*, Background Paper (2007) 10–11.

957 M Parker and C Cartwright, 'Mental capacity in medical practice and advance care planning: Clinical, ethical and legal issues' in B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 84. See also J Blackwood, 'I would rather die with two feet than live with one: The status and legality of advance directives in Australia' (1997) 19(2) *University of Queensland Law Journal* 270, 292.

958 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007 [LCA 33] (Dr William Silvester).

> (d) provide terms or information about exercising the power. (note omitted)

11.58 Section 7 of the approved form, however, makes provision for the appointment of an attorney for *personal* matters.[959] Personal matters include health matters but also cover a range of other things such as where and with whom the principal lives, the principal's work and education, and day-to-day issues like diet and dress.[960]

11.59 This may be a drafting oversight. It does raise the question, however, whether the form for making an advance health directive should be flexible enough to allow the appointment of an attorney for matters other than health care. It may be unduly restrictive, and somewhat artificial, to allow the appointment of an attorney for health matters in the advance health directive form, but not the appointment of an attorney for personal matters. Allowing the appointment of an attorney for both personal and health matters in the advance directive form may reduce the need for execution of an enduring power of attorney form as well as an advance health directive form.

11-4 Are there any difficulties with the use of the approved form for making an advance health directive? If so, how could they be addressed?

11-5 Does the approved form appropriately balance the need for flexibility and specificity? If no, how could the balance be improved?

11-6 Should the approved form allow a principal to appoint an attorney for personal matters as well as for health matters?

Informed decision-making

11.60 One of the major criticisms of advance health directives is that, because they are made in advance of the circumstances in which they are to apply, they may involve uninformed treatment decisions:[961]

---

959 <http://www.justice.qld.gov.au/2254.htm> at 31 October 2009.

960 *Powers of Attorney Act 1998* (Qld) sch 2 s 2.

961 J Blackwood, 'I would rather die with two feet than live with one: The status and legality of advance directives in Australia' (1997) 19(2) *University of Queensland Law Journal* 270, 275. See also eg D Lanham and B Fehlberg, 'Living wills and the right to die with dignity' (1991) 18(2) *Melbourne University Law Review* 329, 335; Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 10 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 31 October 2009. This concern was also raised at some length in the parliamentary debate accompanying the Powers of Attorney Bill 1997 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 23 April 1998, 896–8 (Fiona Simpson).

> The very nature of the document — an *advance* directive — that is to come into effect at some unforeseeable date in the future, means that in some cases, especially those concerning end of life decisions, the person making the directive must try and predict medical problems not yet in existence. It is impossible for a person to contemplate every treatment choice and provide instructions regarding them. (emphasis in original)

11.61 It may be difficult for people to project decisions into the future.[962] It has been noted, for example, that:[963]

> Only if the decision is made at the time of treatment is there a real opportunity to question the medical practitioner, to ask about the implications of the decision, to understand the consequences, and to decide whether to seek another opinion or pursue alternatives. (emphasis in original)

11.62 It appears that, at common law, an anticipatory decision may be binding only if it was based on an informed opinion.[964] The question arises whether the guardianship legislation sufficiently addresses concerns about the potentially uninformed nature of advance decisions.

11.63 These difficulties may be partly overcome by ensuring the person is at least appropriately informed at the time of making the advance directive. This issue was raised in the Commission's earlier Discussion Paper in relation to the role of the doctor who witnesses the advance directive.[965]

11.64 The Irish Law Reform Commission has also recently recommended that people should be encouraged to consult a healthcare professional when making an advance directive.[966] In the case of an advance directive refusing life-sustaining medical treatment, it also recommended that 'the decision must be an informed decision', but that consultation with a doctor should not be

---

The requirement for consent to medical treatment to be informed and to relate specifically to the treatment or procedure that is to be given or carried out applies equally to advance directives: CM Cartwright and M Parker, 'Advance care planning and end of life decision making' (2004) 33(1) *Australian Family Physician* 815. *Powers of Attorney Act 1998* (Qld) s 42 requires the principal to understand the nature and effect of making the advance health directive.

962 Eg South Australia Government, *South Australian Advance Directives Review*, Background Paper (2007) 10.

963 Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 10 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 31 October 2009.

964 Eg *W Healthcare NHS Trust v H* [2005] 1 WLR 834, 839–40; *Re T* [1992] 4 All ER 649, 663 (Lord Donaldson); C Stewart, 'Advance directives, the right to die and the common law: recent problems with blood transfusions' (1999) 23 *Melbourne University Law Review* 161, 175. Other commentators have argued that a requirement for the person to have been given sufficient information for an advance refusal of treatment to be effective 'must be incorrect' given the proposition that a competent patient has an absolute right to refuse treatment for any reason, rational or irrational, of for no reason at all: L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 221. See also *Malette v Shulman* (1990) 72 OR (2d) 417, 422 (Robins JA) in which it was held, in the context of a refusal of blood transfusions on the basis of religious belief, that the doctrine of informed consent did not apply to advance refusals.

965 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) [7.84]–[7.88].

966 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Report No 94 (2009) [3.70], [5.27]. In the United Kingdom, people are advised, but not required, to discuss an advance refusal of life-sustaining treatment with a doctor: Office of the Public Guardian (UK), *Mental Capacity Act (2005) Code of Practice* [9.14] <http://www.publicguardian.gov.uk/mca/code-of-practice.htm> at 28 October 2009.

mandated.[967] In its view, a requirement to consult a doctor may be both overly burdensome and in conflict with the principle that medical treatment may be refused on non-medical grounds:[968]

> the Commission accepts that the emphasis should be on ensuring that a person understands what treatment they are refusing and the implications of that decision, not who or where they get the information from. The important point is that the decision is an informed decision. (note omitted)

11.65 A requirement for a doctor to certify that he or she has discussed the content of the directive with the person is likely to be particularly important: the attending health professional will, for directives made a long time in advance, be unable to assess whether the patient understood the nature and effect of making the directive at the time it was made and will, instead, need to rely on the certificate of the witness.[969]

11.66 On its own, such a requirement may still be insufficient. One of the difficulties identified with advance health directives is that the person's views, the available treatment options or other circumstances may change after the directive is made.[970] While there is provision for a person to revoke an advance health directive while he or she retains capacity to do so, an issue to consider is whether regular review of such directives should be required.

11.67 Regular review would be consistent with the recommended approach to the advance care planning process, one outcome of which may be the making of an advance health directive.[971] At present, the approved form for making an advance health directive includes a specific section for its review. It states:[972]

> It is strongly recommended that you regularly review this document, as your wishes may change or there may be advances in medical technology. You would be wise to review the document every two years or if the state of your health changes significantly.

---

967 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Report No 94 (2009) [3.70], [5.27]. The Irish Law Reform Commission had previously proposed medical consultation be required for advance refusals of life-sustaining treatment: Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Consultation Paper No 51 (2008) [3.15].

968 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Report No 94 (2009) [3.68]–[3.69].

969 Eg J Inge, 'Advance directives' (2000) July *Medicine Today* 121.

970 Eg New Zealand Medical Association, 'Advance Directives' <http://www.nzma.org.nz/patient-guide/Advance%20Directive.pdf> at 31 October 2009; M Wallace, *Health Care and the Law* (3rd ed, 2001) [5.104]; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making for People who Need Assistance Because of Mental or Intellectual Disability*, Discussion Paper, WP No 38 (1992) 145–6.

971 The Australian Medical Association recommends that advance care plans be reviewed as the patient's condition and preferences change and updated regularly to ensure currency and to encourage patients to explore all advance care plan options: Australian Medical Association, Position Statement, *The Role of the Medical Practitioner in Advance Care Planning* (2006) [3.7] <http://www.ama.com.au/node/2428> at 31 October 2009.

972 *Powers of Attorney Act 1998* (Qld) s 44(2), Form 4 available at <http://www.justice.qld.gov.au/2254.htm> at 28 October 2009.

> Each time you review your document and your wishes have not changed, sign and date one of the acknowledgments below. If your wishes have changed a great deal, you should complete a new document.

11.68 The recommendation to review is reiterated in the explanatory notes at the beginning of the approved form. It is not, however, a legislative requirement that advance health directives be reviewed, nor that the approved form be used. An issue to consider is whether reviews should be mandatory and, if so, what the consequences of this might be — for example, whether directives should automatically lapse after a given period of time unless they have been affirmed by the principal. It is important to consider the impact these options may have on the convenience of advance health directives as a means of giving effect to an adult's wishes about future medical treatment.

11.69 These concerns may also be partly addressed by the appointment of an attorney in combination with an instructional advance health directive. In Queensland, the legislation allows a person to appoint an attorney to exercise power in the event the instructions in the directive prove inadequate. This combined approach has been recognised as potentially the 'most effective way to ensure that an individual's wishes are respected'.[973] It has also been suggested that consent by a substitute decision-maker, which can be given in an informed way at the time the decision is needed, is preferable to any attempt to derive consent from an advance health directive.[974]

11-7 How should the guardianship legislation address concerns about the potentially uninformed nature of decisions made in advance health directives?

11-8 Should regular review of an advance health directive be required under the legislation? If so, how should this operate?

Copies and proof

11.70 Under section 44(2) of the *Powers of Attorney Act 1998* (Qld), an advance health directive must be made in writing, although it need not be made in the approved form.

---

973 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Consultation Paper No 51 (2008) [1.62]: 'The drawback of each type of document is counterbalanced by the presence of the other.' This combined approach has also been recommended elsewhere: eg Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Healthcare: A Joint Report of the Alberta Law Reform Institute and the Health Law Institute*, Report No 64 (1993) 6–8, 36. See also eg J Blackwood, 'I would rather die with two feet than live with one: The status and legality of advance directives in Australia' (1997) 19(2) *University of Queensland Law Journal* 270, 293–4.

974 Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 10 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 31 October 2009 in which it is suggested that an advance statement of the person's wishes should be taken into account in deciding whether consent to particular treatment should be given, but that such consent should be given by another mechanism, such as by an attorney, at the relevant time.

11.71 As noted in Chapter 9 of this Discussion Paper, section 45 of the Act deals with proof of enduring documents, including advance health directives. It provides that, without limiting the ways in which an advance health directive may be proved, it may be proved by a copy certified in the prescribed manner as a true and complete copy of the original.[975] An advance health directive may also be proved by a certified copy of a certified copy.

11.72 Similar provision is not made in relation to advance health directives in the other Australian jurisdictions.

11.73 As discussed in Chapter 9, section 45 raises the issue of whether the legislation provides sufficient certainty for third parties in determining the authenticity of a copy of an advance health directive. This may be an especially important issue in the context of health care given the seriousness of the consequences involved in giving, or withholding, medical treatment.[976]

11.74 At present, the legislation does not specify other ways in which the authenticity of a copy of an advance health directive may be verified or assumed. It may be useful for the legislation to clarify this.

11.75 It might also be appropriate for the approved form for making an advance health directive to alert principals to the desirability of providing certified copies of the instrument to third parties.[977] At present, the explanatory notes in the approved form advise principals to give a copy of their directive to people such as their doctor, attorney, family member, friend or solicitor. The form does not mention, however, the provision for certified copies.

11-9 Should section 45 of the *Powers of Attorney Act 1998* (Qld) clarify the ways in which a copy of an advance health directive may be proved? If so, in what ways could a copy of an advance health directive be proved?

11-10 Should the explanatory information provided in the approved form for making an advance health directive advise principals to provide certified copies of the document to relevant third parties?

Notification and registration

11.76 At present in Queensland, there is no provision for registration of advance health directives. In contrast, South Australia and Western Australia

975 The certification, which must appear on every page, must be given by the principal, a justice of the peace, a commissioner for declarations, a notary public, a lawyer, a trustee company or a stockbroker: s 45(4).

976 See B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 49–50.

977 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 51.

provide for the voluntary registration of advance health directives,[978] and while registration is not available in the other jurisdictions, the ACT and Victoria specifically require a patient's advance health directive to be placed with the patient's file.[979]

11.77 Concerns have been raised about the reluctance of health professionals to recognise advance health directives.[980] While this often involves conflicts, whether perceived or actual, between the health professional's ethical duties and the adult's wishes,[981] reluctance to rely on an advance health directive may also be attributable to an uncertainty about the authenticity of the directive.

11.78 Concerns have also been raised about the difficulties of alerting health providers to the existence of a valid advance health directive:[982]

> There is no provision for recording of, or access to, medical directives, which may be a critical issue where a person is not competent to determine treatment. A person who has multiple or a serious illness may be being cared for by a large number of health carers. They may or may not be in a health care facility, and may be transferred between facilities or discrete treatment areas within the same facility. There is a need to ensure that health carers are at any time aware of the existence of an advance directive.

11.79 This is likely to be particularly problematic in emergency situations, for example, when ambulance officers attend at a person's home.[983]

11.80 The explanatory notes on the approved form for making an advance health directive advise principals to give a copy of the completed form to their

---

978 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14; *Guardianship and Administration Act 1990* (WA) s 110RA, which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

979 *Medical Treatment (Health Directions) Act 2006* (ACT) ss 13, 14; *Medical Treatment Act 1988* (Vic) s 5E. *Powers of Attorney Act 2006* (ACT) s 49 also requires a person in charge of a health facility to inquire whether a patient has an enduring power of attorney and to keep a copy with the patient's file.

980 Eg C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38, 48. Stewart suggests this reluctance is related to a 'general ignorance about advance directives and their legal status'.

981 Eg Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007, [LCA11] (Brian Herd).

982 M Wallace, *Health Care and the Law* (3rd ed, 2001) [5.117]. The Federal Parliament's Standing Committee on Legal and Constitutional Affairs has also recommended that the Australian Government investigate ways of encouraging people to inform their health providers about their advance directives: Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Report (2007) [3.188].

983 Eg South Australia Government, *South Australian Advance Directives Review*, Background Paper (2007) 13; M Parker and C Cartwright, 'Mental Capacity in Medical Practice and Advance Care Planning: Clinical, Legal and Ethical Issues' in B Collier, C Coyne and K Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (2005) 56, 89. Under s 63 of the *Guardianship and Administration Act 2000* (Qld), health care that should be carried out urgently to meet imminent risk to the adult's life or health may be carried out without consent unless the health provider knows the adult objects to the health care in an advance health directive. See also s 63A in relation to a decision, without consent, to withdraw or withhold a life-sustaining measure when the decision needs to be made immediately. These provisions are considered in more detail in Chapter 12 of this Discussion Paper.

'own doctor' and to other people, such as the principals' attorney and family members. The legislation does not require, however, that an advance directive be made in the approved form. Also, giving a copy to the principal's general practitioner may not assist in alerting other health providers who may become involved in the principal's care.

11.81 It has been suggested that one way to overcome such concerns is to provide a searchable register.[984] Recently, the Law Reform Commission of Ireland recommended the establishment of a register of advance care directives,[985] noting that a register would be 'in the interests of all involved, the maker, the health care proxy (if any) and all health care professionals'.[986]

11.82 While registration may alleviate health providers' concerns about the authenticity of an advance directive, a system of registration would not be without its difficulties. As noted above, the legislation in South Australia provides for voluntary registration of advance health directives. However, the South Australian register appears to have had limited success:[987]

> The Consent Act required a register to be established, and in 1999 this role was contracted to the MedicAlert Foundation. Although the register was set up under the Consent Act for MPAs and Anticipatory Directions, many people have lodged EPGs and advance directives from other states. MedicAlert can be contacted 24 hours a day and will retrieve the form and either fax it or read it to the requesting clinician. Those who register their advance directive can choose to wear an inscribed bracelet or pendant. To date MedicAlert has never been contacted with an enquiry about an advance directive.
>
> Internationally, research suggests that advance directives registers are seldom effective unless they are both compulsory and free. The South Australian register is voluntary and subject to a fee. (note omitted)

11.83 Registration, whether voluntary or mandatory, would also have considerable resource implications and may even deter people from making advance directives.[988] These and other concerns about registration are discussed, in the context of enduring powers of attorney, in Chapter 9 of this Discussion Paper.

---

984 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 50.

985 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Report No 94 (2009) [3.96].

986 Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Report No 94 (2009) [3.95].

987 South Australia Government, *South Australian Advance Directives Review*, Background Paper (2007) 13. See also South Australia Government, *Planning Ahead: Your Health, Your Money, Your Life*, Issues Paper (2007) 32.

988 Law Reform Commission Hong Kong, *Substitute Decision-making and Advance Directives in Relation to Medical Treatment*, Report (2006) [8.66]. That Commission recommended against the introduction of a central registry system: [8.66]. See also Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Consultation Paper No 51 (2008) [4.87] where the Commission commented that registration may involve considerable complexity and cost which may not be justified. Note that in its final report the Commission recommended the establishment of a register: see [11.81] above.

11.84 Other suggestions have also been made for bringing the existence of an advance directive to health providers' attention. For example, the Law Reform Commission of Nova Scotia recommended that, rather than require notification or registration, the legislation should impose a duty on health providers to inquire about the existence of a directive.[989] Provision to this effect is made in section 49 of the *Powers of Attorney Act 2006* (ACT) in relation to enduring powers of attorney:

> **49 Obligations on health care facilities in relation to powers of attorney**
>
> The person in charge of a health care facility must take all reasonable steps to ensure that—
>
> (a) each person receiving care at the facility is asked whether the person has an enduring power of attorney for personal care matters or health care matters; and
>
> (b) if a person has a power of attorney of that kind—a copy of the power of attorney is kept with the person's records; and
>
> (c) a process is in place to periodically check the currency of powers of attorney kept.

11.85 Similar provision in the *Powers of Attorney Act 1998* (Qld) might be appropriate in relation to advance health directives.

11.86 A non-legislative approach may be to inform principals of the need to alert health providers about their advance health directive. In the United Kingdom, for example, the *Mental Capacity Act 2005 Code of Practice* states:[990]

> It is the responsibility of the person making the advance decision to make sure their decision will be drawn to the attention of healthcare professionals when it is needed. Some people will want their decision to be recorded on their healthcare records. Those who do not will need to find other ways of alerting people that they have made an advance decision and where somebody will find any written document and supporting evidence. Some people carry a card or wear a bracelet. It is also useful to share this information with family and friends, who may alert healthcare professionals to the existence of an advance decision. But it is not compulsory. Providing their GP with a copy of the written document will allow them to record the decision in the person's healthcare records.

11-11 Should the *Powers of Attorney Act 1998* (Qld) provide for registration of advance health directives? If yes, what features should the registration system have?

989 Nova Scotia Law Reform Commission, *Adult Guardianship and Personal Health Care Decisions*, Report (1995) 40.

990 Department for Constitutional Affairs (UK), *Mental Capacity Act 2005 Code of Practice* [9.38] <http://www.publicguardian.gov.uk/mca/code-of-practice.htm> at 29 October 2009.

11-12 Alternatively, should the *Powers of Attorney Act 1998* (Qld) impose a duty on health providers to inquire about the existence of an advance health directive for their patients?

11-13 Should principals be advised in the approved form or other explanatory information of the importance of taking steps to notify their health providers about their advance health directive?

Interstate recognition

11.87 Section 40 of the *Powers of Attorney Act 1998* (Qld) provides for recognition of a document, prescribed by regulation, validly made in another Australian jurisdiction, to the extent its provisions 'could have been validly included in an advance health directive made under [the] Act'. To date, no documents have been prescribed in regulations.

11.88 Western Australia is the only other Australian jurisdiction that includes interstate recognition provisions for advance health directives. It provides that the Tribunal may make an order recognising an instrument made under the law of another jurisdiction if satisfied the instrument corresponds sufficiently, in form and effect, to an enduring power of attorney or an advance health directive made in Western Australia.[991]

11.89 The difficulties associated with a lack of portability of advance planning instruments and with Queensland's inter-jurisdictional recognition provision have been noted, in the context of enduring powers of attorney, in Chapter 9 of this Discussion Paper.

11.90 It has been suggested that the same issues arise in relation to the recognition of interstate advance health directives.[992] For example, section 40 does not extend to instruments executed in New Zealand or other foreign jurisdictions, and does not provide for automatic recognition but requires interpretation on a case-by-case basis in light of the relevant legal provisions.

11-14 Are there any difficulties with section 40 of the *Powers of Attorney Act 1998* (Qld), which deals with the recognition of interstate advance health directives? If so, how could they be addressed?

991 *Guardianship and Administration Act 1990* (WA) ss 104A, 110ZA. Similar provision is made for the recognition of an instrument appointing an enduring guardian: s 110O. Sections 110ZA and 110O will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

992 Evidence to Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Brisbane, 16 July 2007, [LCA3] (Brian Herd). See also eg M Brown, 'The law and practice associated with advance directives in Canada and Australia: Similarities, differences and debates' (2003) 11(1) *Journal of Law and Medicine* 59, 64.

11-15 Should the *Powers of Attorney Act 1998* (Qld) provide for recognition of advance health directives made in New Zealand or in any other foreign jurisdictions?

11-16 Should recognition of interstate advance health directives:

(a) depend on the instrument:

(i) having been validly made in the other jurisdiction; and

(ii) including provisions that could validly be included in an advance health directive made under the *Powers of Attorney Act 1998* (Qld); or

(b) require a declaration from the Tribunal;

(c) depend on some other requirement?

Protection from liability

11.91 A health provider who acts on a valid advance health directive is protected from liability to the same extent as if the adult had capacity and had given consent.[993] This reflects the nature of an advance health directive as a means of providing substitute consent. A health provider may not, however, be aware of the existence of an advance directive or may act on an invalid directive without knowing of the invalidity. The *Powers of Attorney Act 1998* (Qld) protects a person from liability in those circumstances.

11.92 Section 100 of the *Powers of Attorney Act 1998* (Qld) provides that a person, other than an attorney, who acts in reliance on an advance health directive without knowing the directive is invalid, does not incur any liability to the adult or anyone else because of the invalidity.[994]

11.93 In addition, section 102 of the Act provides that a health provider 'is not affected by an advance health directive' to the extent he or she does not know the adult has an advance health directive.[995]

---

993 *Powers of Attorney Act 1998* (Qld) ss 36(1)(b), 101.

994 This provision also applies if a person relies on the purported exercise of a power for a health matter without knowing the power is invalid. See also *Guardianship and Administration Act 2000* (Qld) s 77. This is similar to the protection given to attorneys and third parties who act on an enduring power of attorney without knowing the power is invalid: *Powers of Attorney Act 1998* (Qld) ss 98, 99.

995 Similarly, under the *Natural Death Act* (NT) s 4(3), the medical practitioner's duty to act in accordance with an advance direction given by the patient arises only if the practitioner 'has notice of that direction'.

11.94 It has been suggested that the scope of these protections may not be sufficient and requires clarification.[996] It has also been noted, however, that while the need for clarity and protection for health providers is important:[997]

> this needs to be balanced by an understanding that this legislation must always give priority to the interests of people with impaired capacity, a highly vulnerable group of people.

The type of knowledge that is relevant

11.95 One issue identified for clarification is the type of knowledge that is required to lose the protection. At present, the legislation does not specify the type of knowledge that is required.[998] In the absence of a definition, actual knowledge may be thought to be the relevant threshold.[999] A question arises whether this is appropriate or whether some form of constructive knowledge should be sufficient to lose the protection. Too high a threshold 'offers doctors no incentive to investigate the scope and validity of advance directives'.[1000] On the other hand, a threshold that is too low may impose a risk of liability on a person who acts without extreme diligence to determine the validity or existence of the directive. A threshold of constructive knowledge would be consistent with the equivalent protection given to attorneys and third parties who act without knowing an enduring power of attorney is invalid.[1001]

The meaning of an 'invalid' enduring document

11.96 Similarly, it may be desirable to clarify what invalidity, of an advance health directive, means. Again, the legislation does not provide a definition.[1002] In the absence of a statutory limitation, the protection would apply to an advance health directive that is invalid for any reason. However, it is not clear whether the protection would apply in relation to an advance health directive

---

996 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) [3.1]–[3.3].

997 Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 6–7 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 31 October 2009.

998 *Powers of Attorney Act 1998* (Qld) s 96 provides that knowing of a *power's* invalidity includes knowing of the happening of an event that invalidates the power, such as the principal's death, or having reason to believe the power is invalid. This applies for the purpose of the protections given to attorneys and third parties, who act without knowing the power given in an enduring power of attorney is invalid: ss 98, 99. However, this definition does not seem to apply to knowledge of an invalid *directive* or to knowledge of whether an advance health directive exists.

999 In *Guardianship and Administration Act 2000* (Qld) ss 77, 78, 'knowing' is contrasted with 'or could reasonably be expected to have known', and 'reckless indifference' suggesting that to know requires actual knowledge. See also, in relation to the protection given for invalid powers of attorney, B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 179 in which it is suggested that 'knowledge' requires actual knowledge.

1000 K Stern, 'Advance directives' (1994) 2 *Medical Law Review* 57, 74.

1001 See n 998 above.

1002 *Powers of Attorney Act 1998* (Qld) s 96 defines what is meant by an invalid *power* for the purpose of the protections given to attorneys and third parties in ss 98 and 99 of the Act. However, this definition does not seem to apply to an invalid directive.

that was validly made, but has since been revoked.[1003] A question arises as to whether the reference to 'invalid' is appropriate or whether the provision should make it clear that protection should also apply in relation to an advance health directive that has been revoked.

A different test for protection: acting in good faith with reasonable care and skill

11.97 Another issue is whether the protection should continue to hinge on knowledge. It has been suggested that rather than a test of knowledge, the protection should depend on whether the person 'acted in good faith with reasonable care and skill', allowing individual circumstances to be taken into account:[1004]

> In some cases, for example, where the invalidity is less obvious … and there was some urgency attached to treatment, it may be appropriate that the doctor is excused for not discovering the invalidity. On the other hand, if the AHD is clearly invalid … and there was no urgency associated with treatment, then it may not be appropriate for the health provider to receive protection under s 100. The invalidity of the AHD would have been apparent had the health provider acted with reasonable care and skill.

11.98 To the extent it focuses on whether the person would have known of the invalidity had he or she made the inquiries a reasonable person would have made in the circumstances, this suggested approach seems to advocate a threshold of constructive knowledge.[1005]

11.99 The incorporation of a good faith test would, however, be consistent with the position in Victoria and Western Australia. In Victoria, a combined good faith and knowledge test applies: a medical practitioner is protected from liability if he or she acts 'in good faith and in reliance on a refusal of treatment certificate' but is not aware that the certificate has been cancelled.[1006]

11.100 In Western Australia, treatment action taken by a health professional 'relying in good faith on what is purportedly a treatment decision in an advance health directive made by the patient' is effective even if, among other things, the directive, or the decision contained in the directive, is invalid or has been revoked.[1007]

1003 See B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 39.

1004 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 40. See also 43–4 in relation to the protection given by s 102 of the *Powers of Attorney Act 1998* (Qld).

1005 Eg RP Meagher, JD Heydon and MJ Leeming, *Equity: Doctrines and Remedies* (4th ed, 2002) [8-270]; 'Constructive knowledge' and 'Constructive notice' in LexisNexis, *Encyclopaedic Australian Legal Dictionary* (27 October 2008).

1006 *Medical Treatment Act 1988* (Vic) s 9.

1007 *Guardianship and Administration Act 1990* (WA) s 110ZK(2), (3)(b), (c), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

11.101 An approach based on good faith and reasonable care has been criticised, however, for failing to adequately indicate the extent to which a health professional would be required to investigate the validity of the directive.[1008]

11-17 Are there any difficulties with the protections from liability in sections 100 and 102 of the *Powers of Attorney Act 1998* (Qld)? If so, how could they be addressed?

11-18 Should the *Powers of Attorney Act 1998* (Qld) define 'knowledge' for the purpose of sections 100 and 102 of the Act and, if so, how? For example, should a person have the benefit of the protection if he or she did not *actually* know the directive was invalid even if he or she *should have* known the directive was invalid?

11-19 Should the *Powers of Attorney Act 1998* (Qld) define what an 'invalid' advance health directive means for the purpose of sections 100 and 102 of the Act and, if so, how?

11-20 Should the test in section 100 and 102 *Powers of Attorney Act 1998* (Qld) for protection from liability be one of knowledge or should a different test be used? For example, should there be a 'good faith' test?

Non-compliance by health providers

11.102 It appears that at common law, an advance directive will be binding and effective only if, among other things, the adult's decision 'was made with reference to and was intended to cover the particular (and perhaps changed or unforseen) circumstances which have in fact subsequently occurred'.[1009] A health provider will not be bound to follow a direction in an advance directive if:[1010]

- the direction is uncertain or ambiguous, for example, because its language is vague or imprecise or because it refers to outdated medical treatments; or

1008 K Stern, 'Advance directives' (1994) 2 *Medical Law Review* 57, 74.

1009 J Munby, 'Rhetoric and reality: the limitations of patient self-determination in contemporary English law' (1998) 14(2) *Journal of Contemporary Health Law and Policy* 315, 329. See also *Re T* [1992] 4 All ER 649, 662–3 (Lord Donaldson MR); C Stewart, 'Advance directives, the right to die and the common law: recent problems with blood transfusions' (1999) 23 *Melbourne University Law Review* 161, 175–7.

1010 L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 222–4, 234–5. A change in circumstances could include a change in the adult's religious beliefs or a change of mind about a direction such that there is evidence the adult intended to revoke it.

- the direction does not, or is not intended to, apply to the circumstances. For example, the adult's personal circumstances or advances in medical science may have changed such that the adult would not have intended the directive to apply in the changed circumstances, or it may have been made on incorrect information or assumptions.

11.103 In Queensland, section 103 of the *Powers of Attorney Act 1998* (Qld). protects a health provider from liability for departing from an advance health directive in certain circumstances:[1011]

> **103 Protection of health provider for non-compliance with advance health directive**
>
> (1) This section applies if a health provider has reasonable grounds to believe that a direction in an advance health directive is uncertain or inconsistent with good medical practice or that circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate.
>
> (2) The health provider does not incur any liability, either to the adult or anyone else, if the health provider does not act in accordance with the direction.
>
> (3) However, if an attorney is appointed under the advance health directive, the health provider has reasonable grounds to believe that a direction in the advance health directive is uncertain only if, among other things, the health provider has consulted the attorney about the direction.

11.104 While some elements of section 103 of the *Powers of Attorney Act 1998* (Qld) are consistent with the common law position,[1012] concerns have been raised about its potentially wider operation.

1011 While a health provider need not follow an advance health directive in these circumstances, health care must not be given without appropriate consent or authorisation. If there is no direction for the matter in an advance health directive, consent must be sought from the appropriate substitute decision-maker (for a health matter) or from the Tribunal (for a special health matter). The substitute decision-maker must apply the Health Care Principle and, in so doing, must seek and take account of the adult's views and wishes, including those expressed in an advance health directive. See *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(2), 65, 66, 79, sch 1 s 12(2), (3); *Powers of Attorney Act 1998* (Qld) s 76, sch 1 s 12(2)–(3). The Health Care Principle is examined in Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 5.

1012 Legislative protections are also given in some other jurisdictions. For example, under s 25 of the *Mental Capacity Act 2005* (UK) health providers need not follow an advance decision that is not valid and applicable to the treatment. Section 25(3) provides that an advance decision is not applicable to the treatment in question if:

- the treatment is not the treatment specified in the advance decision;
- any circumstances specified in the advance decision are absent; or
- there are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of the advance decision and which would have affected his or her decision had he or she anticipated them.

Provision in similar terms has recently been recommended by the Law Reform Commission of Ireland. It also recommended that if 'the advance care directive is ambiguous, there will be a presumption in favour of the preservation of life': Law Reform Commission of Ireland, *Bioethics: Advance Care Directives*, Report No 94 (2009) [3.86], [5.29].

Uncertainty and changed circumstances

11.105 Section 103 reflects the position at common law that a health provider is not bound to follow an advance direction that is uncertain or ambiguous or that is not intended to apply in the circumstances that have arisen.

11.106 However, it has been suggested that section 103 has a different focus from the common law and gives a health provider greater scope not to act in accordance with an adult's directions than would be the case at common law:[1013]

> At common law, the test that is applied is whether the change in circumstances is such that *the adult* would not have intended his or her refusal to apply to the circumstances that have arisen. The wording of the Queensland provision, however, with its reference to a *health professional's belief* (on reasonable grounds) that the direction is *inappropriate* seems to shift the focus of the enquiry away from the adult and towards the health professional.
>
> How such a provision might operate can be illustrated by the example of a 25-year-old woman who makes an advance directive refusing life-sustaining medical treatment. Subsequent to the completion of the directive, the woman has a child. The Queensland provision is wide enough to allow a health professional not to follow the advance directive on the basis that, since the adult now has the responsibility for a young child, it is no longer 'appropriate' to comply with the directive. The authors contend that the excuse as drafted in Queensland is too wide as it enables an unjustifiable departure from an adult's directive. The common law position is to be preferred as it strikes a more sensible balance between principles of autonomy and the sanctity of life. (emphasis in original, notes omitted)

11.107 On another view, the discretion given to health providers in section 103 may be considered desirable. A health provider may not be sure, for example, that the adult would have changed his or her mind, but may properly consider that the circumstances have changed so significantly that reliance on the directive as specific and binding consent, or refusal, is untenable. It has been suggested, for example, that a truly autonomous decision is one that is 'freely made, by a competent person, based on his or her most recent set of values' and that is 'applicable to the circumstances in question, with a full understanding of the relevant facts'.[1014] Arguably, acting upon an advance directive that does not meet these conditions may risk serious harm to the adult.

Similar, though narrower, provision is made in some of the other jurisdictions where the health provider considers that the adult changed or intended to revoke his or her decision: *Medical Treatment (Health Directions) Act 2006* (ACT) s 12; *Natural Death Act* (NT) s 4(3); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7(3). In Victoria, protection is given where the health provider considers the medical condition to which the direction relates has changed: *Medical Treatment Act 1988* (Vic) s 7(3).

1013 L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 230.

1014 P Biegler, C Stewart, J Savulescu et al, 'Determining the validity of advance directives' (2000) 172 *Medical Journal of Australia* 545, 545 citing G Dworkin, *The Theory and Practice of Autonomy* (1988).

11.108 The competing considerations were referred to in *HE v A Hospital NHS Trust*:[1015]

> Whether there truly is some real reason to doubt, whether the doubt is a real doubt or only some speculative or fanciful doubt, will inevitably depend on the circumstances. Holding the balance involves awesome responsibility. Too ready a submission to speculative or merely fanciful doubts will rob advance directives of their utility and may condemn those who in truth do not want to be treated to what they would see as indignity or worse. … Too sceptical a reaction to well-founded suggestions that circumstances have changed may turn an advance directive into a death warrant for a patient who in truth wants to be treated.
>
> … the longer the time which has elapsed since an advance directive was made, and the greater the apparent changes in the patient's circumstances since then, the more doubt there is likely to be as to its continuing validity and applicability.

11.109 An issue to consider is whether the formulation in section 103 is appropriate. On the one hand, the protection should not be so wide as to unjustifiably infringe the adult's right to give or refuse consent in advance. On the other hand, consideration must be given to the need for consent, even if given in advance, to be specific to the health care in question.

11.110 Section 103 may also appropriately allow a discretion in departing from an advance directive where the adult's current views differ from those expressed in the directive, particularly given that a principal may revoke an advance health directive only if he or she has sufficient capacity to do so.[1016]

11.111 Some additional guidance might be drawn from the provision recently added to the legislation in Western Australia. Under section 110S(3) of the *Guardianship and Administration Act 1990* (WA), a decision in an advance health directive does not operate if circumstances exist or have arisen that the adult did not anticipate at the time of making the directive and would have caused the adult to change his or her mind about the decision. In determining whether section 110S(3) applies in relation to a treatment decision in an advance health directive, section 110S(4) requires the following factors to be be taken into account:[1017]

- the adult's age at the time the directive was made and the time the decision would otherwise operate;
- the period that has elapsed between those times;
- whether the adult reviewed the treatment decision at any time during that period and, if so, the period that has elapsed between the time of the last

---

1015 [2003] EWHC 1017, [44]–[45] (Munby J).

1016 Eg M Wallace, *Health Care and the Law* (3rd ed, 2001) [5.116].

1017 *Guardianship and Administration Act 1990* (WA) s 110S(4), which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

review and the time at which the treatment decision would otherwise operate; and

- the nature of the condition and the treatment and the consequences of providing and not providing the treatment.

11.112 The Queensland legislation may benefit from a similar list of considerations.

Inconsistent with good medical practice

11.113 One element of section 103 that appears to be broader than the common law is the protection from liability of a health provider who does not follow an advance health directive on the basis that he or she has reasonable grounds to believe that doing so would be inconsistent with good medical practice.[1018]

11.114 On one view, this is inconsistent with a function of advance health directives, namely to permit an adult to refuse treatment that he or she does not want.[1019] The decision to complete an advance health directive and refuse certain treatment is likely to be informed by a range of considerations including medical advice, personal preferences, lifestyle choices and perhaps spiritual or religious beliefs. These are matters on which people may have different views. Permitting a medical practitioner, on the grounds of good medical practice, to provide treatment that has been refused expressly is inconsistent with respecting that person's autonomous choice. Such an approach is also out of step with the position in other Australian jurisdictions as no other State or Territory provides protection for a health provider based on good medical practice.[1020]

11.115 On the other hand, others have pointed to the importance of doctors retaining the right to exercise their professional discretion to give treatment they consider medically necessary.[1021] There may also be utility in specifically confirming in relation to advance health directives that doctors need not provide treatment that good medical practice dictates should not be offered.[1022] The reference to 'good medical practice' was not contained in the original Powers of

---

1018 L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 235.

1019 Ibid 235–6.

1020 Ibid 227.

1021 Australian Medical Association, Position Statement, *The Role of the Medical Practitioner in Advance Care Planning* (2006) <http://www.ama.com.au/node/2428> at 31 October 2009. Although note the criticism of this policy in relation to this point by M Parker et al, 'Two steps forward, one step back: advance care planning, Australian regulatory frameworks and the Australian Medical Association' (2007) 39(9) Internal Medicine Journal 637.

1022 That treatment which is not clinically indicated need not be offered is consistent with the position at common law: *R (Burke) v General Medical Council* [2006] QB 273, [50] (Lord Phillips MR). Although note that the position in Queensland appears to be different in relation to withholding and withdrawing life-sustaining measures: see [12.106]–[12.110] below.

Attorney Bill and it appears that it was to address this concern that the Government accepted the amendment:[1023]

> The doctor can never be required to carry out medical treatment which would be contrary to good medical practice. This principle has always been implicit in the Bill, as is the case with the observance of the Criminal Code. This amendment merely restates this in legislative form. Nevertheless, in light of certain representations, I am prepared to propose that the phrase be included as an amendment to this clause.

Requirement to consult attorney

11.116 Section 103 also provides that a health provider will have reasonable grounds to believe the direction is uncertain only if he or she has consulted with the attorney appointed under the advance health directive (if there is one). An issue arises about whether this is appropriate.

11.117 On the one hand, the requirement appears consistent with a person's ability under section 35(1)(c) of the Act to appoint an attorney in an advance health directive to exercise power in the event the direction proves inadequate. On the other hand, the requirement to consult may be diluted in practice if there is no corresponding obligation to accept the attorney's interpretation.[1024]

11.118 It has also been noted that the provision requires consultation with an attorney appointed under an advance health directive, but not one appointed under an enduring power of attorney.[1025] While this may seem anomalous, it is unclear whether an attorney under an enduring power of attorney could provide relevant input as to the adult's intention in making the directive since the attorney would have been appointed under a different instrument and perhaps at a different time.

1023 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1025 (Denver Beanland, Attorney-General and Minister for Justice). The amendment was proposed by Liz Cunningham: Queensland, *Parliamentary Debates*, Legislative Assembly, 12 May 1998, 1025. Her comments do not appear, however, to be restricted specifically to the provision of treatment that is not clinically indicated:

> So the addition of these words in this clause just gives the added clarification that, if an advance health directive is contrary to what would be good medical practice, then the doctor is well within his rights—indeed, he has the responsibility—not to take notice of that advance health directive but to comply with good medical practice.

1024 L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 232. The authors also argue that an attorney may interpret the directive in accordance with his or her own views, rather than giving an unbiased account of what the adult intended. However, this risk is inherent in all substitute decision-making appointments and is not specific to the situation addressed by s 103 of the *Powers of Attorney Act 1998* (Qld).

1025 L Willmott, B White and M Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30 *Melbourne University Law Review* 211, 232.

11-21 Are there any difficulties with the elements of section 103 of the *Powers of Attorney Act 1998* (Qld), which set out the circumstances in which a health professional is protected from liability for departing from a direction given in an advance health directive, namely:

(a) if a health provider has reasonable grounds to believe that a direction is uncertain;

(b) if a health provider has reasonable grounds to believe that a direction is inconsistent with good medical practice;

(c) if a health provider has reasonable grounds to believe that circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate?

11-22 If yes to Question 11-21, how should those difficulties be addressed?

11-23 Should section 103 of the *Powers of Attorney Act 1998* (Qld) include a list of factors, such as those included in section 110S(4) of the *Guardianship and Administration Act 1990* (WA),[1026] to be taken into account when considering whether circumstances have changed such that a direction in an advance health directive is no longer appropriate?

11-24 Is the provision in section 103(3) of the *Powers of Attorney Act 1998* (Qld) for consultation with the adult's attorney appointed under the advance health directive appropriate? If no, how should it be changed? For example, should there be a requirement to consult an attorney appointed under a different instrument?

Recognition of common law directives

11.119 Section 39 of the *Powers of Attorney Act 1998* (Qld) provides that:

> This Act does not affect common law recognition of instructions about health care given by an adult that are not given in an advance health directive.

11.120 As an extension of the right of self-determination, the common law recognises the right of every competent adult to indicate in advance whether or not he or she consents to particular medical treatment.[1027] An anticipatory

1026 See [11.111] above.

1027 Generally C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38, 38–42.

decision is binding at common law if the person had capacity to give or refuse consent to the treatment at the time the decision was made, the decision was free from undue pressure or influence, and the decision was intended to apply in the circumstances that subsequently arise.[1028]

11.121 There are no specific formal requirements for making an advance decision at common law, such as a requirement for writing. Such matters will, however, go to the weight of evidence in determining whether a valid and applicable advance decision has been made.[1029] For example, in the Canadian case *Malette v Shulman*,[1030] the patient's refusal of blood transfusions was evidenced by her signed 'no blood transfusion' card.

11.122 However, there have been few reported cases[1031] (and none in Australia) where a common law directive was found to be operative. It is also not known how often in practice anticipatory decisions satisfy the common law test and are considered legally binding on health providers.

11.123 However, doubt has been raised about whether section 39 of the *Powers of Attorney Act 1998* (Qld) is adequately drafted to preserve common law directives.[1032]

11.124 The scheme for health care decisions for an adult with impaired capacity is derived from both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). In particular, section 66 of the *Guardianship and Administration Act 2000* (Qld) governs the way in which a health matter for an adult with impaired capacity is to be dealt with.[1033] Section 66 is expressed as an exhaustive provision but does not make reference to common law advance directives. Further, section 8 of the *Guardianship and Administration Act 2000* (Qld) and section 6A(4) of the *Powers of Attorney Act 1998* (Qld) provide that in the case of inconsistency between those two Acts, the *Guardianship and Administration Act 2000* (Qld) will prevail.[1034]

11.125 An issue to consider is whether common law directives should be recognised alongside the legislative scheme for advance health directives. The

---

1028 *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR).

1029 Eg C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38, 40–1.

1030 (1990) 72 OR (2d) 417.

1031 *Malette v Shulman* (1990) 72 OR (2d) 417. Cf *Qumsieh v Guardianship and Administration Board* [1998] VSCA 45 (application for special leave to appeal to the High Court was refused).

1032 B White and L Willmott, 'Will you do As I ask? Compliance with instructions about health care in Queensland' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 77. See also B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 25, 28.

1033 See also *Guardianship and Administration Act 2000* (Qld) s 79 (Offence to carry out health care unless authorised). Section 66 is set out in full at [12.16] below.

1034 B White and L Willmott, 'Will you do As I ask? Compliance with instructions about health care in Queensland' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 77, 83.

principal advantage of recognising common law directives is that a person's wishes will not be disregarded only because they are not expressed in the way required by the legislation, provided the common law test is satisfied.[1035] Consistent with the principles of autonomy and self-determination, this would 'maximise the opportunity for people to exercise control over their future medical treatment'.[1036] It may also encourage advance care planning and reflect community expectations.[1037]

11.126 On the other hand, the recognition of common law directives alongside the legislative scheme results in a 'two-tier system'.[1038] This could lead to uncertainty and confusion and could undermine restrictions imposed on advance directives under the legislation.[1039] In particular, this may present practical problems for health providers who will not only be required to consider the validity of statutory advance health directives, but will also need to determine if other previously expressed statements satisfy the common law test and constitute legally binding common law directives. Queensland Health, in its submission, has suggested that section 39 of the *Powers of Attorney Act 1998* (Qld) be 'clarified to reflect whether health practitioners have to have regard for health directives which do not comply with the formal requirements of the Act'.[1040] This uncertainty for health providers, as to their legal obligations and liability, is undesirable, especially in the context of end of life medical treatment.[1041] Having only one system of advance health directives would, arguably, resolve this particular issue for health providers.

11.127 If common law directives are to be recognised, it appears that section 39 of the *Powers of Attorney Act 1998* (Qld) would need to refer not only to that Act but also to the *Guardianship and Administration Act 2000* (Qld).

11.128 Legislation in the ACT, the Northern Territory, Victoria and Western Australia provides that the legislative provision for advance health directives does not affect any right a person has to refuse medical treatment.[1042]

1035 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, 357.

1036 Ibid 358.

1037 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 26.

1038 Ibid 27.

1039 Ibid. See also Law Commission (England and Wales), *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, Consultation Paper No 129 (1993) [3.17].

1040 Submission C87.

1041 See [12.92]–[12.96] below.

1042 *Medical Treatment (Health Directions) Act 2006* (ACT) s 6; *Natural Death Act* (NT) s 5(1); *Medical Treatment Act 1988* (Vic) s 4(1); *Guardianship and Administration Act 1990* (WA) s 110ZB, which will be inserted when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences. In Western Australia, the Act does not affect the common law relating to a person's entitlement to make treatment decisions in respect of the person's future treatment.

11-25 Should common law directives, which recognises a competent adult's right to give or refuse consent to medical treatment in advance, apply alongside the legislative scheme for advance health directives?

11-26 If so, should section 39 of the *Powers of Attorney Act 1998* (Qld) be clarified to ensure that common law directives have effect despite the provisions of the *Guardianship and Administration Act 2000* (Qld)?

Chapter 12

The withholding and withdrawal of life-sustaining measures

INTRODUCTION

12.1 The Commission's terms of reference direct it to review the law relating to the withholding and withdrawal of life-sustaining measures under the

Guardianship and Administration Act 2000 (Qld) and the *Powers of Attorney Act 1998* (Qld).[1043]

12.2 This chapter gives an overview of the current legislative scheme for the withholding and withdrawal of life-sustaining measures in Queensland. It considers the two primary mechanisms by which decisions can be made about the withholding or withdrawal of life-sustaining measures (namely by an advance health directive, or through the consent of a substitute decision-maker),[1044] as well as the Tribunal's powers in relation to the withholding or withdrawal of life-sustaining measures. The chapter also outlines the approaches taken in other jurisdictions before raising some specific issues for consideration.

12.3 The discussion in this chapter is limited to the lawful withholding or withdrawal of a life-sustaining measure and does not extend to the separate issues of euthanasia and physician-assisted suicide of patients.[1045] Consideration of these topics is not within the Commission's terms of reference.

BACKGROUND

12.4 The common law recognises that an adult with capacity may consent to, or refuse, any medical treatment that is offered,[1046] including a life-sustaining measure.[1047] For a competent adult, the principle of personal autonomy prevails over the 'sanctity of life' principle,[1048] even if the adult's refusal of treatment may lead to his or her death.

12.5 The reasons for a competent adult's refusal of life-sustaining measures are likely to be complex and may be influenced by personal, cultural or religious reasons or a view that nature should be allowed to take its course allowing a person to die with dignity. Some of these views may have developed in response to advances in medical technology that allow a patient to live in circumstances where, previously, the patient would have died without

---

1043 The terms of reference are set out in Appendix 1.

1044 In this chapter, the term 'substitute decision-maker' is used to refer to a guardian, an attorney appointed under an enduring document or a statutory health attorney.

1045 The Queensland guardianship legislation provides that these Acts do not authorise euthanasia or affect particular provisions of the Criminal Code: *Guardianship and Administration Act 2000* (Qld) s 238, which is set out at [12.174] below; *Powers of Attorney Act 1998* (Qld) s 37.

1046 *Re B* [2002] 2 All ER 449, 474 (Butler-Sloss P). See also comments in *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 232–4 (Mason CJ, Dawson, Toohey and Gaudron JJ), 309–10 (McHugh J).

1047 See [12.14] below for the definition in the Queensland legislation.

1048 *Re B* [2002] 2 All ER 449, 455–6 (Butler-Sloss P); *Nancy B v Hotel-Dieu de Quebec* (1992) 86 DLR (4th) 385. This also appears to be the position in Australia: LL Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (3rd ed, 2008) [10.27]–[10.30]; L Willmott, B White and M Howard, 'Refusing advance refusals: advance directives and life-sustaining medical treatment' (2006) 30 *Melbourne University Law Review* 211, 212.

intervention.[1049] In *Auckland Area Health Board v Attorney General*,[1050] Thomas J observed:[1051]

> The problem arises when life passes into death but obscurely. It is a problem made acute by the enormous advances made in technology and medical science in recent decades. With the use of sophisticated life-support systems, life may be perpetuated well beyond the reach of the natural disease. The process of living can become the process of dying so that it is unclear whether life is being sustained or death being deferred.

12.6 This chapter considers the law that applies if an adult does not have the capacity to consent to, or refuse, a life-sustaining measure. Two separate circumstances are considered:

- where the adult, at a time when he or she had capacity, clearly expressed his or her wishes about medical treatment at the end of life; and

- where the adult's views about medical treatment at the end of life are unknown.

12.7 If an adult has previously expressed a wish to refuse treatment in particular circumstances, the decision to withhold or withdraw treatment will generally be seen as a reflection of the adult's wishes. However, for an adult whose wishes are not known or who is unable to communicate his or her wishes, it may be necessary for other persons to decide whether to withhold or withdraw a life-sustaining measure from the adult.

12.8 A decision whether to withhold or withdraw a life-sustaining measure raises a number of medical, legal and ethical factors. Within the community, there are divergent views about how those principles should be applied in individual cases, what should be taken into account, and who should be able to make such a significant decision.

12.9 One consideration is whether the existing legislative safeguards in relation to end-of-life decision-making need to be strengthened to protect adults who lack the capacity to make their own decisions from inappropriate or improper decisions. There are also concerns that it is dangerous to allow some forms of life-sustaining measures to be withheld or withdrawn because it may eventually result in society's tolerance of the withholding and withdrawal of life-sustaining measures from vulnerable adults, even though the withholding or withdrawal may be inappropriate. For example, commentators have described

---

1049 See n 896 above.

1050 [1993] 1 NZLR 235.

1051 Ibid 245.

some of the concerns in relation to the withholding or withdrawal of artificial nutrition and hydration:[1052]

> The controlling idea is that policies of not providing [medically administered nutrition and hydration] will lead to adverse consequences because society will lose its ability to limit decisions about [medically administered nutrition and hydration] to legitimate cases, especially under pressures of cost containment in health care. Whereas 'death with dignity' first emerged as a compassionate response to the threat of overtreatment, patients now face the threat of undertreatment because of the pressures to contain the escalating costs of health care … Some fear that the 'right to die' will be transformed into the 'obligation to die,' perhaps against the patient's wishes and interests.

12.10 This view is consistent with the *Convention on the Rights of Persons with Disabilities*, which provides that States shall 'prevent discriminatory denial of health care … on the basis of disability'.[1053]

12.11 On the other hand, there is a view that, in order to give effect to an adult's autonomy, legislation should more easily facilitate the carrying out of an adult's previously expressed wishes about the withholding or withdrawal of a life-sustaining measure.[1054]

12.12 There is legal recognition in various common law jurisdictions that in some circumstances the provision of life-sustaining measures may not be in the best interests of the adult and, consequently, that life-sustaining measures may be withheld or withdrawn.[1055] This view is reflected in Queensland's guardianship legislation.[1056]

1052 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (6th ed, 2009) 161.

1053 United Nations, *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, 13 December 2006, Art 25(f). The Convention is discussed in a separate Discussion Paper: Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity*, Discussion Paper, WP No 64 (2008) ch 3. See also the comments in *R (Burke) v General Medical Council* [2005] QB 424 [83]: 'people … are entitled to have confidence that they will be treated properly and in accordance with good practice, and that they will not be ignored or patronised because of their disability' (Lord Phillips MR, Waller and Wall LJJ).

1054 See eg Submission C133.

1055 See eg *Airedale NHS Trust v Bland* [1993] AC 789 (UK) and *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235 (NZ). In relation to Australia, see *Re Application by Herrington; Re King* [2007] VSC 151; *Messiha v South East Health* [2004] NSWSC 1061; *Melo v Superintendent of Royal Darwin Hospital* (2007) 21 NTLR 197.

1056 See *Guardianship and Administration Act 2000* (Qld) s 61(b)(ii), which was inserted in recognition of the fact that 'it may be in the adult's best interests for the natural processes of dying not to be interfered with by the futile administration of artificial measures': Explanatory Notes, Guardianship and Administration and Other Acts Amendment Bill 2001 (Qld) 6.

THE LAW IN QUEENSLAND

Introduction

12.13 Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) provides for a scheme of decision-making in relation to health matters and special health matters for adults with impaired capacity. The definition of 'health care' provides, relevantly:[1057]

> **5 Health care**
>
> …
>
> (2) Health care, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

12.14 Under the guardianship legislation, a 'life-sustaining measure' is 'health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation'.[1058] However, it does not include a blood transfusion.[1059]

12.15 The *Guardianship and Administration Act 2000* (Qld) defines a 'health matter', for an adult as 'a matter relating to health care, other than special health care, of the adult'.[1060] The *Powers of Attorney Act 1998* (Qld) includes a similar definition.[1061] Under both Acts, a decision about the withholding or withdrawal of a life-sustaining measure is a health matter, rather than a special health matter.[1062]

12.16 The guardianship legislation provides for decisions about the withholding or withdrawal of a life-sustaining measure from an adult to be made in accordance with an advance health directive made by the adult while he or she had capacity or, alternatively, with the consent of the adult's substitute decision-maker. Because the withholding or withdrawal of a life-sustaining measure is a health matter, decision-making about it is generally governed by

---

1057 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2). The *Powers of Attorney Act 1998* (Qld) includes a similar definition of 'health care', except that it refers to 'a principal', rather than to 'an adult': *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2).

1058 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5A(1); *Powers of Attorney Act 1998* (Qld) sch 2 s 5A(1). The full definition is set out at [12.67] below.

1059 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5A(3); *Powers of Attorney Act 1998* (Qld) sch 2 s 5A(3).

1060 *Guardianship and Administration Act 2000* (Qld) sch 2 s 4.

1061 *Powers of Attorney Act 1998* (Qld) sch 2 s 4.

1062 This was not always the case: see [12.135]–[12.136] below.

section 66 of the *Guardianship and Administration Act 2000* (Qld). That section provides:

> **66 Adult with impaired capacity—order of priority in dealing with health matter**
>
> (1) If an adult has impaired capacity for a health matter, the matter may only be dealt with under the first of the following subsections to apply.
>
> (2) If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.
>
> (3) If subsection (2) does not apply and the tribunal has appointed 1 or more guardians for the matter or made an order about the matter, the matter may only be dealt with by the guardian or guardians or under the order.
>
> *Editor's note—*
>
> If, when appointing the guardian or guardians, the tribunal was unaware of the existence of an enduring document giving power for the matter to an attorney, see section 23 (Appointment without knowledge of enduring document), particularly subsection (2).
>
> (4) If subsections (2) and (3) do not apply and the adult has made 1 or more enduring documents appointing 1 or more attorneys for the matter, the matter may only be dealt with by the attorney or attorneys for the matter appointed by the most recent enduring document.
>
> (5) If subsections (2) to (4) do not apply, the matter may only be dealt with by the statutory health attorney.
>
> (6) This section does not apply to a health matter relating to health care that may be carried out without consent under division 1.

12.17 The effect of section 66 is that an adult's substitute decision-maker may make a decision about the withholding or withdrawal of a life-sustaining measure only if the adult does not have an advance health directive that gives a direction about the matter.

12.18 The *Guardianship and Administration Act 2000* (Qld) also includes a provision that authorises a health provider, in limited circumstances, to withhold or withdraw a life-sustaining measure without consent.[1063]

1063 *Guardianship and Administration Act 2000* (Qld) s 63A, which is considered at [12.43]–[12.45] below.

Withholding or withdrawal of a life-sustaining measure under an advance health directive[1064]

12.19 The *Powers of Attorney Act 1998* (Qld) provides that an adult (called the 'principal') may, by an advance health directive, give directions about health matters and special health matters for his or her future health care.[1065] In particular, the principal may give a direction 'requiring, in the circumstances specified, a life-sustaining measure to be withheld or withdrawn'.[1066]

12.20 A direction in an advance health directive is as effective as if the principal gave the direction when decisions about the matter needed to be made and the principal then had capacity for the matter.[1067]

12.21 There appears to be community support in favour of people having the ability, generally, to make health care decisions in anticipation of a future time when they lose capacity.[1068] In particular, research indicates that there is support for enabling adults to make advance health directives in relation to terminal care:[1069]

> The desire for greater involvement in decision-making on health issues is even more pronounced in relation to the area of terminal care.
>
> > Australian opinion polls show that community attitudes are moving strongly towards wanting more control over the terminal stage of life, and the Public Health Association of Australia supports legislation to allow people to prepare enforceable living wills rejecting excessive medical treatment in the event of terminal illness.[1070] (note in original)

12.22 However, the use of advance health directives in relation to the withholding and withdrawal of life-sustaining measures has also been criticised. Given the irreversible consequences involved, there is a view that advance health directives are an inadequate tool to reflect accurately the wishes of an adult at the time when the health care is to be withheld or withdrawn.[1071] It has also been suggested that advance health directives are open to abuse, with

---

1064 Advance health directives and common law directives are considered in Chapter 11 of this Discussion Paper. In this chapter, reference to an advance health directive means an advance health directive made under the *Powers of Attorney Act 1998* (Qld).

1065 *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

1066 *Powers of Attorney Act 1998* (Qld) s 35(2)(b).

1067 *Powers of Attorney Act 1998* (Qld) s 36(1)(b). Note, however, that a direction in an advance health directive operates only while the principal has impaired capacity for the matter covered by the direction: s 36(1)(a).

1068 S Ellison et al, *The Legal Needs of Older People in New South Wales,* Law and Justice Foundation of New South Wales (2004) 156.

1069 Ibid.

1070 M Steinberg et al, *End of Life Decision-making: Perspectives of General Practitioners and Patients,* Department of Social and Preventive Medicine, The University of Queensland (1996) xix.

1071 Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 10 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 25 October 2009.

vulnerable persons potentially being pressured into completing advance health directives to refuse life-sustaining measures.[1072] It has been suggested that this pressure may be in the form of direct coercion from a person close to the adult but may also be in the form of 'social' pressure:[1073]

> For people with disability, the social pressure not to be a 'burden' can be great and, in the absence of other protective measures which guard against both overt duress on an individual and the more general social coercion, people with disability may believe they have an obligation to die.

12.23 This view raises concerns about the appropriateness of justifying the use of advance health directives for the withholding or withdrawal of life-sustaining measures in terms of patient autonomy.[1074]

12.24 Other suggested problems with using advance directives for decisions in relation to life-sustaining measures include:[1075]

- the low numbers of people who actually execute advance directives;
- the reality that often people are 'not provided with enough information about illnesses and treatments to make prospective life-or-death decisions about them';
- evidence suggesting that people can change their treatment preferences over short periods of time; and
- the problems of locating and interpreting the advance directive at the relevant time.

12.25 On the other hand, some commentators, while acknowledging these concerns, are of the view that the right to make an advance health directive should nevertheless be retained.[1076] One commentator has noted that:[1077]

> the fact that most people have not made an advance directive does not mean that they do not want the *right* to make one. Many of the important civil rights in Australia are never exercised by the majority of the population but they are fundamental rights which Australians expect to have access to if needed, for

---

1072 Ibid 7–8, 11–13.

1073 Ibid 12.

1074 This concern also arises in relation to people with disabilities who have not lost decision-making capacity: see A Asch, 'Recognising death while affirming life: Can end of life reform uphold a disabled person's interest in continued life?', Improving End of Life Care: Why Has it Been So Difficult? Hastings Center Report Special Report (2005) 6 *Hastings Center Report* S31, S33.

1075 A Fagerlin and C Schneider, 'The Failure of the Living Will' (2004) 34 *Hastings Center Report* 30; T Beauchamp and J Childress, *Principles of Biomedical Ethics* (6th ed, 2009) 186–7.

1076 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (6th ed, 2009), 187; C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal on Ageing* S25, S28.

1077 C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal on Ageing* S25, S28.

> example, rights to trial, rights to freedom of movement and rights to protest. The right to make an advance directive is also a fundamental right and for that reason it is worthy of our respect.

12.26 Advance health directives in relation to withholding and withdrawal of life-sustaining measures are also seen to be an important component of advance care planning generally in which informed discussions about treatment preferences for end-of-life care can take place between patients, family and health providers.[1078] Competent adults may wish to put these measures in place to relieve family members of the potential burden of life or death decision-making on their behalf in the event that they later lose capacity.[1079]

Limitations on the operation of a direction to withhold or withdraw a life-sustaining measure[1080]

12.27 Because of the significant consequences of a direction to withhold or withdraw a life-sustaining measure, the *Powers of Attorney Act 1998* (Qld) provides that a direction in an advance health directive to withhold or withdraw a life-sustaining measure cannot operate unless certain conditions are satisfied. Section 36(2) of the *Powers of Attorney Act 1998* (Qld) provides:

> **36 Operation of advance health directive**
>
> …
>
> (2) A direction to withhold or withdraw a life-sustaining measure can not operate unless—
>
> (a) 1 of the following applies—
>
> (i) the principal has a terminal illness or condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the principal and another doctor, the principal may reasonably be expected to die within 1 year;
>
> (ii) the principal is in a persistent vegetative state, that is, the principal has a condition involving severe and irreversible brain damage which, however, allows some or all of the principal's vital bodily functions to continue, including, for example, heart beat or breathing;
>
> (iii) the principal is permanently unconscious, that is, the principal has a condition involving brain damage so severe that there is no reasonable prospect of the principal regaining consciousness;

1078 C Stewart, 'The Australian experience of advance directives and possible future directions' (2005) 24 *Australasian Journal on Ageing* S25, S28.

1079 Health Forum 2.

1080 These limitations are considered in more detail at [12.75]–[12.90] below.

(iv) the principal has an illness or injury of such severity that there is no reasonable prospect that the principal will recover to the extent that the principal's life can be sustained without the continued application of life-sustaining measures; and

(b) for a direction to withhold or withdraw artificial nutrition or artificial hydration—the commencement or continuation of the measure would be inconsistent with good medical practice; and

(c) the principal has no reasonable prospect of regaining capacity for health matters. (notes omitted)

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

Decision-making priority

12.28 As mentioned earlier, section 66 of the *Guardianship and Administration Act 2000* (Qld) establishes an order of priority for decision-making in relation to health matters.[1081] If an adult does not have a relevant advance health directive, a decision about a health matter (which includes a decision to withhold or withdraw a life-sustaining measure) is to be made in the following order of priority:[1082]

- by a guardian appointed by the Tribunal, if any;
- if a guardian has not been appointed, by an attorney appointed under an enduring document,[1083] if the adult has made one; or
- if there is no guardian or attorney, by a statutory health attorney.[1084]

12.29 In making a decision about the withholding or withdrawal of a life-sustaining measure, a substitute decision-maker must apply the General Principles and the Health Care Principle.[1085]

Limitation on the operation of a substitute decision-maker's consent

12.30 Although a decision to withhold or withdraw a life-sustaining measure is a health matter, rather than a special health matter, it is nevertheless a very significant decision. For that reason, the *Guardianship and Administration Act*

1081 *Guardianship and Administration Act 2000* (Qld) s 66 is set out at [12.16] above.

1082 *Guardianship and Administration Act 2000* (Qld) s 66(3)–(5).

1083 Enduring document is defined to mean 'an enduring power of attorney or advance health directive': *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) s 28.

1084 Statutory health attorneys are considered in Chapter 10 of this Discussion Paper.

1085 *Guardianship and Administration Act 2000* (Qld) s 11 (for a guardian); *Powers of Attorney Act 1998* (Qld) s 76 (for an attorney under an enduring document and a statutory health attorney).

2000 (Qld) includes a provision that is intended to operate as a safeguard against inappropriate decision-making by a substitute decision-maker.

12.31 Section 66A provides that a consent to the withholding or withdrawal of a life-sustaining measure for an adult cannot operate 'unless the adult's health provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice'.[1086] Accordingly, if the adult's health provider is not of that view, the substitute decision-maker's consent will not be effective.

The effect of an adult's objection

12.32 The *Guardianship and Administration Act 2000* (Qld) provides that, in certain circumstances, an exercise of power for a health matter (or a special health matter) is ineffective if the health provider knows, or ought reasonably to know, that the adult objects to the health care. Section 67 provides:[1087]

> **67 Effect of adult's objection to health care**
>
> (1) Generally, the exercise of power for a health matter or special health matter is ineffective to give consent to health care of an adult if the health provider knows, or ought reasonably to know, the adult objects to the health care.
>
> *Editor's note—*
>
> ***Object*** is defined in schedule 4 (Dictionary). Note also the *Powers of Attorney Act 1998*, section 35(2)(a) (Advance health directives) provides that 'by an advance health directive [a] principal may give a direction—
>
> (a) consenting, in the circumstances specified, to particular future health care of the principal when necessary and despite objection by the principal when the health care is provided'.
>
> (2) However, the exercise of power for a health matter or special health matter is effective to give consent to the health care despite an objection by the adult to the health care if—
>
> (a) the adult has minimal or no understanding of 1 of the following—
>
> (i) what the health care involves;
>
> (ii) why the health care is required; and
>
> (b) the health care is likely to cause the adult—
>
> (i) no distress; or
>
> (ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care.

1086 *Guardianship and Administration Act 2000* (Qld) s 66A is set out at [12.125] below.

1087 The effect of an adult's objection to health care is considered in Chapter 14 of this Discussion Paper.

> (3) Subsection (2) does not apply to the following health care—
>
> (a) removal of tissue for donation;
>
> (b) participation in special medical research or experimental health care or approved clinical research.

12.33 In order for a substitute decision-maker's consent to override the adult's objection to health care (which could be an objection to the withholding or withdrawal of a life-sustaining measure or the provision of a life-sustaining measure), the test in section 67(2) must be satisfied, namely that:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

12.34 The term 'object' is defined to mean that the adult indicates that he or she does not wish to have the health care or that the adult previously indicated, in similar circumstances, that he or she did not then wish to have the health care and since then he or she has not indicated otherwise.[1088] The legislation provides examples of how that objection may be indicated:[1089]

> An indication may be given in an enduring power of attorney or advance health directive or in another way, including, for example, orally or by conduct.

12.35 However, in practical terms, section 67 deals with the effect of an objection that is made *other* than in an advance health directive. As explained earlier, if an adult has made an advance health directive that contains a relevant direction about the withholding or withdrawal of a life-sustaining measure, the matter may only be dealt with under that direction.[1090] In those circumstances, there is no scope for the adult's substitute decision-maker to exercise a power for the matter. As a result, section 67 has no application to an objection made in an advance health directive.

The Adult Guardian's role in relation to the withholding or withdrawal of a life-sustaining measure

12.36 The *Guardianship and Administration Act 2000* (Qld) includes two provisions that enable the Adult Guardian to exercise power for a health matter for an adult even though the Adult Guardian is not the adult's guardian, attorney or statutory health attorney. These provisions apply to health matters generally and are not limited to the withholding or withdrawal of a life-sustaining measure.

1088 *Guardianship and Administration Act 2000* (Qld) sch 4.

1089 *Guardianship and Administration Act 2000* (Qld) sch 4.

1090 *Guardianship and Administration Act 2000* (Qld) s 66(2). Section 66 is set out at [12.16] above.

However, given the implications of a decision to withhold or withdraw a life-sustaining measure, the Adult Guardian's powers are especially important in that context.

Disagreement between the adult's substitute decision-makers

12.37 Section 42 of the *Guardianship and Administration Act 2000* (Qld) applies if there is a disagreement about a health matter for an adult and the disagreement cannot be resolved by mediation by the Adult Guardian. In that situation, the Adult Guardian may 'exercise the power for the health matter'.[1091] Where the health matter involves the proposed withholding or withdrawal of a life-sustaining measure, section 42 enables the Adult Guardian to consent to the withholding or withdrawal of the life-sustaining measure or to consent to the provision of the life-sustaining measure.

12.38 The section includes the following definition of 'disagreement about a health matter':[1092]

> ***disagreement*** about a health matter means—
>
> (a) a disagreement between a guardian or attorney[1093] 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)

12.39 The definition encompasses a dispute about whether the health care should be given, as well as a dispute about who should be the adult's statutory health attorney.

12.40 If the Adult Guardian exercises power in relation to a health matter under this provision, the Adult Guardian must advise the Tribunal in writing of 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.[1094]

1091 *Guardianship and Administration Act 2000* (Qld) s 42(1).

1092 *Guardianship and Administration Act 2000* (Qld) s 42(3).

1093 *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.

1094 *Guardianship and Administration Act 2000* (Qld) s 42(2).

Substitute decision-maker acting contrary to the Health Care Principle

12.41 Section 43 of the *Guardianship and Administration Act 2000* (Qld) applies if a guardian or attorney for a health matter or a statutory health attorney[1095] for an adult:

- refuses to make a decision about the health matter for the adult 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.

12.42 In that situation the Adult Guardian may exercise power for the health matter.[1096] If the Adult Guardian exercises power under section 43, the Adult Guardian must advise the Tribunal in writing of the name of the adult, the name of the guardian, attorney or statutory health attorney, a statement as to why the refusal or decision is contrary to the Health Care Principle, and the decision made by the Adult Guardian.

Withholding or withdrawal of a life-sustaining measure in an acute emergency

12.43 The provisions discussed above deal with the withholding or withdrawal of a life-sustaining measure on the authority of an adult's advance health directive or with the consent of an adult's substitute decision-maker.

12.44 The *Guardianship and Administration Act 2000* (Qld) also includes a number of provisions that authorise health providers, in limited circumstances, to carry out particular types of health care without consent. Section 63A deals with the withholding or withdrawal of a life-sustaining measure, without consent, in an acute emergency. It provides:[1097]

> **63A Life-sustaining measure in an acute emergency**
>
> (1) A life-sustaining measure may be withheld or withdrawn for an adult without consent if the adult's health provider reasonably considers—
>
> (a) the adult has impaired capacity for the health matter concerned; and
>
> (b) the commencement or continuation of the measure for the adult would be inconsistent with good medical practice; and

1095 *Guardianship and Administration Act 2000* (Qld) s 43(3).

1096 *Guardianship and Administration Act 2000* (Qld) s 43(1).

1097 Note, s 63 of the *Guardianship and Administration Act 2000* (Qld), which authorises a health provider, in specified circumstances, to carry out health care urgently without consent, does not apply to the withholding or withdrawal of a life-sustaining measure for an adult: s 63(5).

(c) consistent with good medical practice, the decision to withhold or withdraw the measure must be taken immediately.

(2) However, the measure may not be withheld or withdrawn without consent if the health provider knows the adult objects to the withholding or withdrawal.

Editor's note—

Object is defined in schedule 4 (Dictionary).

(3) The health provider must certify in the adult's clinical records as to the various things enabling the measure to be withheld or withdrawn because of this section.

(4) For this section, artificial nutrition and hydration is not a ***life-sustaining measure***.

12.45 The intention of this provision was said to be to ensure that, in an emergency situation, 'adults with impaired capacity do not have to be subjected to invasive or unnecessary treatments when good medical practice demands that such treatment should cease immediately'.[1098] However, the section does not authorise the withholding or withdrawal of a life-sustaining measure without consent if the health provider knows that the adult objects to the withholding or withdrawal of the measure.[1099]

Certification by health provider in adult's clinical records

12.46 Generally, if a life-sustaining measure is withheld or withdrawn, section 66B of the *Guardianship and Administration Act 2000* (Qld) requires the adult's health provider to certify in the adult's medical records the authority for the withholding or withdrawal of the measure — that is, whether the measure was withheld or withdrawn:

- on the basis of the adult's advance health directive under section 66(2) of the *Guardianship and Administration Act 2000* (Qld) and section 36 of the *Powers of Attorney Act 1998* (Qld); or
- with the consent of the adult's substitute decision-maker under section 66(3), (4) or (5) and section 66A.[1100]

12.47 This requirement does not apply if the withholding or withdrawal of the life-sustaining measure is authorised to be carried out, without consent, under section 63A of the *Guardianship and Administration Act 2000* (Qld).[1101]

1098 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 2001, 2909 (Rod Welford, Attorney-General and Minister for Justice).

1099 *Guardianship and Administration Act 2000* (Qld) s 63A(2).

1100 *Guardianship and Administration Act 2000* (Qld) s 66B(2).

1101 *Guardianship and Administration Act 2000* (Qld) s 66B(1).

THE LAW IN OTHER JURISDICTIONS

Withholding and withdrawal of life-sustaining measures under an advance health directive

12.48 As explained in Chapter 11 of this Discussion Paper,[1102] the other Australian jurisdictions have statutory provisions dealing with advance heath directives (or their equivalent).

12.49 In the Northern Territory, a person of sound mind who has attained the age of 18 years, and who desires not to be subjected to 'extraordinary measures' in the event of his or her suffering from a terminal illness, may make a direction in the prescribed form.[1103]

12.50 Similarly, in Western Australia, when the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences,[1104] the *Guardianship and Administration Act 1990* (WA) will provide that a person who has reached 18 years of age and has full legal capacity may make an advance health directive containing treatment decisions in respect of the person's future treatment.[1105] 'Treatment' will be defined to include 'a life sustaining measure'.[1106]

12.51 In the ACT, South Australia and Victoria, although the legislation relating to advance directives does not expressly mention life-sustaining measures,[1107] it appears that the language of the legislation is sufficiently wide to include a direction to withhold or withdraw a life-sustaining measure.

12.52 In New South Wales and Tasmania, the legislation does not make provision for advance health directives. However, a common law directive to withhold or withdraw a life-sustaining measure will be effective if the relevant requirements are satisfied.[1108]

1102 See [11.24]–[11.30] above.

1103 *Natural Death Act* (NT) s 4(1). 'Extraordinary measures' are defined to mean 'medical or surgical measures that prolong life, or are intended to prolong life, by supplanting or maintaining the operation of bodily functions that are temporarily or permanently incapable of independent operation': s 3.

1104 The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) was assented to on 19 June 2008 but has not yet commenced.

1105 *Guardianship and Administration Act 1990* (WA) s 110P, which will be inserted when s 11 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

1106 *Guardianship and Administration Act 1990* (WA) s 3(1), as amended by s 5 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA). Section 3(1) will define 'life sustaining measure' to mean 'a medical, surgical or nursing procedure directed at supplanting or maintaining a vital bodily function that is temporarily or permanently incapable of independent operation, and includes assisted ventilation and cardiopulmonary resuscitation'.

1107 See *Medical Treatment (Health Directions) Act 2006* (ACT); *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Medical Treatment Act 1988* (Vic) s 5.

1108 Common law directives are considered at [12.91]–[12.96] below. See also New South Wales Department of Health, *Using Advance Care Directives: New South Wales* (2004) <http://www.health.nsw.gov.au/policies/gl/2005/pdf/GL2005_056.pdf> at 25 October 2009.

Consent to withhold or withdraw life-sustaining measures by a substitute decision-maker

12.53 In all other Australian jurisdictions, the legislation makes provision for a substitute decision-maker to make health care decisions for an adult with impaired capacity. However, there are differences between the jurisdictions as to whether this extends to a decision to withhold or withdraw a life-sustaining measure.

12.54 In the ACT, the ACT Civil and Administrative Tribunal ('ACAT') may appoint a guardian for an adult with the power to give a consent required for a medical procedure or other treatment for the adult.[1109] Arguably, this could allow an appointed guardian to make a decision in relation to the withholding or withdrawal of life-sustaining measures. A person appointed under an enduring power of attorney with power for health matters may make a decision to withhold or withdraw medical treatment for the principal.[1110] If a health professional believes on reasonable grounds that a person is a protected person[1111] and that the person needs treatment, the health professional may ask the adult's health attorney (the equivalent of a statutory health attorney[1112]) to consent to the treatment.[1113] If the health attorney refuses to give his or her consent to the medical treatment, the health professional must refer the matter to the Public Advocate.[1114] On the referral of a matter, if the Public Advocate considers that the refusal is reasonable, the Public Advocate must take no further action if the refusal is considered reasonable or, alternatively, apply to ACAT for appointment as the guardian of the protected person.[1115]

12.55 In New South Wales, conflicting decisions of the Administrative Decisions Tribunal and NSW Guardianship Tribunal have resulted in some uncertainty in the law.[1116] It appears that a person appointed as an enduring guardian, where conferred with a power to make decisions about the adult's health care (as distinct from a power to consent to medical treatment), may make a decision to withhold or withdraw a life-sustaining measure from the

---

1109 *Guardianship and Management of Property Act 1991* (ACT) s 7(3)(e). A guardian cannot consent to a 'prescribed medical procedure': s 7(3)(e). The definition of prescribed medical procedure does not refer to the withholding or withdrawal of a life-sustaining measure: *Guardianship and Management of Property Act 1991* (ACT) dictionary; nor does the *Guardianship and Management of Property Regulation 1991* (ACT) prescribe the withholding or withdrawal of a life-sustaining measure as a prescribed medical procedure.

1110 *Powers of Attorney Act 2006* (ACT) ss 12, 13(2).

1111 A protected person is a person who has impaired decision-making ability for the giving of consent to medical treatment and who has not appointed an attorney with authority to consent to medical treatment and for whom ACAT has not appointed a guardian with authority to consent to medical treatment: *Guardianship and Management of Property Act 1991* (ACT) s 32A.

1112 See *Guardianship and Management of Property Act 1991* (ACT) s 32B.

1113 *Guardianship and Management of Property Act 1991* (ACT) s 32D(1)–(2).

1114 *Guardianship and Management of Property Act 1991* (ACT) s 32H(1)–(2).

1115 *Guardianship and Management of Property Act 1991* (ACT) s 32H(3).

1116 See *WK v Public Guardian (No 2)* [2006] NSWADT 121; *FI v Public Guardian* [2008] NSWADT 263.

adult.[1117] Similarly, if the NSW Guardianship Tribunal appoints a guardian and confers on the guardian a power to make health care decisions (as distinct from a power to consent to medical treatment), the guardian will be able to make a decision to withhold or withdraw a life-sustaining measure.[1118] However, the NSW Administrative Decisions Tribunal has suggested that, if a guardian is appointed to make decisions about health care and 'consent to medical and dental treatment', there is some doubt as to whether that extends to the withholding or withdrawal of a life-sustaining measure.[1119] On that view, it seems that a 'person responsible'[1120] (the equivalent of a statutory health attorney) would have the power to consent to medical or dental treatment but would not have the power to refuse treatment (including a life-sustaining measure).[1121]

12.56 In the Northern Territory, a person may be appointed as a guardian for an adult with the power 'to consent to any heath care that is in the best interests of the represented person'.[1122] Arguably, this could allow an appointed guardian to make a decision in relation to the withholding or withdrawal of life-sustaining measures if it is in the best interests of the adult.

12.57 In South Australia, an adult may make a medical power of attorney authorising a medical agent 'to make medical decisions about the medical treatment of the person who granted the power'.[1123] This would appear generally to include a decision to withhold or withdraw a life-sustaining measure, although a medical agent may not refuse medical treatment that would result in the grantor of the power of attorney regaining the capacity to make decisions about his or her own medical treatment unless the grantor is in the terminal phase of a terminal illness.[1124] If the adult has not appointed a medical agent, consent to the adult's medical treatment may be given by a person appointed as guardian by the Guardianship Board of South Australia (subject to the terms of the order appointing the person)[1125] or a person appointed as the adult's enduring guardian under an enduring power of attorney (subject to the terms of the instrument).[1126] The definition of medical treatment

---

1117 *Guardianship Act 1987* (NSW) s 6E(1)(b).

1118 *FI v Public Guardian* [2008] NSWADT 263, [52]–[53].

1119 *WK v Public Guardian (No 2)* [2006] NSWADT 121, [12].

1120 *Guardianship Act 1987* (NSW) s 33A(4).

1121 See *Guardianship Act 1987* (NSW) s 36(1)(a).

1122 *Adult Guardianship Act* (NT) s 17(2)(d). Although this power does not extend to consenting to a major medical procedure (s 21), the withholding or withdrawal of a life-sustaining measure does not appear to be a major medical procedure under the Act.

1123 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(1), (7)(a).

1124 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(7)(b)(iii).

1125 See *Guardianship and Administration Act 1993* (SA) ss 29, 31.

1126 *Guardianship and Administration Act 1993* (SA) s 25(5).

appears wide enough to encompass life-sustaining measures.[1127] If an adult does not have a medical agent or a guardian, certain persons are authorised under section 59 of the *Guardianship and Administration Act 1993* (SA) to consent to medical or dental treatment for the adult. It is not clear that that would extend to a decision to withhold or withdraw a life-sustaining measure.

12.58 In Tasmania, a guardian appointed by the Guardianship and Administration Board and a person appointed as an enduring guardian under an enduring power of attorney may be given express power 'to consent to any health care that is in the best interests of the [adult] and to refuse or withdraw consent to any such treatment'.[1128] This appears wide enough to encompass a decision to withhold or withdraw a life-sustaining measure on behalf of an adult. A 'person responsible' for an adult (the equivalent of a statutory health attorney) may also consent to the carrying out of medical treatment[1129] if he or she is satisfied that the treatment would be in the best interests of the adult.[1130] For the purposes of determining whether any medical treatment would be in the best interests of the adult, the person responsible must take into account a number of specified matters, including 'that the treatment is to be carried out only to promote and maintain the health and wellbeing of that person'.[1131] In view of that requirement, it appears that a person responsible may not make a decision to withhold or withdraw a life-sustaining measure.

12.59 In Victoria, a person appointed as an agent under an enduring power of attorney (medical treatment)[1132] may make a decision to withhold or withdraw a life-sustaining medical treatment on behalf of an adult.[1133]

12.60 In addition, a person appointed by the Victorian Civil and Administrative Tribunal ('VCAT') as a plenary guardian may consent to any health care that is in the best interests of the adult.[1134] This would appear to include the power to withhold or withdraw a life-sustaining measure. A person appointed as an enduring guardian may exercise the powers of a guardian,[1135] which would appear to include the power to withhold or withdraw a life-sustaining measure.

1127 *Guardianship and Administration Act 1993* (SA) s 3(1) defines 'medical treatment' to mean 'treatment or procedures administered or carried out by a health provider or other health professional in the course of professional practice and includes the prescription or supply of drugs'.

1128 *Guardianship and Administration Act 1995* (Tas) ss 25(2)(e), 32(5). Although this does not extend to consenting to special treatment, the definition of 'special treatment' does not appear to encompass the withholding or withdrawal of a life-sustaining measure: *Guardianship and Administration Act 1995* (Tas) s 3(1); *Guardianship and Administration Regulation 2007* (Tas) reg 6.

1129 *Guardianship and Administration Act 1995* (Tas) s 39(1).

1130 *Guardianship and Administration Act 1995* (Tas) s 43(1)(b).

1131 *Guardianship and Administration Act 1995* (Tas) s 43(2)(e).

1132 *Medical Treatment Act 1988* (Vic) s 5A.

1133 *Medical Treatment Act 1988* (Vic) s 5B.

1134 *Guardianship and Administration Act 1986* (Vic) s 24(2)(d).

1135 *Guardianship and Administration Act 1986* (Vic) ss 35A, 35B.

However, although a 'responsible person'[1136] (the equivalent of a statutory health attorney) may consent to the carrying out of medical and dental treatment,[1137] it appears that he or she may not effectively refuse treatment if the adult's registered practitioner believes on reasonable grounds that the proposed treatment is in the adult's best interests and the Tribunal agrees. The guardianship legislation provides that, if the person responsible does not consent to proposed medical treatment and a registered practitioner considers that treatment should be given, the registered practitioner may, within three days of being notified of the responsible person's decision, give the responsible person and the Public Advocate a written statement to the effect that:[1138]

- the person responsible for the adult has been informed about the nature of the patient's condition to an extent that would be sufficient to enable the adult, if he or she were able to consent, to decide whether or not to consent to the proposed treatment generally or to treatment of a particular kind for that condition;

- the person responsible has not consented to the proposed treatment;

- the registered practitioner believes on reasonable grounds that the proposed treatment is in the best interest of the adult; and

- unless the person responsible applies to the Tribunal and the Tribunal otherwise orders, the practitioner will, not earlier than seven days after giving the statement to the person responsible, carry out the proposed treatment.

12.61 If the person responsible does not make such an application, the registered practitioner may carry out the treatment, but not earlier than seven days after giving the person responsible the statement.[1139] However, if the registered practitioner does not disagree with the responsible person's decision not to consent to the provision of a life-sustaining measure, the decision will be effective to withhold the provision of the life-sustaining measure.

12.62 In Western Australia, when amendments to the *Guardianship and Administration Act 1990* (WA) commence,[1140] a guardian appointed by the State Administrative Tribunal[1141] and, subject to the terms of his or her appointment, an enduring guardian appointed under the equivalent of an enduring power of

---

1136 *Guardianship and Administration Act 1986* (Vic) s 37.

1137 *Guardianship and Administration Act 1986* (Vic) s 39(1)(b).

1138 *Guardianship and Administration Act 1986* (Vic) s 42L(1), (2)(a).

1139 If after 7 days the 'person responsible' has not made an application: *Guardianship and Administration Act 1986* (Vic) s 42L(2)(a).

1140 See the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA), which was assented to on 19 June 2008 but has not yet commenced.

1141 *Guardianship and Administration Act 1990* (WA) s 45(1), (2)(d).

attorney,[1142] will have the power to consent or refuse to consent to the commencement or continuation of a life-sustaining measure.[1143] The Act will also be amended to enable a 'responsible person' to exercise that power.[1144]

ISSUES FOR CONSIDERATION

Achieving the right balance

12.63 The considerations that underpin decision-making by, and for, adults in relation to health care at the end of life can sometimes conflict. If an adult has previously had capacity and expressed a view about what should happen if he or she loses capacity at the end of life, the issue is how to recognise the adult's expressed view, while at the same time safeguarding the interests of the adult now that he or she has lost capacity and is vulnerable. On the other hand, if an adult has never expressed a view about what should happen if he or she loses capacity, or has never had capacity, a balance must be sought between allowing another appropriate person to make decisions for the adult and the need to safeguard the interests of the adult.

12.64 As explained earlier, the Queensland guardianship legislation provides two main mechanisms for decision-making about end-of-life health care for adults with impaired capacity. First it makes provision for an adult, while he or she still has capacity, to make an advance health directive giving directions about his or her future health care in the event that he or she loses capacity. Secondly, it establishes a scheme of substitute decision-making, which enables a guardian, attorney or statutory health attorney to make decisions about health matters (including the withholding or withdrawal of a life-sustaining measure) for the adult.

12.65 The current scheme for decision-making in relation to the withholding or withdrawal of life-sustaining measures has the following key features:

- *Legal recognition of advance health directives*: Generally, if a competent adult has given a direction in an advance health directive about his or her end-of-life health care, the matter must be dealt with in accordance with the direction if the adult later loses capacity.[1145] In this respect, the legislation recognises the adult's autonomy.

1142 *Guardianship and Administration Act 1990* (WA) s 110G(1), which will be inserted when s 11 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

1143 See *Guardianship and Administration Act 1990* (WA) s 3(1) (definitions of 'treatment' and 'treatment decision'), which will be inserted when s 5 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

1144 See *Guardianship and Administration Act 1990* (WA) s 110ZD, which will be inserted when s 11 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

1145 *Guardianship and Administration Act 2000* (Qld) s 66(2).

This position is qualified, however, by limitations in the legislation. If the direction relates to the withholding or withdrawal of a life-sustaining measure, the direction operates only if certain conditions have been satisfied. The satisfaction of those conditions is intended to be a safeguard on the operation of the advance health directive.[1146]

- *Substitute decision-making on behalf of an adult with impaired capacity*: If an adult does not have a relevant advance health directive and a decision needs to be made for the adult about the withholding or withdrawal of a life-sustaining measure, the decision can usually be made by the adult's substitute decision-maker — that is, in descending order, by a guardian appointed by the Tribunal, an attorney appointed under an enduring power of attorney if the adult has made one or, if there is no guardian or attorney, the adult's statutory health attorney.[1147]

  A substitute decision-maker who is making a decision for an adult about a health matter must apply the General Principles and the Health Care Principle.[1148] Of particular significance in relation to a decision to withhold or withdraw a life-sustaining measure is that, under the Health Care Principle, the power may be exercised only if, in all the circumstances, it is in the adult's best interests.[1149] If a substitute decision-maker refuses to make a decision about a health matter and the refusal is contrary to the Health Care Principle, or makes a decision about a health matter and the decision is contrary to the Health Care Principle, the Adult Guardian may make the decision in relation to the health matter.[1150]

- *Circumstances where medical professionals have a role in decision-making*: As mentioned earlier, 'health care' is defined to include the withholding or withdrawal of a life-sustaining measure if the commencement or continuation of the measure would be inconsistent with good medical practice.[1151] As a result, an adult's health provider plays a role in determining whether the decision made by the substitute decision-maker is effective in the circumstances. Further, in certain circumstances a direction in an advance health directive about the withholding or withdrawal of a life-sustaining measure will not operate unless the commencement or continuation of the measure would be

1146 See [12.75]–[12.90] below.

1147 *Guardianship and Administration Act 2000* (Qld) s 66(3)–(5).

1148 *Guardianship and Administration Act 2000* (Qld) ss 11, 34; *Powers of Attorney Act 1998* (Qld) s 76.

1149 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)(b)(ii); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)(b)(ii).

1150 *Guardianship and Administration Act 2000* (Qld) s 43, which is discussed at [12.41]–[12.42] above.

1151 See the definition of 'health care' at [12.13] above.

inconsistent with good medical practice. In that situation, the adult's health provider will not be required to comply with the direction.[1152]

While these limitations provide a safeguard against inappropriate decision-making about the adult's end-of-life health care,[1153] they may also restrict the adult's autonomy and the role of the adult's substitute decision-maker.

12.66 An issue for consideration is whether the Queensland guardianship legislation currently strikes the appropriate balance between competing considerations in relation to the withholding or withdrawal of life-sustaining measures from an adult.

12-1 Does the guardianship legislation currently strike an appropriate balance:

(a) for an adult who has previously had capacity and expressed a view about his or her end-of-life health care — between recognising the adult's autonomy and safeguarding the adult's interests; and

(b) for an adult who has never expressed a view about his or her end-of-life health care — between allowing appropriate substitute decision-making and safeguarding the adult's interests?

12-2 If no to Question 12-1(a) or (b), how should the legislation be changed and why?

The definition of 'life-sustaining measure'

12.67 Both the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) include the following definition of 'life-sustaining measures':[1154]

> **5A Life-sustaining measure**
>
> (1) A life-sustaining measure is health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation.

1152 See [12.84]–[12.86], [12.121]–[12.132] below.

1153 Eg, it may help to ensure that a person exercising a power under the Act is doing so in a way that is consistent with the adult's proper care and protection: *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(5); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(5).

1154 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5A; *Powers of Attorney Act 1998* (Qld) sch 2 s 5A.

(2) Without limiting subsection (1), each of the following is a ***life-sustaining measure***—

(a) cardiopulmonary resuscitation;

(b) assisted ventilation;

(c) artificial nutrition and hydration.

(3) A blood transfusion is not a ***life-sustaining measure***.

12.68 Although antibiotics and dialysis are not specifically mentioned in section 5A(2), it appears that, in some circumstances, they may constitute life-sustaining measures.[1155]

12.69 An issue for consideration is the appropriateness of this definition. For example, it has been suggested that the exclusion of blood transfusions from the definition is counter-intuitive.[1156] It has also been suggested that cardiopulmonary resuscitation should be excluded from the definition of life-sustaining measures.[1157] However, that suggestion appears to have been a response to the view that, in the absence of a substitute decision-maker's consent to withhold life-sustaining measures, a health provider may be required to provide all life-sustaining measures, including cardiopulmonary resuscitation, even in circumstances where the health provider considers it to be medically inappropriate.[1158]

12-3 Is the definition of 'life-sustaining measure' in the guardianship legislation appropriate or should it be changed in some way? If so, how should the definition be changed?

Withholding and withdrawal: identical treatment under the legislation

12.70 Section 79(1) of the *Guardianship and Administration Act 2000* (Qld) provides that it is an offence for a person to carry out health care of an adult with impaired capacity unless:

- the *Guardianship and Administration Act 2000* (Qld) or another Act provides that the health care may be carried out without consent;
- consent to the health care is given under the *Guardianship and Administration Act 2000* (Qld) or another Act; or

1155 See *Re MHE* [2006] QGAAT 9; *Re RWG* [2000] QGAAT 2, [23].

1156 Submission C93.

1157 Health Forums 1, 2.

1158 The issue of medically futile treatment is considered at [12.97]–[12.110] below.

- the health care is authorised by the Supreme Court by an order made in its *parens patriae* jurisdiction.

12.71 Because section 79 of the *Guardianship and Administration Act 2000* (Qld) generally requires consent for the carrying out of health care,[1159] and 'health care' is defined to include the withholding or withdrawal of a life-sustaining measure,[1160] the effect of the Act is to require consent for both the withholding and withdrawal of life-sustaining measures.

12.72 It has been suggested by some commentators that there is a difference between a decision not to implement a life-sustaining measure and a decision to withdraw or stop a life-sustaining measure that is already in place:[1161]

> Many professionals and family members feel justified in withholding treatment they never started, but not in withdrawing treatment already initiated. They sense that decisions to stop treatments are more momentous and consequential than decisions not to start them.

12.73 However, a contrary view is that it is ethically justified to treat acts of withholding and withdrawal of life-sustaining measures in the same way:[1162]

> Feelings of reluctance about withdrawing treatments are understandable, but the distinction between withdrawing and withholding treatment is morally irrelevant and can be dangerous. The distinction is unclear, inasmuch as withdrawing can happen through an omission (withholding) such as not recharging batteries that power respirators or not putting the infusion into a feeding tube.

12.74 The Queensland guardianship legislation adopts the latter view by treating withholding and withdrawal of life-sustaining measures in an identical manner.

12-4 Is it appropriate that the guardianship legislation treats the withholding and withdrawal of life-sustaining measures in an identical manner?

1159 See *Guardianship and Administration Act 2000* (Qld) s 79(1)(b).

1160 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2), which is set out at [12.13] above.

1161 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (6th ed, 2009) 157. See also General Medical Council, *Withholding and withdrawing life-prolonging treatments: Good practice in decision-making* (2006) Appendix B (definition of 'Starting then stopping treatment'); KV Iserson, 'Withholding and Withdrawing Medical Treatment: An Emergency Medicine Perspective' (1996) 28 *Annals of Emergency Medicine* 51, 52; D Sulmasy and J Sugarman, 'Are withholding and withdrawing therapy always morally equivalent?' (2004) 20 *Journal of Medical Ethics* 218. Cf J Harris, 'Are withholding and withdrawing therapy always morally equivalent? A reply to Sulmasy and Sugarman' (1994) 20 *Journal of Medical Ethics* 223. For views of some health care professionals see: G Melltorp and T Nilstun, 'The difference between withholding and withdrawing life-sustaining treatment' (1997) 23 *Intensive Care Medicine* 1264.

1162 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (6th ed, 2009) 158. See also G Melltorp and T Nilstun, 'The difference between withholding and withdrawing life-sustaining treatment' (1997) 23 *Intensive Care Medicine* 1264, 1264 ref 1-11.

12-5 If no to Question 12-4, how should the guardianship legislation treat the withholding and withdrawal of life-sustaining measures differently?

Specific limitations on the operation of a direction in an advance health directive to withhold or withdraw a life-sustaining measure

12.75 The *Powers of Attorney Act 1998* (Qld) imposes restrictions on the operation of a direction in an advance health directive to withhold or withdraw a life-sustaining measure. Section 36(2) of the Act provides:

> **36 Operation of advance health directive**
>
> …
>
> (2) A direction to withhold or withdraw a life-sustaining measure[37] can not operate unless—
>
> (a) 1 of the following applies—
>
> (i) the principal has a terminal illness or condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the principal and another doctor, the principal may reasonably be expected to die within 1 year;
>
> (ii) the principal is in a persistent vegetative state, that is, the principal has a condition involving severe and irreversible brain damage which, however, allows some or all of the principal's vital bodily functions to continue, including, for example, heart beat or breathing;
>
> (iii) the principal is permanently unconscious, that is, the principal has a condition involving brain damage so severe that there is no reasonable prospect of the principal regaining consciousness;[38]
>
> (iv) the principal has an illness or injury of such severity that there is no reasonable prospect that the principal will recover to the extent that the principal's life can be sustained without the continued application of life-sustaining measures; and
>
> (b) for a direction to withhold or withdraw artificial nutrition or artificial hydration—the commencement or continuation of the measure would be inconsistent with good medical practice; and
>
> (c) the principal has no reasonable prospect of regaining capacity for health matters.

37 Defined in schedule 2, section 5A.

38 This is sometimes referred to as 'a coma'.

12.76 Because of the limitations imposed by section 36(2), a direction to withhold or withdraw a life-sustaining measure will generally operate only if the following conditions are satisfied:

- the adult is terminally ill or very sick and may reasonably be expected to die within one year;
- for a direction that relates to the withholding or withdrawal of artificial nutrition or artificial hydration (and possibly other life-sustaining measures),[1163] the commencement or continuation of the measure would be inconsistent with good medical practice; and
- the adult has no reasonable prospect of regaining capacity for health matters.

12.77 This is different from the position at common law, where the effectiveness of a common law directive does not depend on the satisfaction of these conditions.[1164]

The requirement that the adult has a terminal illness or is very sick

12.78 The first issue for consideration is whether the operation of a direction to withhold or withdraw a life-sustaining measure should require, as is presently the case under section 36(2)(a) of the *Powers of Attorney Act 1998* (Qld), that one of the following four conditions relating to the gravity of the adult's illness is satisfied, namely, that:[1165]

- the adult has a terminal illness or condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the principal and another doctor, the principal may reasonably be expected to die within one year;
- the adult is in a persistent vegetative state;
- the adult is permanently unconscious; or
- the adult has an illness or injury of such severity that there is no reasonable prospect that the adult will recover to the extent that his or her life can be sustained without the continued application of life-sustaining measures.

1163 See [12.133]–[12.138] below.

1164 Common law directives are considered at [12.91]–[12.96] below.

1165 *Powers of Attorney Act 1998* (Qld) s 36(2) is set out at [12.75] above.

12.79 There may be circumstances where none of the four conditions in section 36(2)(a) about the gravity of the adult's illnesses applies, and yet the adult does not want any life-sustaining measures to be provided if he or she loses capacity. For example, a person with terminal cancer may have provided in an advance health directive that he or she does not want any life-sustaining measures to be provided in the event that he or she loses capacity. However, if the adult may not reasonably be expected to die within a year, the direction will not operate unless the adult is in a persistent vegetative state, is permanently unconscious, or has no prospect of recovering to the extent that his or her life can be sustained without the continued application of life-sustaining measures.

12.80 In the Northern Territory, the legislation enables an adult to make a direction that he or she not to be subjected to 'extraordinary measures' in the event that he or she has a terminal illness.[1166] The legislation includes the following definition of 'terminal illness':[1167]

> "terminal illness" means such an illness, injury or degeneration of mental or physical faculties—
>
> (a) that death would, if extraordinary measures were not undertaken, be imminent; and
>
> (b) from which there is no reasonable prospect of a temporary or permanent recovery, even if extraordinary measures were undertaken.

12.81 Similarly, in South Australia an adult may give a direction about the medical treatment that he or she wants, or does not want, if at some future time the adult is 'in the terminal phase of a terminal illness, or in a persistent vegetative state' and is 'incapable of making decisions about medical treatment when the question of administering the treatment arises.'[1168]

12.82 In contrast, in the ACT there appear to be no restrictions on when a 'health direction' can operate.[1169] That also appears to be the case in Victoria in relation to a refusal of treatment certificate.[1170] Similarly, in Western Australia amendments to the *Guardianship and Administration Act 1990* (WA)[1171] will allow an advance health directive to be made in relation to life-sustaining measures[1172] without limitations of the kind referred to in section 36(2)(a) of the *Powers of Attorney Act 1998* (Qld).

1166 *Natural Death Act* (NT) s 4(1).

1167 *Natural Death Act* (NT) s 3.

1168 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7(1).

1169 See *Medical Treatment (Health Directions) Act 2006* (ACT).

1170 *Medical Treatment Act 1988* (Vic) s 5(1).

1171 *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 11, which will insert pt 9B (Advance Health Directives) into the *Guardianship and Administration Act 1990* (WA).

1172 See *Guardianship and Administration Act 1990* (WA) pt 9B, which will be inserted when s 11 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) commences.

12.83 As explained in Chapter 11, in those Australian jurisdictions that do not make provision for statutory advance health directives, the common law operates.[1173] A common law directive is not subject to limitations of the kind referred to in section 36(2)(a) of the *Powers of Attorney Act 1998* (Qld).[1174]

12-6 Is it appropriate that section 36(2)(a) of the *Powers of Attorney Act 1998* (Qld) provides that a direction in an advance health directive to withhold or withdraw a life-sustaining measure does not operate unless, in addition to the other requirements of section 36(2), one of the following circumstances applies:

(a) the adult has a terminal illness or condition that is incurable and irreversible and as a result of which, in the opinion of a doctor treating the adult and another doctor, the adult may reasonably be expected to die within one year;

(b) the adult is in a persistent vegetative state;

(c) the adult is permanently unconscious and has brain damage so severe that there is no reasonable prospect of the adult regaining consciousness;

(d) the adult has an illness or injury of such severity that there is no reasonable prospect that the adult will recover to the extent that his or her life can be sustained without the continued application of life-sustaining measures?

The requirement that the commencement or continuation of artificial nutrition or hydration would be inconsistent with good medical practice

12.84 The second issue for consideration is whether the operation of a direction to withhold or withdraw artificial nutrition or artificial hydration should require, as is presently the case under section 36(2)(b) of the *Powers of Attorney Act 1998* (Qld), that the commencement or continuation of the measure would be inconsistent with good medical practice.[1175] If it cannot be established that the commencement or continuation of artificial nutrition or artificial hydration would be inconsistent with good medical practice, the

1173 See [11.24] above.

1174 See [12.91] below.

1175 *Powers of Attorney Act 1998* (Qld) s 36(2) is set out at [12.75] above. This expression 'good medical practice' is considered at [12.139]–[12.143] below.

direction will not operate, even though the requirements of section 36(2)(a) and (c) may be satisfied.[1176]

12.85 It has been suggested that the provision of nutrition and hydration by any means is qualitatively different from the provision of other life-sustaining measures.[1177] The provision of food and water to a person, especially one who is vulnerable, has emotional significance for many people.[1178]

12.86 However, there are also arguments against treating the provision of artificial nutrition and hydration differently from other life-sustaining measures. In *Re BWV; Ex parte Gardner*,[1179] Morris J of the Victorian Supreme Court agreed with the following analysis:[1180]

> respecting a refusal of [artificial nutrition and hydration] is no different from accepting a person's refusal of respiratory support for a failed respiratory system. We have tended to see these situations differently because of values and symbolism attached to the provision of food and drink for those in our care, especially babies and young children. We have wrongly equated artificial hydration and nutrition (a medical life-support treatment) with natural food and drink and, thereby, have mistakenly equated the withholding of them.

12-7 Is it appropriate that section 36(2)(b) of the *Powers of Attorney Act 1998* (Qld) provides that a direction in an advance health directive to withhold or withdraw artificial nutrition or artificial hydration does not operate unless, in addition to the other requirements of section 36(2), the commencement or continuation of artificial nutrition or artificial hydration would be inconsistent with good medical practice?

The requirement that the adult has no reasonable prospect of regaining capacity for health matters

12.87 The third issue for consideration is whether the operation of a direction in an advance health directive to withhold or withdraw a life-sustaining measure should require, as is presently the case under section 36(2)(c) of the *Powers of*

1176 As discussed below, this requirement may also apply to the withholding or withdrawal of other life-sustaining measures: see [12.133]–[12.138] below.

1177 Eg Queensland Advocacy Inc, *Submission on 'Rethinking Life-Sustaining Measures: Questions for Queensland'* (4 July 2005) 16 <http://www.qai.org.au/content/online_library_documents.cfm?ID=27> at 25 October 2009; Submission C128.

1178 See the comments of Schreiber J in *Re Conroy* 486 A 2d 1209 (NJ 1985), 1236 quoted in *Re BWV; Ex parte Gardner* (2003) 7 VR 487, 508 (Morris J).

1179 (2003) 7 VR 487.

1180 Ibid 506, quoting M Somerville, *The Ethical Canary, Science, Society and the Human Spirit* (2000) 163.

Attorney Act 1998 (Qld), that the adult has no reasonable prospect of regaining capacity for health matters.[1181]

12.88 It has been suggested that the requirement in section 36(2)(c) may lead to confusion about when a direction in an advance health directive in relation to the withholding or withdrawal of a life-sustaining measure can operate.[1182] The issue is whether the prospect of the adult regaining capacity should be determined with or without regard to the effect that the particular life-sustaining measure would have if provided to the adult:[1183]

> This issue … has significant implications where a person executes an AHD refusing CPR. If CPR provides a reasonable prospect of regaining capacity, then the legislative requirement in s 36(2)(c) may prevent the AHD from operating. This may be an issue, for example, if an adult has terminal cancer and executes an AHD directing that he or she does not wish to receive CPR. If his or her condition is such that CPR provides a reasonable prospect of regaining capacity, that requirement in the legislation may not be met and the direction in the AHD will not operate.

12.89 In South Australia, the legislation provides a clearer resolution of this issue, although the relevant provision applies to a decision by a substitute decision-maker (rather than to a direction in an advance health directive). The *Consent to Medical Treatment and Palliative Care Act 1995* (SA) provides that a medical power of attorney does not authorise the agent to refuse 'medical treatment that would result in the grantor regaining the capacity to make decisions about his or her own medical treatment *unless the grantor is in the terminal phase of a terminal illness*'.[1184]

12.90 It therefore makes it clear that a medical agent appointed under a medical power of attorney may refuse medical treatment that, if provided, would result in the adult regaining capacity, but only if the adult is in the terminal phase of a terminal illness.

12-8 If an adult's advance health directive includes a direction to refuse a particular life-sustaining measure, in determining whether the condition in section 36(2)(c) of the *Powers of Attorney Act 1998* (Qld) has been satisfied (namely, that the adult has no reasonable prospect of regaining capacity for health matters):

1181 *Powers of Attorney Act 1998* (Qld) s 36(2) is set out at [12.75] above. This expression 'good medical practice' is considered at [12.139]–[12.143] below.

1182 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 32.

1183 Ibid.

1184 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 8(7)(b)(iii) (emphasis added).

(a) should the effect that the life-sustaining measure could have, if provided, be disregarded; or

(b) should the effect that the life-sustaining measure could have, if provided, be taken into account?

12-9 If yes to Question 12-8(a), should the determination of whether the condition in section 36(2)(c) of the *Powers of Attorney Act 1998* (Qld) has been satisfied be made on that basis:

(a) in all cases; or

(b) only if the adult is in the terminal phase of a terminal illness (or some similar limitation)?

The recognition of common law directives about life-sustaining measures

12.91 The common law recognises the right of every competent adult to indicate in advance whether or not he or she consents to particular medical treatment.[1185] An anticipatory decision is binding at common law if the person had capacity to give or refuse consent to the treatment at the time the decision was made, the decision was free from undue pressure or influence, and the decision was intended to apply in the circumstances that subsequently arise.[1186] There are no specific formal requirements for making an advance decision at common law, such as a requirement for writing. Such matters will, however, go to the weight of evidence in determining whether a valid and applicable advance decision has been made.[1187] For example, in the Canadian case *Malette v Shulman*,[1188] the patient's refusal of blood transfusions was evidenced by her signed 'no blood transfusion' card.

12.92 Issues in relation to common law directives are generally considered in Chapter 11 of this Discussion Paper. As explained in that chapter, it is unclear whether common law directives are effective in Queensland.[1189] Whether or not common law directives should operate alongside statutory advance health directives is particularly important in relation to decisions about end-of-life health care.

1185 See generally, C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38, 38–42.

1186 *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR).

1187 See eg C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38, 40–1.

1188 (1990) 72 OR (2d) 417.

1189 See [11.123]–[11.124] above.

12.93 A statutory scheme for advance health directives in relation to the withholding or withdrawal of life-sustaining measures provides for formal mechanisms to be followed to ensure, to the greatest extent possible, that a direction to withhold or withdraw a life-sustaining measure is made by a competent adult who understands the nature and likely effect of each direction in the advance health directive. For example, the *Powers of Attorney Act 1998* (Qld) provides that an advance health directive must be in writing and must include a certificate by a doctor stating that the principal, at the time of making the advance health directive, appeared to the doctor to have the capacity necessary to make it.[1190] In addition, the Act provides, as a further safeguard, that a direction to withhold or withdraw artificial nutrition or artificial hydration cannot operate unless the commencement or continuation of the measure would be inconsistent with good medical practice.[1191]

12.94 In contrast, at common law, there are no specific formal requirements for making a directive about medical treatment. Although common law directives have fewer formal safeguards, their recognition at law is seen as an extension of the right of self-determination and the right of every competent adult to indicate in advance whether he or she consents to particular medical treatment.[1192] The express recognition of common law advance directives would therefore be consistent with the principles of autonomy and self-determination, and would maximise the chance for adults to exercise control over their future medical treatment.[1193]

12.95 However, the recognition of common law directives in addition to a statutory scheme providing for advance health directives may also create uncertainty and create a two tiered system where different laws apply to the two types of advance directives without any real justification for those differences.[1194] Further, if a competent adult expresses a view about his or her end-of-life health care, but the view is not expressed in a way that complies with the requirements for the making of a statutory advance health directive, a health provider would need to decide whether the adult's previously expressed view satisfies the common law test. This may be difficult to determine in practice.

12.96 In Chapter 11, the Commission has sought submissions on whether the guardianship legislation should clarify the situation by providing for the recognition of only statutory advance health directives or whether it should also

---

1190 *Powers of Attorney Act 1998* (Qld) s 44 sets out the formal requirements for the execution of an advance health directive.

1191 *Powers of Attorney Act 1998* (Qld) s 36(2)(b). Note, however, that this chapter considers whether this is an appropriate limitation on the operation of an advance health directive: see [12.84]–[12.86] above.

1192 See generally, C Stewart, 'Advance directives: Disputes and dilemmas' in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 38, 38–42.

1193 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, 358.

1194 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 27. See also Law Commission (England and Wales), *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, Consultation Paper No 129 (1993) [3.17].

recognise common law directives. If only statutory advance health directives are recognised, a statement about the withholding or withdrawal of a life-sustaining measure that was made by a competent adult before losing capacity, but that does not comply with the formal requirements for an advance health directive, will not be binding. However, that does not mean that the adult's previously expressed wishes will not be relevant; in applying the Health Care Principle and the General Principles, a substitute decision-maker will be required to take the adult's previously expressed wishes into account.[1195]

12-10 Should the guardianship legislation:

(a) recognise a direction about the withholding or withdrawal of a life-sustaining measure only if it is made in an advance health directive; or

(b) provide that it does not affect a common law directive to withhold or withdraw a life-sustaining measure?

An obligation to provide medically futile treatment

The common law

12.97 At common law, a health provider is not obliged to provide treatment that is of no medical benefit and is considered to be medically 'futile'.[1196]

12.98 In a case involving an application by family members of an adult to the New South Wales Supreme Court for the continuation of treatment, the Court recognised the futility of the treatment in that case:[1197]

> Apart from extending the patient's life for some relatively brief period, the current treatment is futile. I believe that it is also burdensome and will be intrusive to a degree. I am not satisfied that this Court's jurisdiction has been enlivened by the evidence before me from the family members. The Court is in no better position to make a determination of future treatment than are those who are principally under the duty to make such a decision. The withdrawal of treatment may put his life in jeopardy but only to the extent of bringing forward what I believe to be the inevitable in the short term. I am not satisfied that the withdrawal of his present treatment is not in the patient's best interest and welfare.

1195 *Guardianship and Administration Act 2000* (Qld) sch 1 ss 7(3)(b), 12(2)(a); *Powers of Attorney Act 1998* (Qld) sch 1 ss 7(3)(b), 12(2)(a).

1196 L Skene, *Law and Medical Practice — Rights, Duties, Claims and Defences* (3rd ed, 2008) [10.43]; M Thiagarajan, J Savulescu and L Skene, 'Deciding about life-support: A perspective on the ethical and legal framework in the United Kingdom and Australia' (2007) 14 *Journal of Law and Medicine* 583, 591–3.

1197 *Messiha v South East Health* [2004] NSWSC 1061, [28] (Howie J).

12.99 In *Auckland Area Health Board v Attorney General*, Thomas J of the Supreme Court of New Zealand held that:[1198]

> a doctor acting in good faith and in accordance with good medical practice is not under a duty to render life support necessary to prolong life if that is, in his or her judgment, contrary to the best interests of the patient.

12.100 Thomas J also considered that the withholding or withdrawal of a life-sustaining measure was a lawful action by a health provider, commenting that '[t]o require the administration of a life-support system when such a system has no further medical function or purpose and serves only to defer the death of the patient is to confound the purpose of medicine'.[1199]

12.101 This would appear to be the position at common law even if a patient has requested a particular treatment that a health provider does not consider to be clinically indicated. The English Court of Appeal recently endorsed propositions from the General Medical Council that describe the duties of a health provider where a patient wants treatment of a type that the health provider considers is not clinically indicated:[1200]

> If, … [a patient] refuses all of the treatment options offered to him and instead informs the doctor that he wants a form of treatment which the doctor has not offered him, the doctor will, no doubt, discuss that form of treatment with him (assuming that it is a form of treatment known to him) but if the doctor concludes that this treatment is not clinically indicated he is not required (ie he is under no legal obligation) to provide it to the patient although he should offer to arrange a second opinion.

12.102 The Court of Appeal concluded that:[1201]

> ultimately, however, a patient cannot demand that a doctor administer a treatment which the doctor considers is adverse to the patient's clinical needs.

12.103 The Manitoba Law Reform Commission has expressed a similar view:[1202]

> we do not favour a right to indefinite life sustaining medical treatment. The appeal of autonomous decision making and personal control of all end of life medical decision making is initially attractive. An unfettered right to life sustaining treatment, however, may result in unreasonable demands being made for indefinite inappropriate medical treatment. We cannot judge how significant a risk this is and we cannot quantify the burden on the health care system but there are additional and independent reasons for caution. First, the recognition of such a right may be inconsistent with the fundamental

1198 *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235, 252.

1199 Ibid 250.

1200 *R (on the application of Burke) v General Medical Council* [2006] QB 273, 301.

1201 Ibid 302.

1202 Manitoba Law Reform Commission, *Withholding or Withdrawing Life Sustaining Medical Treatment*, Report 109 (2003) 12–13.

> professional and ethical obligations of physicians not to provide medically inappropriate treatment. Second, it opens the door to a more general right to other forms of inappropriate medical treatment prior to the end of life situation. Third, human and economic health care resources are strained and some professional control over the use of medical technology to sustain life *indefinitely* is appropriate. (emphasis in original)

12.104 The third issue raised by the Manitoba Law Reform Commission has been more explicitly recognised by legal commentators in Australia who consider that, in the context of life-prolonging medical treatment, 'resource implications will become increasingly important as pressure increases on the funds available in the health system'.[1203] They suggest that 'the concept of patient autonomy in the delivery of health services will always be relative to the competing needs of other users and there cannot be any absolute right to demand life-prolonging medical treatment without regard for the financial considerations'.[1204]

12.105 The common law position in relation to the provision of medically futile treatment is also reflected in the Australian Medical Association's statement on the role of the medical practitioner in end-of-life care:[1205]

> Medical practitioners are not obliged to give, nor patients to accept, futile or burdensome treatments or those treatments that will not offer a reasonable hope of benefit or enhance quality of life.

Queensland

12.106 As mentioned earlier, section 79 of the *Guardianship and Administration Act 2000* (Qld) generally makes it an offence for a person to carry out health care of an adult without consent given under the *Guardianship and Administration Act 2000* (Qld) or another Act.[1206] Because 'health care' is defined to include the withholding or withdrawal of a life-sustaining measure,[1207] the *Guardianship and Administration Act 2000* (Qld) generally appears to require consent for the withholding or withdrawal of a life-sustaining measure.[1208]

12.107 As a result of these provisions, the *Guardianship and Administration Act 2000* (Qld) arguably requires a health provider to obtain consent from an

---

1203 M Thiagarajan, J Savulescu and L Skene, 'Deciding about life-support: A perspective on the ethical and legal framework in the United Kingdom and Australia' (2007) 14 *Journal of Law and Medicine* 583, 595.

1204 Ibid.

1205 Australian Medical Association, Position Statement, *The Role of the Medical Practitioner in End of Life Care* (2007) [10.2] <http://www.ama.com.au/node/2803> at 25 October 2009.

1206 *Guardianship and Administration Act 2000* (Qld) s 79 provides two exceptions: where the *Guardianship and Administration Act 2000* (Qld) or another Act authorises the health care to be carried out without consent and where the Supreme Court authorises the health care in its *parens patriae* jurisdiction.

1207 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2), which is set out at [12.13] above.

1208 Note that in limited circumstances, s 63A of the *Guardianship and Administration Act 2000* (Qld) authorises a health provider to withhold or withdraw a life-sustaining measure without consent.

adult's substitute decision-maker before withholding or withdrawing medically futile treatment. Until that consent is obtained, there may also be uncertainty as to whether the health provider is under a legal obligation to provide such treatment.[1209] The legislation may also result in a substitute decision-maker being able to insist that certain measures be commenced or continued, even though the measures may be medically futile. In that circumstance, for a life-sustaining measure to be withheld or withdrawn, it appears that an application would need to be made to the Tribunal[1210] or the Supreme Court to authorise the withholding or withdrawal of the life-sustaining measure.

12.108 Although the *Guardianship and Administration Act 2000* (Qld) appears to require consent for both the withholding and withdrawal of life-sustaining measures, it has been suggested that, in practical terms, it may be easier for a health provider not to obtain consent for the withholding of medical treatment:[1211]

> In withholding care, doctors typically withhold information about interventions judged too futile to offer. They thus retain greater decision-making burden (and power) and face weaker obligations to secure consent from patients or proxies. In withdrawing care, there is a clearer imperative for the doctor to include patients (or proxies) in decisions, share information and secure consent, even when continued life support is deemed futile.

12.109 In relation to life-sustaining measures, compliance with the guardianship legislation appears to require health providers to disclose information about all possible interventions for an adult, including those that they consider to be medically futile, in order to obtain consent from a substitute decision-maker to withhold (ie not commence) that measure. If the health provider fails to seek consent, it appears that the health provider may be committing an offence, even though it may subsequently be decided that he or she acted in the best interests of the adult in withholding the measure.[1212]

12.110 An issue for consideration is whether the guardianship legislation should more closely reflect the common law or whether it is currently satisfactory on the basis that it offers a further safeguard against the inappropriate withholding or withdrawal of life-sustaining measures.

12-11 Should the *Guardianship and Administration Act 2000* (Qld) be changed so that a health provider is not required to obtain:

1209 However, under the *Guardianship and Administration Act 2000* (Qld), consent is also ordinarily required in order to carry out health care, including the provision of a life-sustaining measure.

1210 The Tribunal's powers in relation to the withholding or withdrawal of life-sustaining measures are considered at [12.149]–[12.167] below.

1211 E Gedge, M Giacomini and D Cook, 'Withholding and withdrawing life support in critical care settings: ethical issues concerning consent' (2007) 33 *Journal of Medical Ethics* 215.

1212 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 72.

(a) consent to withhold a medically futile life-sustaining measure; or

(b) consent to withdraw a medically futile life-sustaining measure?

12-12 Should the *Guardianship and Administration Act 2000* (Qld) provide that a health provider is not obliged to provide a medically futile life-sustaining measure?

Objection by an adult in the context of the withholding or withdrawal of life-sustaining measures

12.111 In Chapter 14 of this Discussion Paper, the Commission has generally considered the effect under the *Guardianship and Administration Act 2000* (Qld) of an adult's objection to health care. This part of the chapter raises a specific issue that arises when an adult objects to health care in the context of life-sustaining measures.

12.112 It should be noted that, because 'health care' includes the withholding or withdrawal of a life-sustaining measure for the adult',[1213] an adult's objection to health care could be an objection to:

- the commencement or continuation of a life-sustaining measure; or
- the withholding or withdrawal of a life-sustaining measure.

12.113 In a non-emergency situation, the effect of an adult's objection to health care is governed by section 67 of the *Guardianship and Administration Act 2000* (Qld).[1214]

12.114 As explained earlier in this chapter, an objection to health care may be made in the form of an advance health directive or orally or by conduct.[1215] However, the effect of section 66 of the *Guardianship and Administration Act 2000* (Qld), which sets out the priority for decision-making about 'health matters', is that in practical terms section 67 deals with the effect of an objection that is made *other* than in an advance health directive. If an objection to health care is made in an advance health directive, health care can only be dealt with under the direction and the adult's substitute decision-maker is not able to exercise a power in relation to the matter under section 67.

1213 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2), which is set out at [12.13] above.

1214 *Guardianship and Administration Act 2000* (Qld) s 67 is set out at [12.32] above.

1215 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'object') and see [12.34] below.

12.115 The effect of section 67(2) is that, in order for a substitute decision-maker's consent to override an adult's objection to health care, the test in section 67(2) must be satisfied, namely that:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

12.116 If that test is not satisfied, the adult's objection will prevail and the substitute decision-maker will not be able to provide a valid consent for the health care.

Issue for consideration

12.117 In Chapter 14 of this Discussion Paper, the Commission has raised the issue of whether the *Guardianship and Administration Act 2000* (Qld) should provide, as it presently does, that an adult's objection will prevail unless the conditions specified in section 67(2) are satisfied or whether an adult's objection should simply be a matter to be taken into account by a substitute decision-maker in making the health care decision. The Commission has noted that the absolute effect given to an adult's objection in the specified circumstances differs from the approach taken under the legislation in relation to other types of decisions, where the adult's views and wishes must be taken into account, but do not determine the particular issue.[1216]

12.118 Section 67 gives maximum effect to the autonomy of an adult who has more than minimal understanding of the relevant matters. However, it also has the effect that, in those circumstances, it gives the final decision-making power to an adult who has impaired capacity for the relevant health matter.

12.119 This means that, in the specified circumstances, neither a substitute decision-maker nor the Tribunal is capable of consenting to the health care for the adult.[1217] In that situation, only the Supreme Court, exercising its *parens patriae* jurisdiction, may authorise the health care.[1218]

12.120 If the *Guardianship and Administration Act 2000* (Qld) is amended so that, generally, an adult's objection must be taken into account (but does not determine the issue), the question arises as to whether that is an appropriate way to deal with an adult's objection to health care that consists of the withholding or withdrawal of a life-sustaining measure. It is arguable that, even

1216 See [14.61]–[14.63] below.

1217 See *Re L* [2005] QGAAT 13, [81].

1218 *Guardianship and Administration Act 2000* (Qld) s 240 provides that the Act does not affect the court's inherent jurisdiction, including its *parens patriae* jurisdiction.

if an adult's objection to health care should not generally operate as a veto, in the context of the withholding or withdrawal of a life-sustaining measure, it is appropriate that a substitute decision-maker cannot override the objection of an adult who has more than a minimal understanding of what the health care involves or why the health care is required.

12-13 If the *Guardianship and Administration Act 2000* (Qld) is amended so that, generally, an adult's objection to health care must be taken into account, but will not necessarily determine the issue:

(a) is that an appropriate way to deal with the effect of an adult's objection to:

(i) the commencement or continuation of a life-sustaining measure; or

(ii) the withholding or withdrawal of a life-sustaining measure; or

(b) should section 67 be retained at least to the extent of regulating the effect of an adult's objection to:

(i) the commencement or continuation of a life-sustaining measure; or

(ii) the withholding or withdrawal of a life-sustaining measure?

The condition that the commencement or continuation of the life-sustaining measure would be 'inconsistent with good medical practice'

Introduction

12.121 As mentioned earlier in this chapter, in certain situations the withholding or withdrawal of a life-sustaining measure from an adult is subject to the condition that the commencement or continuation of the measure would be inconsistent with good medical practice. This section of the chapter considers the effect of this requirement in two situations:

- where an adult's substitute decision-maker consents to the withholding or withdrawal of a life-sustaining measure; and

- where an adult made an advance health directive that includes a direction to withhold or withdraw a life-sustaining measure other than artificial nutrition or artificial hydration.[1219]

12.122 It also considers the meaning of 'good medical practice' and a number of issues relating to the way in which the current condition is framed.

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

12.123 A relevant substitute decision-maker for an adult may exercise a power in relation to a 'health matter' for the adult, which means health care other than special health care. The scope of the power is therefore limited by what constitutes 'health care'. The guardianship legislation defines 'health care', relevantly, as:[1220]

> **5 Health care**
>
> …
>
> (2) Health care, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice. (emphasis added)

12.124 The effect of the definition of 'health care' is that a substitute decision-maker's power in relation to health matters may be exercised to consent to the withholding or withdrawal of a life-sustaining measure only if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

12.125 In addition, section 66A of the *Guardianship and Administration Act 2000* (Qld) provides that a consent to the withholding or withdrawal of a life-sustaining measure does not operate unless the adult's health provider 'reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice':

> **66A When consent to withholding or withdrawal of life-sustaining measure may operate**
>
> (1) This section applies if a matter concerning the withholding or withdrawal of a life-sustaining measure is to be dealt with under section 66(3), (4) or (5).

1219 The effect of this condition on a direction in an advance health directive to withhold or withdraw artificial nutrition or artificial hydration is considered at [12.84]–[12.86] above.

1220 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2); *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2) is virtually identical except that it refers to a principal rather than to an adult.

Editor's note—

> If a matter concerning the withholding or withdrawal of a life-sustaining measure is to be dealt with under section 66(2), see the *Powers of Attorney Act 1998*, section 36(2) (Operation of advance health directive) as to when a direction to withhold or withdraw a life-sustaining measure can operate.

(2) A consent to the withholding or withdrawal of a life-sustaining measure for the adult can not operate unless the adult's health provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

12.126 If a consent for the withholding or withdrawal of a life-sustaining measure for an adult is effective only if the commencement or continuation of the measure would be inconsistent with good medical practice,[1221] or if the adult's health provider reasonably considers that to be the case,[1222] the decision as to whether this condition is satisfied is effectively left to the adult's health provider.

12.127 Some commentators have referred to this condition on the effectiveness of a consent as giving the health provider a 'right of veto'.[1223] The ability of a health provider to 'veto' the withholding or withdrawal of a life-sustaining measure can operate as a safeguard against a life-sustaining measure being withheld or withdrawn in inappropriate circumstances.[1224] However, commentators have also queried the appropriateness of the current condition.[1225]

12.128 As mentioned earlier in this chapter, section 43 of the *Guardianship and Administration Act 2000* (Qld) enables the Adult Guardian to 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 and the refusal is contrary to the Health Care Principle or if the substitute decision-maker makes a decision about a health matter and the decision is contrary to the Health Care Principle.[1226] However, that provision does not assist if an adult's substitute decision-maker makes a decision to withhold or withdraw a life-sustaining measure and the Adult Guardian agrees with the decision, but the adult's health provider reasonably considers that the commencement or continuation of the measure would not be inconsistent with good medical practice.

1221 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2). See *Re HG* [2006] QGAAT 26, [28] in relation to the application of this condition when the Tribunal's consent is sought for the withholding or withdrawal of a life-sustaining measure.

1222 *Guardianship and Administration Act 2000* (Qld) s 66A.

1223 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 61.

1224 B White and L Willmott, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 450.

1225 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 61–4.

1226 See [12.41]–[12.42] above.

12.129 Queensland is the only jurisdiction in Australia that provides that the view of an adult's health provider has an effect on the operation of a direction in an adult's advance health directive or on the consent given by an adult's substitute decision-maker.

12.130 In Victoria, the *Guardianship and Administration Act 1986* (Vic) provides a mechanism to resolve the situation where a substitute decision-maker does not consent to treatment but the health provider believes on reasonable grounds that the proposed treatment is in the best interests of the patient.[1227] If a health provider receives a communication that the substitute decision-maker does not consent to the treatment, the health provider has three days in which to provide a statement to the substitute decision-maker and the Victorian Public Advocate outlining the circumstance and stating that 'unless the [substitute decision-maker] applies to VCAT and VCAT otherwise orders, the practitioner will, not earlier than 7 days after giving the statement to the [substituted decision-maker], carry out the proposed treatment'.[1228] Given the urgency of some decisions made for an adult at the end of life, it is recognised that the Victorian model may not always be appropriate.

12.131 Under the Victorian legislation, a disagreement between a substitute decision-maker and a health provider about whether the withholding or withdrawal of a life-sustaining measure is in the adult's interests will trigger a review by VCAT. The health provider acts as a 'gatekeeper' under the Victorian legislation rather than as a de facto decision-maker, as in Queensland.[1229] Commentators also appear to consider some form of this model appropriate:[1230]

> [in] the comparatively rare situation in which physicians contest a surrogate's decision and disagreements persist, physicians should seek help from an independent source of review, such as a hospital ethics committee or the judicial system.

12.132 An issue for consideration is whether a consent given by a substitute decision-maker should be ineffective unless the health provider considers that the commencement or continuation of the life-sustaining measure would be inconsistent with good medical practice, or whether an alternative model, such as referring the issue to another health provider or a third party, such as a clinical ethics committee,[1231] may be more appropriate.

1227 *Guardianship and Administration Act 1986* (Vic) s 42L.

1228 *Guardianship and Administration Act 1986* (Vic) s 42M(2)(d).

1229 L Willmott and B White, 'A Lawful Death at the End of Life: Reflections and Suggestions' (Paper presented at the 15th World Congress on Medical Law, Sydney, 2004) 9.

1230 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (6th ed, 2009) 189.

1231 In support of this approach see, T Faunce and C Stewart, 'The *Messiha* and *Schiavo* cases: third-party ethical and legal interventions in futile care disputes' (2005) 183 *Medical Journal of Australia* 261.

12-14 Should section 66A of the *Guardianship and Administration Act 2000* (Qld) continue to provide that a consent to the withholding or withdrawal of a life-sustaining measure does not operate unless the adult's health provider reasonably considers that the commencement or continuation of the measure would be inconsistent with good medical practice?

12-15 Alternatively, should the legislation include a different mechanism for protecting an adult from inappropriate decision-making by a substitute decision-maker? For example:

(a) should the legislation provide that:

(i) the adult's health provider must refer the matter for independent review; and

(ii) the independent reviewer may apply to the Tribunal in an appropriate case; and

(b) if yes to Question 12-15(a), should the independent reviewer be:

(i) a health provider who is not treating the adult;

(ii) the Adult Guardian;

(iii) the Public Advocate;

(iv) a clinical ethics committee; or

(v) another person?

(c) should some other model be adopted?

A direction in an advance health directive for the withholding or withdrawal of a life-sustaining measure other than artificial nutrition or artificial hydration

12.133 Section 35 of the *Powers of Attorney Act 1998* (Qld) provides that an adult may, by an advance health directive, give directions about health matters and special health matters for his or her future health care. As mentioned above, the definition of 'health care' includes the withholding or withdrawal of a life-sustaining measure 'if the commencement or continuation of the measure would be inconsistent with good medical practice'.[1232] Accordingly, it appears that a direction in an advance health directive to withhold or withdraw a life-sustaining measure will constitute a direction about a health matter only if the

1232 *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2).

commencement or continuation of the measure would be inconsistent with good medical practice. Arguably, if the commencement or continuation of the measure would *not* be inconsistent with good medical practice, a direction to withhold or withdraw the measure would not be authorised by the legislation.[1233] Some commentators have queried whether this was the intention of the legislation.[1234]

12.134 It is also awkward that the definition of health care gives rise to a general requirement that the commencement or continuation must be inconsistent with good medical practice, while section 36(2)(b) of the *Powers of Attorney Act 1998* (Qld) includes a specific requirement to that effect when the direction relates to the withholding or withdrawal of artificial nutrition or artificial hydration.

12.135 When the *Guardianship and Administration Act 2000* (Qld) was originally enacted, the 'withholding or withdrawal of special life-sustaining measures' was a category of special health care, and therefore required the Tribunal's consent.[1235] While the *Powers of Attorney Act 1998* (Qld) permitted a person to give a direction in an advance health directive about the withholding or withdrawal of a special life-sustaining measure, if an adult did not have a relevant advance health directive, only the Tribunal could consent to the withholding or withdrawal of the measure.

12.136 That changed in 2002 when the *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) commenced. That Act omitted 'special life-sustaining measures' from the definition of special health care, and inserted what now appears as section 5(2) of the definition of health care in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).[1236] The amendments to the *Guardianship and Administration Act 2000* (Qld) had the effect that the withholding or withdrawal of a life-sustaining measure became a health matter rather than a special health matter and that a decision to withhold or withdraw a life-sustaining measure could therefore be made by an adult's substitute decision-maker.

12.137 However, the complementary amendment of the definition of 'health care' in the *Powers of Attorney Act 1998* (Qld) operated as a restriction on the directions that an adult could effectively give by way of an advance health directive under that Act. Before that amendment, the only type of direction to which the concept of good medical practice was relevant was a direction to withhold or withdraw artificial nutrition or artificial hydration.

1233 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 73–6.

1234 Ibid.

1235 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7(f) (Act as passed).

1236 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) ss 17, 29.

12.138 The argument that health providers are acting as a safeguard in relation to directions contained in an advance health directive is not as strong as the argument for their role when a decision to withhold or withdraw a life-sustaining measure is made by a substitute decision-maker.[1237]

12-16 Is it appropriate for a direction to withhold or withdraw a life-sustaining measure that does not involve artificial nutrition or artificial hydration to be effective only if the commencement or continuation of the measure would be inconsistent with good medical practice?

The definition of 'good medical practice'

12.139 The guardianship legislation defines 'good medical practice' in the following terms:[1238]

> ***Good medical practice*** is good medical practice for the medical profession in Australia having regard to—
>
> (a) the recognised medical standards, practices and procedures of the medical profession in Australia; and
>
> (b) the recognised ethical standards of the medical profession in Australia.

12.140 Only recognised medical practices and medical ethical standards come within the definition of good medical practice. If particular views or practices are held by a minority within the medical profession (for example, a practice carried out, or denied, owing to religious, cultural or moral views about particular matters) and cannot be said to be the recognised medical practices or ethical standards of the medical profession in Australia, those views and practices will not represent 'good medical practice' within the meaning of the guardianship legislation.

12.141 For a substitute decision-maker's consent to the withholding or withdrawal of a life-sustaining measure to be effective, section 66A of the *Guardianship and Administration Act 2000* (Qld) requires that the adult's health provider must reasonably consider that the commencement or continuation of the measure would be *inconsistent* with good medical practice. Similarly, section 36(2)(b) provides that, for a direction in an advance health directive to withhold or withdraw artificial nutrition or artificial hydration to be effective, the commencement or continuation of the measure would be *inconsistent* with good medical practice. This is a higher test than merely requiring that the withholding

1237 The issue of whether a health provider should be protected from liability if he or she does not act in accordance with an adult's advance health directive is considered at [12.168]–[12.172] below.

1238 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5B; *Powers of Attorney Act 1998* (Qld) sch 2 s 5B.

or withdrawal of the measure be consistent with good medical practice.[1239] In *Re HG*,[1240] the Tribunal explained what is required by the test:[1241]

> Before a decision to withhold or withdraw a life-sustaining measure will be a 'health matter' for which consent can be given, the commencement or continuation of the measure must be inconsistent with good medical practice. This test will not be satisfied just because the withholding or withdrawal of the measure is consistent with good medical practice. More must be demonstrated. There must be evidence that the provision of the measure is inconsistent with good medical practice. Therefore, if there was evidence that there were two medically and ethically acceptable treatment options, one being the provision of the measure, the test in the legislation is not satisfied and consent could not be given to the withholding or withdrawal of the measure.

12.142 It has been suggested that arguably the test means that:[1242]

> if a responsible body of medical opinion believes treatment should commence or continue (even if this body does not represent the majority medical view), withholding or withdrawing treatment will be unlawful.

12.143 This high threshold can be viewed as appropriate in light of the serious nature of the decision to withhold or withdraw a life-sustaining measure.[1243] However, an option for a lower threshold would be to permit the withholding or withdrawal of a life-sustaining measure where that was consistent with good medical practice.

12-17 Should the test in relation to the withholding and withdrawal of life-sustaining measures continue to require that the adult's health provider reasonably considers that the commencement or continuation of the measure for the adult would be *inconsistent* with good medical practice? If no, what should the test be?

Deferral to the medical profession

12.144 The definition of 'good medical practice' refers to the standards of the medical profession within Australia. Therefore, the requirement under the guardianship legislation for the commencement or continuation of life-sustaining measures to be 'inconsistent with good medical practice' arguably has the effect

1239 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 59–60.

1240 *Re HG* [2006] QGAAT 26.

1241 Ibid [64]–[65].

1242 B White and L Willmott, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005) 60.

1243 See *Northridge v Central Sydney Area Health Service* (2000) 50 NSWLR 549, 570–1, where the Court ordered that the adult be provided with necessary and appropriate medical treatment directed towards the preserving of his life and the promoting of his good health and welfare and that no 'not for resuscitation' order be made in respect of the adult without prior leave of the Court.

of delegating one aspect of the legal test for lawful withholding or withdrawal of life-sustaining measures to the medical profession.

12.145 Although this aspect of the legislation may offer an additional safeguard against inappropriate decision-making in some cases, Parliament has no control over 'the recognised medical standards, practices and procedures of the medical profession in Australia' or 'the recognised ethical standards of the medical profession in Australia' and therefore has little control over the standards that health professionals will apply both now and in the future. If professional standards and ethics change over time, this may lead to a different practice in relation to the withholding or withdrawal of life-sustaining measures, but one that complies with the law.

12.146 On the other hand, it might be difficult for legislation to prescribe the circumstances when the withholding or withdrawal of different types of life-sustaining measures would be appropriate.

12.147 It has also been suggested that difficulties may arise in determining what constitutes 'good medical practice' owing to the lack of comprehensive recognised medical and ethical standards in relation to withholding and withdrawal of life-sustaining measures in Australia.[1244] This can be contrasted with the position in other countries, for example the United Kingdom, where there are national guidelines dealing with this issue.[1245] The Tribunal has suggested that the development of guidelines by the Australian Medical Association would be desirable:[1246]

> it would be of considerable assistance to families and in particular nursing homes if the Australian Medical Association produced a comprehensive set of Guidelines along the lines of the BMA Guidelines to assist families and health providers to make appropriate decisions in circumstances such as these.

12.148 An issue for consideration is whether the Queensland guardianship legislation should provide for the development of guidelines on this issue, to be applicable to all Queensland health providers.

1244 See eg Australian Medical Association, Position Statement, *The Role of the Health Provider in End of Life Care* (2007) <http://www.ama.com.au/node/2803> at 25 October 2009; Australian Medical Council, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (July 2009) [3.12] <http://goodmedicalpractice.org.au/wp-content/downloads/Final%20Code.pdf> at 24 October 2009; NSW Department of Health, *Guideline for end-of-life care and decision-making,* 2006. See also the limited specific guidance available for the withholding or withdrawal of life-sustaining measures for those in a vegetative or minimally responsive state: National Health and Medical Research Council, *Ethical Guidelines for the care of people in post-coma unresponsiveness (vegetative state) or a minimally responsive state* (2008) [6.2.2]–[6.2.4].

1245 See British Medical Association, *Withholding and withdrawing life-prolonging medical treatment: guidance for decision making* (3rd ed, 2007); General Medical Council, *Withholding and withdrawing life-prolonging treatments: Good practice in decision-making* (2006) <http://www.gmc-uk.org/guidance/current/library/witholding_lifeprolonging_guidance.asp > at 25 October 2009.

1246 See *Re MC* [2003] QGAAT 13, [71].

12-18 Should the guardianship legislation provide for the drafting of guidelines in relation to the withholding or withdrawal of life-sustaining measures that would apply to all health providers in Queensland?

The Tribunal's powers in relation to the withholding or withdrawal of life-sustaining measures

Background

12.149 As explained earlier, when the *Guardianship and Administration Act 2000* (Qld) was originally enacted, the withholding or withdrawal of 'special life-sustaining measures' was a category of special health care. Accordingly only the Tribunal could consent to the withholding or withdrawal of such a measure.[1247]

12.150 The Tribunal's power to withhold or withdraw a special life-sustaining measure was found in section 68 of the *Guardianship and Administration Act 2000* (Qld), which provided (in virtually identical terms to the current provision):

> **Special health care**
>
> 68.(1) The tribunal may consent to special health care, other than electroconvulsive therapy or psychosurgery, for an adult.
>
> (2) To the extent another entity is authorised by an Act to make a decision for an adult about prescribed special health care, the tribunal does not have power to make the decision.[31]
>
> 31 For the application of the general principles and the health care principle to the tribunal and to an entity authorised by an Act to make a decision for an adult about prescribed special health care, see section 11 (Principles for adults with impaired capacity).

12.151 The Tribunal's power to consent to special health care (including the withholding or withdrawal of a special life-sustaining measure) was reflected in section 82(1)(f) of the *Guardianship and Administration Act 2000* (Qld), which listed the Tribunal's functions:

> **Functions**
>
> 82.(1) The tribunal has the functions given to it by this Act, including the following functions—
>
> …
>
> (f) subject to section 68, consenting to special health care for adults with impaired capacity for the special health matter concerned; …

1247 See [12.135] above.

12.152 The priority for making decisions about the withholding or withdrawal of a special life-sustaining measure was determined by section 65 of the Act, which was in virtually the same terms as the current form of that provision. At the time, section 65 provided:

> **Adult with impaired capacity—order of priority in dealing with special health matter**
>
> 65.(1) If an adult has impaired capacity for a special health matter, the matter may only be dealt with under the first of the following subsections to apply.
>
> (2) If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.
>
> (3) If subsection (2) does not apply and an entity other than the tribunal is authorised to deal with the matter, the matter may only be dealt with by the entity.
>
> (4) If subsections (2) and (3) do not apply and the tribunal has made an order about the matter, the matter may only be dealt with under the order.[28]
>
> 28 However, the tribunal may not consent to electroconvulsive therapy or psychosurgery—section 68(1).

The current provisions

12.153 As explained earlier, in 2002 the *Guardianship and Administration Act 2000* (Qld) was amended to make the withholding or withdrawal of a life-sustaining measure a health matter.[1248] The reference to the withholding or withdrawal of a special life-sustaining measure was omitted from the definition of special health care[1249] and section 82(1) of the Act, which sets out the Tribunal's functions, was also amended to insert what now appears as paragraph (f):[1250]

> **82 Functions**
>
> (1) The tribunal has the functions given to it by this Act, including the following functions—
>
> …
>
> (f) consenting to the withholding or withdrawal of a life-sustaining measure for adults with impaired capacity for the health matter concerned; …

1248 See [12.135] above.

1249 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) s 19(1).

1250 *Guardianship and Administration and Other Acts Amendment Act 2001* (Qld) s 13(3).

12.154 However, no specific power was included to confer on the Tribunal the power to consent to the withholding or withdrawal of a life-sustaining measure. Whereas previously, consent was given under section 68 of the Act, the Tribunal now has the bare function of consenting that appears in section 82.

12.155 Further, section 66 of the Act, which sets out the priority for dealing with health matters for an adult, was not amended to address how a decision made by the Tribunal about the withholding or withdrawal of a life-sustaining measure should affect the priority that otherwise applies under that section.[1251] Nor was the legislation amended to address the relationship between the Tribunal's function of consenting to the withholding or withdrawal of life-sustaining measures and the Adult Guardian's powers under sections 42 and 43 of the *Guardianship and Administration Act 2000* (Qld) to exercise power for a health matter (which would include the withholding or withdrawal of a life-sustaining measure) if the adult's substitute decision-makers disagree about the matter or if the adult's substitute decision-maker is acting contrary to the Health Care Principle.[1252]

Issues for consideration

A specific power to consent to the withholding or withdrawal of life-sustaining measures

12.156 As mentioned above, when the withholding or withdrawal of special life-sustaining measures was special health care under the *Guardianship and Administration Act 2000* (Qld), section 68 of the Act provided a specific power for the Tribunal to consent to the withholding or withdrawal of such a measure. Section 68 supported the Tribunal's function under section 82 of the Act of consenting to special health care for adults.

12.157 However, although section 82(1)(f) of the Act now provides that the Tribunal has the function of consenting to the withholding or withdrawal of life-sustaining measures, that function is not supported by a specific provision that confers on the Tribunal the power to consent. It seems desirable for the legislation to include a specific provision conferring on the Tribunal the power to consent to the withholding or withdrawal of life-sustaining measures.

12-19 Should the *Guardianship and Administration Act 2000* (Qld) be amended to include a provision conferring on the Tribunal the specific power to consent to the withholding or withdrawal of life-sustaining measures?

1251 *Guardianship and Administration Act 2000* (Qld) s 66 is set out at [12.16] above. See also the discussion at [12.158]–[12.159] below.

1252 *Guardianship and Administration Act 2000* (Qld) ss 42–43 are considered at [12.36]–[12.42] above.

The relationship between the Tribunal's power to consent and other provisions of the legislation

12.158 As mentioned earlier, section 66 of the *Guardianship and Administration Act 2000* (Qld) does not address how a decision made by the Tribunal about the withholding or withdrawal of a life-sustaining measure should affect the priority that otherwise applies under that section.[1253] Section 66 provides that, for a health matter, the matter may only be dealt with in the following order:

- If the adult has an advance health directive that includes a direction about the matter, the matter may only be dealt with under the direction.
- If the adult does not have a relevant advance health directive and the Tribunal has appointed a guardian or made an order about the matter, the matter may only be dealt with by the guardian or under the order.
- If the adult does not have a relevant advance health directive and the Tribunal has not appointed a guardian or made an order about the matter, the matter may only be dealt with by the attorney for the matter appointed by the most recent enduring document.
- If none of the above applies, the matter may only be dealt with by the adult's statutory health attorney.

12.159 Although the second dot point refers to a Tribunal order about the matter, it is not clear whether that is intended to refer to consent given by the Tribunal or, for example, a direction made by the Tribunal. The reference to a Tribunal order appeared in section 66(3) of the *Guardianship and Administration Act 2000* (Qld) when it was originally enacted, at which time the Tribunal did not have a function of consenting to health matters but only to special health matters.

12.160 It is also unclear under the legislation whether the Tribunal's consent to the withholding or withdrawal of a life-sustaining measure is intended to operate despite the provisions of section 66.

12.161 Further, the relationship between the Tribunal's function of consenting to the withholding or withdrawal of a life-sustaining measure and the Adult Guardian's power to exercise power in relation to the withholding or withdrawal of a life-sustaining measure under section 42 or 43 of the Act is unclear.[1254] If two or more of an adult's substitute decision-makers do not agree about whether a life-sustaining measure should be withheld or withdrawn, the Adult Guardian has the power under section 42 to mediate the dispute and to exercise the power if the dispute cannot be resolved. Further, if an adult's

1253 *Guardianship and Administration Act 2000* (Qld) s 66 is set out at [12.16] above.

1254 *Guardianship and Administration Act 2000* (Qld) ss 42–43 are considered at [12.36]–[12.42] above.

substitute decision-maker refuses to make, or makes, a decision about the withholding or withdrawal of a life-sustaining measure that is contrary to the Health Care Principle, section 43 enables the Adult Guardian to exercise power for the matter. That gives the Adult Guardian the power to consent to the withholding or withdrawal of the measure or to decline to give consent.

12.162 When the withholding or withdrawal of special life-sustaining measures was a type of special health care, there was no issue about the relationship between sections 42 and 43 and the Tribunal's power to consent to the withholding or withdrawal of the measure because sections 42 and 43 apply only to decisions about health matters and do not apply to decisions about special health matters.

12.163 If the Tribunal is to have a specific power to consent to the withholding or withdrawal of a life-sustaining measure, it would be desirable to clarify these issues.

12-20 If the *Guardianship and Administration Act 2000* (Qld) is amended to include a new provision giving the Tribunal the specific power to consent to the withholding or withdrawal of a life-sustaining measure, should the Act provide that that section applies despite section 66?

12-21 Alternatively, should section 66 of the *Guardianship and Administration Act 2000* (Qld) be amended to incorporate into the priority for decisions about health matters the circumstance where the Tribunal consents to the withholding or withdrawal of a life-sustaining measure? If so, what priority should section 66 give to such a decision?

12-22 If the *Guardianship and Administration Act 2000* (Qld) is amended to include a new provision giving the Tribunal the specific power to consent to the withholding or withdrawal of a life-sustaining measure, should the Act be amended to clarify the relationship between that provision and the Adult Guardian's powers under sections 42 and 43 of the Act?

12-23 If yes to Question 12-22, what changes should be made? For example, the *Guardianship and Administration Act 2000* (Qld) could provide that sections 42 and 43 do not limit the Tribunal's power to consent to the withholding or withdrawal of a life-sustaining measure. Alternatively, the Act could provide that the Tribunal's power may be exercised only if a decision made by the Adult Guardian under section 42 or 43 is disputed.

The need for the Tribunal's function of consenting to the withholding or withdrawal of life-sustaining measures

12.164 The *Guardianship and Administration Act 2000* (Qld) provides that an application may be made to the Tribunal 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).[1255] The Act also provides that a guardian, administrator or attorney who acts under the Tribunal's advice is taken to have complied with the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) unless the person knowingly gave false or misleading information relevant to the Tribunal's advice, directions or recommendations.[1256]

12.165 The Tribunal has used its power to make a declaration where issues have arisen about whether a substitute decision-maker's decision to withhold or withdraw a life-sustaining measure was in accordance with the legislation. In *Re MHE*,[1257] the Tribunal made a declaration to the effect that the adult's attorney under an enduring power of attorney was empowered under sections 66 and 66A of the *Guardianship and Administration Act 2000* (Qld) to make decisions about health care for the adult including the withholding or withdrawal of a life-sustaining measure. In *Re SAJ*,[1258] where the Adult Guardian had been appointed as the adult's guardian for a number of decisions including health care, the Tribunal made a declaration to the effect that the continuation of artificial hydration to the adult was inconsistent with good medical practice.

12.166 The Tribunal's power to give directions would also enable the Tribunal to direct a guardian, attorney or statutory health attorney as to how a decision in relation to the withholding or withdrawal of a life-sustaining measure should be made.[1259]

12.167 It is important for the legislation to ensure that the Tribunal has all necessary powers to supervise decisions of this kind so that only decisions that comply with the legislation are made. In view of the Tribunal's existing powers, there may also be an issue as to whether the Tribunal needs the function of consenting to the withholding or withdrawal of life-sustaining measures. In relation to other health matters,[1260] the Tribunal does not have a function of giving consent.

1255 *Guardianship and Administration Act 2000* (Qld) s 115(1).

1256 *Guardianship and Administration Act 2000* (Qld) s 138(4).

1257 [2006] QGAAT 9.

1258 [2007] QGAAT 62.

1259 See *Re WFM* [2006] QGAAT 54. That decision and the power to give directions are considered in Chapter 15 of this Discussion Paper.

1260 The *Guardianship and Administration Act 2000* (Qld) defines 'health matter' for an adult as 'a matter relating to health care, other than special health care, of the adult': sch 2 s 4.

12-24 Should the Tribunal retain the function of consenting to the withholding or withdrawal of life-sustaining measures or are the Tribunal's current powers sufficient to enable the Tribunal to supervise decisions made by substitute decision-makers in relation to the withholding or withdrawal of life-sustaining measures?

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

12.168 As explained in Chapter 11 of this Discussion Paper, section 103 of the *Powers of Attorney Act 1998* (Qld) provides that a health provider does not incur any liability, either to the adult of anyone else, for not acting in accordance with a direction in an advance health directive if the health provider has reasonable grounds to believe that:

- the direction is uncertain;
- the direction is inconsistent with good medical practice; or
- circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate.

12.169 Because section 103 applies even though the specific requirements in section 36(2) of the *Powers of Attorney Act 1998* (Qld) have been satisfied,[1261] the second of the grounds referred to in section 103 operates as a restriction on an adult's autonomy.

12.170 Although the effect of section 103 is considered generally in Chapter 11, it has particular relevance in relation to the withholding or withdrawal of a life-sustaining measure.

12.171 Earlier in this chapter, the issue has been raised as to whether it is appropriate that a direction in an advance health directive to withhold or withdraw a life-sustaining measure is effective only if the commencement or continuation of the measure would be inconsistent with good medical practice.[1262]

12.172 If a competent adult has made an informed decision and recorded that decision in accordance with the statutory requirements, a question arises as to whether a health provider should still be able to override that direction. However, the Australian Medical Association considers it important for health providers to retain the right to exercise their professional discretion to give

1261 *Powers of Attorney Act 1998* (Qld) s 36(2) is set out at [12.75] above.

1262 See [12.84]–[12.86], [12.133]–[12.138] above.

treatment they consider medically necessary.[1263] If the Commission ultimately decides that the effectiveness of a direction to withhold or withdraw a life-sustaining measure should not depend on the commencement or continuation of the measure being inconsistent with good medical practice, a further issue for consideration is whether the protection afforded to health providers under section 103 of the *Powers of Attorney Act 1998* (Qld), in so far as the protection is based on the direction being inconsistent with good medical practice, should be narrowed. Section 103(1) could be amended to omit the reference to the direction being inconsistent with good medical practice.

12-25 If the effectiveness of a direction to withhold or withdraw a life-sustaining measure did not depend on the commencement or continuation of the measure being inconsistent with good medical practice, should section 103(1) of the *Powers of Attorney Act 1998* (Qld) be amended to omit the reference to the direction being inconsistent with good medical practice?

Withholding and withdrawal of life-sustaining measures and potential criminal responsibility

12.173 Concerns have been raised about the potential criminal responsibility of the people responsible for decisions to withhold or withdraw life-sustaining measures under the *Guardianship and Administration Act 2000* (Qld). The concern relates to the effect of certain provisions of the Criminal Code (Qld).

12.174 Section 238 of the *Guardianship and Administration Act 2000* (Qld) provides:

> **238 Act does not authorise euthanasia or affect particular provisions of Criminal Code**
>
> To remove doubt it is declared that nothing in this Act—
>
> (a) authorises, justifies or excuses killing a person; or
>
> (b) affects the Criminal Code, section 284 or chapter 28.

12.175 A virtually identical provision is contained in section 37 of the *Powers of Attorney Act 1998* (Qld).

12.176 Section 284 of the Criminal Code (Qld) provides:

1263 Australian Medical Association, Position Statement, The Role of the Medical Practitioner in Advance Care Planning (2006) <http://www.ama.com.au/node/2428> at 25 October 2009. But note criticism of this policy in relation to this point by M Parker et al, 'Two steps forward, one step back: advance care planning, Australian regulatory frameworks and the Australian Medical Association' (2007) 39(9) *Internal Medicine Journal* 637.

> **284 Consent to death immaterial**
>
> Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused.

12.177 A relevant provision in chapter 28 of the Criminal Code (Qld) is section 296, which provides:

> **296 Acceleration of death**
>
> A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.

12.178 Section 285 of the Criminal Code (Qld), which deals with the duty to provide necessaries, may also be relevant:

> **285 Duty to provide necessaries**
>
> It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

12.179 The fact that these provisions continue to operate raises the possibility that an act or omission carried out by, in particular, a health provider, could amount to a breach of the provisions of the Criminal Code (Qld).

12.180 The Tribunal has also expressed its concern about the interaction of these provisions in cases involving the withholding or withdrawal of life-sustaining measures:[1264]

> The potential criminal liability of a health professional by withholding or withdrawing of a life-sustaining measure was noted by the Tribunal in *Re RWG* [2000] QGAAT 2 at [55] where it observed as follows:
>
> > This issue of whether life-sustaining treatment can be withheld from a patient with impaired capacity is also further complicated by the fact that health providers have certain duties under the Criminal Code which essentially require that a person having charge of another is required to provide that person with the necessaries of life if the person is unable to do so for himself because of sickness or unsoundness of mind or age.

1264 *Re HG* [2006] QGAAT 26, [105]–[107].

> The tensions between the consent provisions of the guardianship legislation relating to withholding and withdrawing of life-sustaining measures and the obligations that exist under the criminal law to provide necessaries of life has been examined in academic literature. This literature notes that these tensions are highlighted by the fact that the guardianship legislation expressly provides that nothing in the *Guardianship and Administration Act 2000* authorises, justifies or excuses the killing of a person, or affects section 284 of the Criminal Code which provides that the consent by a person to their own death does not affect criminal responsibility of a person causing the death.
>
> [The Tribunal] notes that the intersection of the Criminal Code with the *Guardianship and Administration Act 2000* in the context of consent to withholding and withdrawing life-sustaining measures is a matter that should be clarified by the legislature.

12.181 However, commentators have suggested that, despite the apparent *prima facie* criminal responsibility of health providers who act on a decision to withhold or withdraw a life-sustaining measure, there are two bases on which it may be argued that a person who carries out health care in accordance with the guardianship legislation will not be liable for a breach of the Criminal Code (Qld).[1265]

12.182 The first basis depends on the effect of section 80 of the *Guardianship and Administration Act 2000* (Qld), which provides:

> **80 No less protection than if adult gave health consent**
>
> A person carrying out health care of an adult that is authorised by this or another Act is not liable for an act or omission to any greater extent than if the act or omission happened with the adult's consent and the adult had capacity to consent.

12.183 The argument is based on the fact that a person with capacity can refuse treatment, even if that refusal will result in the person's death, and a health provider is not criminally responsible for acting in accordance with the person's wishes; in fact, if the health provider did otherwise, he or she would be guilty of assault. As a result, section 80 arguably has the effect that a person who acts on an adult's advance health directive or on the consent of an adult's substitute decision-maker to withhold or withdraw a life-sustaining measure is not liable for that act or omission as he or she would not be liable if he or she had withheld or withdrawn the life-sustaining measure with the adult's consent.[1266]

12.184 The second basis upon which it is argued that the withholding or withdrawal of a life-sustaining measure in accordance with the guardianship legislation does not result in criminal responsibility relates specifically to the duty to provide necessaries in accordance with section 285 of the Criminal

---

1265 L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 451–3.

1266 Ibid

Code (Qld).[1267] The argument is that, if a life-sustaining measure is not a 'necessary of life', a health provider will not be under a duty to provide it.[1268] In *Auckland Area Health Board v Attorney General*,[1269] Thomas J considered that whether the provision of a particular life-sustaining measure amounted to the provision of a necessary of life would depend on the facts of the individual case:[1270]

> To my mind, however, there is no absolute answer; the answer in each case must depend on the facts. Thus, the provision of artificial respiration may be regarded as a necessary of life where it is required to prevent, cure or alleviate a disease that endangers the health or life of the patient. If, however, the patient is surviving only by virtue of the mechanical means which induces heartbeat and breathing and is beyond recovery, I do not consider that the provision of a ventilator can properly be construed as a necessary of life.

12.185 On this view, it is arguable that, depending on the life-sustaining measure in question and the circumstances of the adult, a life-sustaining measure is not a necessary of life and that the withholding or withdrawal of the measure will not amount to a breach of section 285 of the Criminal Code (Qld).[1271]

12.186 These matters highlight the uncertainty of the legislation. This is an area that might be clarified by amendments to the guardianship legislation or the Criminal Code (Qld).

12-26 Should the law be changed to clarify the criminal liability of a person who acts on the basis of a consent provided in accordance with the guardianship legislation for the withholding or withdrawal of life-sustaining measures from an adult?

12-27 If yes, should this be done in the guardianship legislation or in the Criminal Code (Qld)?

1267 Criminal Code (Qld) s 285 is set out at [12.178] above.

1268 *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235, 249–50, discussed in L Willmott and B White, 'Charting a course through difficult legislative waters: Tribunal decisions on life-sustaining measures' (2005) 12 *Journal of Law and Medicine* 441, 452–3.

1269 [1993] 1 NZLR 235.

1270 Ibid 249–50.

1271 Cf R Cavell, 'Not-for-resuscitation orders: The medical, legal and ethical rationale behind letting patients die' (2008) 16 *Journal of Law and Medicine* 305, 331: 'There is no clarity as to whether Queensland's "necessaries of life" … include therapies that would prolong life without benefiting it'.

Chapter 13

Consent to participation in medical research

INTRODUCTION

13.1 The Commission's terms of reference direct it to review the law in relation to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), including 'consent to special medical research or experimental health care'.[1272] The terms of reference also direct the Commission to have regard, among other things, to:

- the need to ensure that adults are not deprived of necessary health care because they have impaired capacity; and
- 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.

BACKGROUND

13.2 Medical research encompasses a range of procedures that vary in their potential for therapeutic benefit for, and in their risk and inconvenience to, the research participant.

13.3 Some medical research is conducted by way of clinical trials, where new drugs or medical devices are tested on participants to determine their

1272 The terms of reference are set out in Appendix 1.

efficacy and safety.[1273] Other medical research does not involve the trialling of a drug or device, but may depend on obtaining from the research participants a blood or tissue sample, which is then used in the research. In the latter case, the research is unlikely to be of direct therapeutic benefit to the participants.

13.4 The participation of all people in medical research requires safeguards to ensure that they are not exploited or put at risk. In the case of adults with impaired capacity, who are especially vulnerable, the need for safeguards against exploitation is even greater. However, if adults with impaired capacity are not able to participate in medical research at all, they may be denied what could be potentially beneficial health care.

THE LAW IN QUEENSLAND

Terminology

13.5 The *Guardianship and Administration Act 2000* (Qld) deals with the consent mechanisms for the participation by an adult in medical research in two contexts:

- special medical research or experimental health care; and
- approved clinical research.

13.6 The guardianship legislation defines 'special medical research or experimental health care' as follows:[1274]

> **12 Special medical research or experimental health care**
>
> (1) Special medical research or experimental health care, for an adult, means—
>
> (a) medical research or experimental health care relating to a condition the adult has or to which the adult has a significant risk of being exposed; or
>
> (b) medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had.
>
> (2) Special medical research or experimental health care does not include—

1273 See Department of Health and Ageing, Therapeutic Goods Administration, *Access to Unapproved Therapeutic Goods — Clinical Trials in Australia* (October 2004) 9 <www.tga.gov.au/docs/pdf/unapproved/clintrials.pdf> at 20 October 2009.

1274 *Guardianship and Administration Act 2000* (Qld) sch 2 s 12; *Powers of Attorney Act 1998* (Qld) sch 2 s 12.

(a) psychological research; or

(b) approved clinical research.

13.7 The guardianship legislation defines 'clinical research' and 'approved clinical research' as follows:[1275]

> **13 Approved clinical research**
>
> (1) ***Clinical research*** is—
>
> (a) medical research intended to diagnose, maintain or treat a condition affecting the participants in the research; or
>
> (b) a trial of drugs or techniques involving the carrying out of health care that may include the giving of placebos to some of the participants in the trial.
>
> (1A) However, a comparative assessment of health care already proven to be beneficial is not medical research.
>
> *Examples—*
>
> - a comparative assessment of the effects of different forms of administration of a drug proven to be beneficial in the treatment of a condition, for example, a continuous infusion, as opposed to a once-a-day administration, of the drug
> - a comparative assessment of the angle at which to set a tilt-bed to best assist an adult's breathing
>
> (2) ***Approved clinical research*** is clinical research approved by the tribunal.

Participation in special medical research or experimental health care

Requirements for the Tribunal's consent

13.8 Under the guardianship legislation, the participation by an adult in special medical research or experimental health care is a category of special health care.[1276] Accordingly, the adult's participation is regulated by sections 65 and 72 of the *Guardianship and Administration Act 2000* (Qld).

13.9 Section 65 of the *Guardianship and Administration Act 2000* (Qld) sets out an order of priority for dealing with special health matters. It provides:

1275 *Guardianship and Administration Act 2000* (Qld) sch 2 s 13(1); *Powers of Attorney Act 1998* (Qld) sch 2 s 13(1).

1276 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7(d); *Powers of Attorney Act 1998* (Qld) sch 2 s 7(d).

65 Adult with impaired capacity—order of priority in dealing with special health matter

(1) If an adult has impaired capacity for a special health matter, the matter may only be dealt with under the first of the following subsections to apply.

(2) If the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.

(3) If subsection (2) does not apply and an entity other than the tribunal is authorised to deal with the matter, the matter may only be dealt with by the entity.

(4) If subsections (2) and (3) do not apply and the tribunal has made an order about the matter, the matter may only be dealt with under the order.

Editor's note—

However, the tribunal may not consent to electroconvulsive therapy or psychosurgery—section 68(1).

13.10 The effect of section 65(2) is that, if an adult has made an advance health directive giving a direction about participation in special medical research or experimental health care, the matter may only be dealt with under that direction.

13.11 Section 72 of the *Guardianship and Administration Act 2000* (Qld) is relevant if the adult does not have an advance health directive dealing with the matter. It prescribes the circumstances in which the Tribunal may consent to the adult's participation in special medical research or experimental health care:

72 Special medical research or experimental health care

(1) The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to the adult's participation in special medical research or experimental health care relating to a condition the adult has or to which the adult has a significant risk of being exposed only if the tribunal is satisfied about the following matters—

(a) the special medical research or experimental health care is approved by an ethics committee;[1277]

1277 *Guardianship and Administration Act 2000* (Qld) sch 4 defines 'ethics committee' to mean:

(a) a Human Research Ethics Committee registered by the Australian Health Ethics Committee established under the *National Health and Medical Research Council Act 1992* (Cwlth); or

(b) if there is no committee mentioned in paragraph (a)—

(i) an ethics committee established by a public sector hospital under the *Health Services Act 1991*, section 2; or

(ii) an ethics committee established by a university and concerned, wholly or partly, with medical research; or

(iii) an ethics committee established by the National Health and Medical Research Council.

(b) the risk and inconvenience to the adult and the adult's quality of life is small;

(c) the special medical research or experimental health care may result in significant benefit to the adult;

(d) the potential benefit can not be achieved in another way.

Editor's note—

Special medical research or experimental health care does not include—

(a) psychological research; or

(b) approved clinical research—see schedule 2, section 12(2).

(2) The tribunal may consent, for an adult with impaired capacity for the matter, to the adult's participation in special medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had only if the tribunal is satisfied about the following matters—

(a) the special medical research or experimental health care is approved by an ethics committee;

(b) the risk and inconvenience to the adult and the adult's quality of life is small;

(c) the special medical research or experimental health care may result in significant benefit to the adult or other persons with the condition;

(d) the special medical research or experimental health care can not reasonably be carried out without a person who has or has had the condition taking part;

(e) the special medical research or experimental health care will not unduly interfere with the adult's privacy.

(3) The tribunal may not consent to the adult's participation in special medical research or experimental health care if—

(a) the adult objects to the special medical research or experimental health care; or

Editor's note—

Section 67, which effectively enables an adult's objection to be overridden in some cases, does not apply.[1278]

(b) the adult, in an enduring document, indicated unwillingness to participate in the special medical research or experimental health care. (notes added)

1278 This Editor's note is not entirely accurate. It should state that s 67(2) does not apply. See the discussion of the application of s 67(1) of the *Guardianship and Administration Act 2000* (Qld) at [13.19] below.

13.12 Section 72 deals with the giving of consent in relation to two types of special medical research or experimental health care:

- section 72(1) applies where the special medical research or experimental health care relates to a condition that the adult has or to which the adult has a significant risk of being exposed;
- section 72(2) applies where the special medical research or experimental health care is intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition that the adult has or has had.

13.13 There is a degree of commonality in the matters about which the Tribunal must be satisfied before giving its consent under section 72(1) or (2). In both cases, the Tribunal must be satisfied that:[1279]

> (a) the special medical research or experimental health care is approved by an ethics committee;
>
> (b) the risk and inconvenience to the adult and the adult's quality of life is small.

13.14 The differences in the remaining matters about which the Tribunal must be satisfied reflect the different purposes of the research to which section 72(1) and (2) applies.

13.15 Although section 72(1) does not refer expressly to medical research or experimental health care that has a potentially therapeutic effect, it is implicit in the matters referred to in section 72(1)(c) and (d) that this is the intended purpose of the section; hence the requirement that the Tribunal must, in addition to the matters referred to at [13.13] above, be satisfied that:

> (c) the special medical research or experimental health care may result in significant benefit to the adult; and
>
> (d) the potential benefit can not be achieved in another way.

13.16 In contrast, section 72(2), which deals with 'special medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had', does not require the Tribunal to be satisfied that the special medical research or experimental health care may result in significant benefit to the adult personally. Instead, the Tribunal must, in addition to the matters referred to at [13.13] above, be satisfied that:[1280]

> (c) the special medical research or experimental health care may result in significant benefit to the adult or other persons with the condition;

1279 *Guardianship and Administration Act 2000* (Qld) s 72(1)(a)–(b), (2)(a)–(b).

1280 *Guardianship and Administration Act 2000* (Qld) s 72(2)(c)–(e).

(d) the special medical research or experimental health care can not reasonably be carried out without a person who has or has had the condition taking part;

(e) the special medical research or experimental health care will not unduly interfere with the adult's privacy. (emphasis added)

The effect of an adult's objection

13.17 Section 72(3) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may not consent to the adult's participation in special medical research or experimental health care if:

- the adult objects to the special medical research or experimental health care; or
- the adult, in an enduring document, indicated unwillingness to participate in the special medical research or experimental health care.

13.18 The guardianship legislation provides for two kinds of enduring documents: enduring powers of attorney and advance health directives.[1281] Under section 65(2) of the Act, if the adult has impaired capacity for a special health matter and has made an advance health directive giving a direction about the matter (which could include an objection to particular special health care), the matter must be dealt with under the direction. In so far as section 72(3)(b) refers to an expression of unwillingness in an advance health directive, it is presumably intended to capture an expression of the adult's views that falls short of amounting to a direction or objection about the matter. In so far as that section refers to an expression of unwillingness in an enduring power of attorney, it is presumably intended to capture information given by the adult in an enduring power of attorney.[1282]

13.19 If the Tribunal consents to an adult's participation in special medical research or experimental health care and the adult later objects, the effect of the adult's objection is governed by section 67 of the Act. In that situation, the Tribunal's consent will be ineffective if the health provider knows, or ought reasonably to know, that the adult objects to the health care.[1283] Because section 67(2) of the Act does not apply to participation in special medical research or experimental health care,[1284] the adult's objection amounts to an

1281 *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'enduring document'); *Powers of Attorney Act 1998* (Qld) s 28.

1282 Section 32(1) of the *Powers of Attorney Act 1998* (Qld) provides that an adult may, by an enduring power of attorney, appoint an attorney for one or more personal matters and may provide terms or information about exercising the power. However, a 'personal matter' does not include a special health matter: *Powers of Attorney Act 1998* (Qld) sch 2 s 2. Accordingly, an adult may not, by an enduring power of attorney, appoint an attorney to exercise a power in relation to the adult's participation in special medical research or experimental health care.

1283 *Guardianship and Administration Act 2000* (Qld) s 67(1).

1284 *Guardianship and Administration Act 2000* (Qld) s 67(3)(b).

absolute veto and does not depend, for its effectiveness, on the adult's level of understanding of what the health care involves or why it is required or on the level of distress that the health care is likely to cause the adult.

Data about Tribunal consents

13.20 Consent for an adult's participation in special medical research or experimental health care is given by the Tribunal on a case-by-case basis. If the particular research involves a number of adults with impaired capacity, it will be necessary for an application for the Tribunal's consent to be made in relation to each adult.

13.21 Information published in the Tribunal's Annual Reports for the financial years 2004–05 to 2007–08 reveals that applications for consent for an adult's participation in special medical research or experimental health care are extremely rare:

	Applications made	Applications approved	Applications dismissed	Applications withdrawn
2004–05[1285]	1	1	0	0
2005–06[1286]	0	0	0	0
2006–07[1287]	1	0	1	0
2007–08[1288]	0	0	0	0

Table 1: Applications for consent to an adult's participation in special medical research or experimental health care

Participation in approved clinical research

13.22 The *Guardianship and Administration Act 2000* (Qld) establishes a different framework for obtaining consent for the participation of an adult with impaired capacity in approved clinical research.

Requirements for the Tribunal's approval of clinical research

13.23 Section 13 of schedule 2 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may approve clinical research in specified circumstances, and deals with the effect of that approval:[1289]

1285 Guardianship and Administration Tribunal, *Annual Report 2004–2005* (2005) 31.

1286 Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 44.

1287 Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 46. The application was refused, as the Tribunal was of the view that the health care in question was not experimental health care: see *Re MP* [2006] QGAAT 86.

1288 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 48.

1289 *Guardianship and Administration Act 2000* (Qld) sch 2 s 13.

13 Approved clinical research

…

(3) The tribunal may approve clinical research only if the tribunal is satisfied about the following matters—

(a) the clinical research is approved by an ethics committee;

(b) any drugs or techniques on trial in the clinical research are intended to diagnose, maintain or treat a condition affecting the participants in the research;

(c) the research will not involve any known substantial risk to the participants or, if there is existing health care for the particular condition, the research will not involve known material risk to the participants greater than the risk associated with the existing health care;

(d) the development of any drugs or techniques on trial has reached a stage at which safety and ethical considerations make it appropriate for the drugs or techniques to be made available to the participants despite the participants being unable to consent to participation;

(e) having regard to the potential benefits and risks of participation, on balance it is not adverse to the interests of the participants to participate.

(4) The fact that a trial of drugs or techniques will or may involve the giving of placebos to some of the participants does not prevent the tribunal from being satisfied it is, on balance, not adverse to the interests of the participants to participate.

(5) The tribunal's approval of clinical research does not operate as a consent to the participation in the clinical research of any particular person.

13.24 The matters about which the Tribunal must be satisfied in order to approve clinical research provide a safeguard for the interests of adults with impaired capacity.[1290] The requirement for approval by an ethics committee[1291] ensures that the proposed research has been scrutinised by a multi-disciplinary committee. Further, the requirement that the Tribunal must be satisfied that 'any drugs or techniques on trial in the clinical research are intended to diagnose, maintain or treat a condition affecting the participants in the research'[1292] limits the types of clinical trials that may be approved by the Tribunal. For example, a study on participants to determine whether a

1290 *Guardianship and Administration Act 2000* (Qld) sch 2 s 13(3).

1291 *Guardianship and Administration Act 2000* (Qld) sch 2 s 13(2); *Powers of Attorney Act 1998* (Qld) sch 2 s 13(2). Approval by an ethics committee is also a requirement for the Tribunal's consent to special medical research or experimental health care: see *Guardianship and Administration Act 2000* (Qld) s 72(1)(a), (2)(a).

1292 *Guardianship and Administration Act 2000* (Qld) sch 2 s 13(3)(b).

proposed new generic drug is bioequivalent to an existing approved drug would not be a study that could be undertaken using adults with impaired capacity.

13.25 Because 'special medical research or experimental health care', as defined in the guardianship legislation, does not include 'approved clinical research',[1293] the effect of the Tribunal's approval of clinical research is that the research, which would otherwise fall within the definition of 'special medical research or experimental health care', is no longer special health care. Instead, a decision about an adult's participation in the approved clinical research is a health matter.

13.26 The significance of being a health matter, rather than a special health matter, is that the Tribunal's consent is not required in order for an individual adult to participate in the approved clinical research. If the adult has an advance health directive dealing with this particular health matter, the matter must be dealt with under the directive. If the adult does not have a relevant advance health directive, the matter may be dealt with according to the hierarchy established by section 66 of the *Guardianship and Administration Act 2000* (Qld) — that is, by:[1294]

- the guardian or guardians appointed by the Tribunal, if any;
- if the Tribunal has not appointed a guardian or guardians — by the attorney or attorneys appointed by the adult in an enduring power of attorney or advance health directive; or
- if there are no guardians or attorneys — by the statutory health attorney.

The effect of an adult's objection

13.27 Because participation in approved clinical research is a health matter, the effect of an adult's objection to the health care is governed by sections 66 and 67 of the *Guardianship and Administration Act 2000* (Qld).[1295]

13.28 If an adult has impaired capacity for a health matter and has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.[1296]

13.29 If the adult does not have an advance health directive dealing with the matter, the effect of the adult's objection is governed by section 67 of the Act. In that situation, the Tribunal's consent will be ineffective if the health provider knows, or ought reasonably to know, that the adult objects to the health

1293 *Guardianship and Administration Act 2000* (Qld) sch 2 s 12(2)(b); *Powers of Attorney Act 1998* (Qld) sch 2 s 12(2)(b). Section 12 of sch 2 is set out at [13.6] above.

1294 *Guardianship and Administration Act 2000* (Qld) s 66(3)–(5).

1295 The effect of an adult's objection to health care is considered in Chapter 14 of this Discussion Paper.

1296 *Guardianship and Administration Act 2000* (Qld) s 66(1)–(2).

care.[1297] Because section 67(2) of the Act does not apply to participation in approved clinical research,[1298] the adult's objection amounts to an absolute veto; it does not depend, for its effectiveness, on the adult's level of understanding of what the health care involves or why it is required or on the level of distress that the health care is likely to cause the adult.

Data about Tribunal approvals

13.30 Although the number of applications made to the Tribunal for the approval of clinical research is relatively small, such applications are much more common than applications for consent for an adult's participation in special medical research or experimental health care. Information published in the Tribunal's Annual Reports for the financial years 2002–03 to 2007–08 reveals that the following numbers of applications have been made for the approval of clinical research:

	Applications made	Applications approved	Applications dismissed	Applications withdrawn
2002–03[1299]	22	13	1	1
2003–04[1300]	19	13	0	1
2004–05[1301]	28	20	4	0
2005–06[1302]	29	25	4	0
2006–07[1303]	9	10	1	0
2007–08[1304]	19	15	2	1

Table 2: Applications for approval of clinical research

1297 *Guardianship and Administration Act 2000* (Qld) s 67(1).

1298 *Guardianship and Administration Act 2000* (Qld) s 67(3)(b).

1299 The Tribunal's 2002–03 Annual Report records that the other seven clinical trials were finalised before hearing as investigation and evaluation determined that they did not require the approval of the Tribunal: Guardianship and Administration Tribunal, *Annual Report 2002–2003* (2003) 25.

1300 The Tribunal's 2003–04 Annual Report records that it was awaiting further information before another application was approved, that one other matter had been set down for hearing, and that three other clinical trials were finalised before hearing as investigation and evaluation determined that they did not require the approval of the Tribunal: Guardianship and Administration Tribunal, *Annual Report 2003–2004* (2004) 26.

1301 The Tribunal's 2004–05 Annual Report records that two applications had been set down for hearing, but had not been determined, and a further three applications were finalised before hearing as investigation and evaluation determined that they did not require the approval of the Tribunal: Guardianship and Administration Tribunal, *Annual Report 2004–2005* (2005) 32.

1302 Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 45. The Annual Report notes (at 45) that the four applications were dismissed because they did not constitute research within the meaning of the *Guardianship and Administration Act 2000* (Qld).

1303 The Tribunal's 2006–07 Annual Report records that four applications were still pending at the end of 2005–06. The application that was dismissed did not constitute research within the meaning of the *Guardianship and Administration Act 2000* (Qld): Guardianship and Administration Tribunal, *Annual Report 2006–2007* (2007) 47.

1304 Guardianship and Administration Tribunal, *Annual Report 2007–2008* (2008) 48. At the end of the 2007–08 financial year, four applications were pending (including two from the previous financial year): at 48.

THE LAW IN OTHER JURISDICTIONS

Jurisdictions with specific consent mechanisms for medical research

13.31 Two other Australian jurisdictions — New South Wales and Victoria — include specific consent mechanisms in their guardianship legislation for the participation of adults with impaired capacity in medical research.

13.32 The New South Wales provisions are similar in some respects to the Queensland provisions discussed above. The Victorian provisions are quite different, in that they do not require the consent of the Victorian Civil and Administrative Tribunal.

New South Wales

13.33 The *Guardianship Act 1987* (NSW) provides separate mechanisms for consent to 'special treatment' and participation in 'clinical trials'. These terms are defined in the legislation as follows:[1305]

> ***clinical trial*** means a trial of drugs or techniques that necessarily involves the carrying out of medical or dental treatment on the participants in the trial.
>
> ***special treatment*** means:
>
> (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out, or
>
> (b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned, or
>
> (c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part,
>
> but does not include treatment in the course of a clinical trial.

13.34 The *Guardianship Act 1987* (NSW) provides that consent to the carrying out of 'medical or dental treatment'[1306] on a relevant patient may be given:[1307]

- in the case of minor or major treatment — by the 'person responsible' for the patient;[1308] and

---

1305 *Guardianship Act 1987* (NSW) s 33(1).

1306 The term 'medical or dental treatment' is defined broadly in s 33(1) of the *Guardianship Act 1987* (NSW), which is set out at [13.63] below.

1307 *Guardianship Act 1987* (NSW) s 36(1).

- in any case — by the NSW Guardianship Tribunal.

13.35 Because 'major treatment'[1309] and 'minor treatment'[1310] are defined to exclude 'special treatment' and treatment in the course of a 'clinical trial', the person responsible cannot consent to 'special treatment' for the patient and cannot, without an order of the NSW Guardianship Tribunal, consent to the patient's participation in a clinical trial.

Special treatment

13.36 As noted above, the *Guardianship Act 1987* (NSW) provides generally that the NSW Guardianship Tribunal may consent to the carrying out of medical or dental treatment on a relevant patient.[1311] The Act provides that any person may apply to the Tribunal for consent to the carrying out of medical or dental treatment on a relevant patient,[1312] and that the Tribunal may consent to the carrying out of the treatment if it is satisfied that it is appropriate for the treatment to be carried out.[1313]

13.37 The Act also imposes a number of restrictions on the Tribunal's power to give consent, including, in particular, restrictions on its power to consent to special treatment for a patient. Section 45 provides:

> **45 Restrictions on Tribunal's power to give consent**
>
> (1) The Tribunal must not give consent to the carrying out of medical or dental treatment on a patient to whom this Part applies unless the Tribunal is satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient's health and well-being.

1308 For a person other than a child or a person in the care of the Director-General under s 13 of the *Guardianship Act 1987* (NSW), the 'person responsible' is determined according to the hierarchy in s 33A(4) of the Act. The hierarchy is, in descending order:

- the person's guardian if the instrument appointing the guardian provides for the guardian to give consent to the carrying out of medical or dental treatment on the person;
- the spouse of the person if the relationship between the person and the spouse is close and continuing and the spouse is not a person under guardianship;
- a person who has the care of the person;
- a close friend or relative of the person.

1309 *Guardianship Act 1987* (NSW) s 33(1) defines 'major treatment' as follows:

> ***major treatment*** means treatment (other than special treatment or treatment in the course of a clinical trial) that is declared by the regulations to be major treatment for the purposes of this Part.

1310 *Guardianship Act 1987* (NSW) s 33(1) defines 'minor treatment' as follows:

> ***minor treatment*** means treatment that is not special treatment, major treatment or treatment in the course of a clinical trial.

1311 *Guardianship Act 1987* (NSW) s 36(1).

1312 *Guardianship Act 1987* (NSW) s 42(1).

1313 *Guardianship Act 1987* (NSW) s 44(1). Section 44(2) specifies the matters to which the Tribunal must have regard.

(2) However, the Tribunal must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:

(a) to save the patient's life, or

(b) to prevent serious damage to the patient's health,

or unless the Tribunal is authorised to give that consent under subsection (3).

(3) In the case of:

(a) special treatment of a kind specified in paragraph (b) of the definition of that expression in section 33(1), or

(b) prescribed special treatment (other than special treatment of a kind specified in paragraph (a) of that definition),

the Tribunal may give consent to the carrying out of the treatment if it is satisfied that:

(c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient, and

(d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment—those guidelines have been or will be complied with as regards the patient.

Clinical trials

13.38 The *Guardianship Act 1987* (NSW) also provides that the NSW Guardianship Tribunal may, in specified circumstances, approve a clinical trial as a trial in which relevant patients may participate. Section 45AA provides:

45AA Tribunal may approve clinical trials

(1) The Tribunal may approve, in accordance with this section, a clinical trial as a trial in which patients to whom this Part applies may participate.

(2) The Tribunal may give an approval under this section only if it is satisfied that:

(a) the drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition from which the patients suffer, and

(b) the trial will not involve any known substantial risk to the patients (or, if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments), and

(c) the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to

patients who suffer from that condition even if those patients are not able to consent to taking part in the trial, and

(d) having regard to the potential benefits (as well as the potential risks) of participation in the trial, it is in the best interests of patients who suffer from that condition that they take part in the trial, and

(e) the trial has been approved by a relevant ethics committee and complies with any relevant guidelines issued by the National Health and Medical Research Council.

(3) The fact that a clinical trial will or may involve the giving of placebos to some of the participants in the trial does not prevent the Tribunal from being satisfied that it is in the best interests of patients that they take part in the trial.

(4) The Tribunal's approval of a clinical trial under this section does not operate as a consent to the participation in the trial of any particular patient to whom this Part applies. The appropriate consent must be obtained under Division 3 or 4 before any medical or dental treatment in the course of the trial is carried out on the patient.

(5) In this section:

ethics committee means:

(a) for so long as there is any relevant Institutional Ethics Committee registered by the Australian Health Ethics Committee established under the *National Health and Medical Research Council Act 1992* of the Commonwealth—an Institutional Ethics Committee so registered, or

(b) in the absence of such a committee, an ethics committee established by:

(i) an area health service or a public hospital, or

(ii) a university, being an ethics committee concerned, wholly or partly, with medical research, or

(iii) the National Health and Medical Research Council.

13.39 Section 45AB of the Act further provides for who may consent to a patient's participation in a clinical trial that has been approved by the Tribunal. It provides:

45AB Consent for participation in clinical trials in individual cases

(1) If the Tribunal is satisfied as to the matters specified in section 45AA(2) in relation to a clinical trial, it may, by order, determine:

(a) that the function of giving or withholding consent for the carrying out of medical or dental treatment on patients in the course of the trial is to be exercised by the persons responsible for the patients (in which case Division 3 applies), or

> (b) that the Tribunal is to exercise that function itself (in which case Division 4 applies).
>
> (2) Before making a determination referred to in subsection (1)(a), the Tribunal must be satisfied that the form for granting consent and the information available about the trial provide sufficient information to enable the persons responsible to decide whether or not it is appropriate that the patients should take part in the trial.

13.40 Section 45AB(1) provides two avenues for consent. The Tribunal may determine that the function of giving or withholding consent for the treatment involved in the clinical trial may be given by the persons responsible for the patients. Alternatively, the Tribunal may determine that it will exercise that function itself.

13.41 Section 45(2) provides a safeguard where the Tribunal proposes to determine that consent may be given by the persons responsible for the patients. Before making such a determination, the Tribunal must be satisfied that the form for granting consent and the information available about the trial provide sufficient information to enable the persons responsible to decide whether or not it is appropriate that the patients should take part in the trial.

13.42 The New South Wales provisions in relation to clinical trials differ from the Queensland provisions in relation to clinical research in that they enable the NSW Guardianship Tribunal to reserve to itself the power to consent to an adult's participation in a clinical trial. In addition, there is no similar requirement under the Queensland legislation for the Tribunal to be satisfied about the sufficiency of the information contained in the consent form and of the information available about the trial.

Victoria

13.43 In Victoria, as a result of amendments made to the *Guardianship and Administration Act 1986* (Vic) in 2006, it is no longer necessary to obtain the approval of the Victorian Civil and Administrative Tribunal ('VCAT') in order to carry out a medical research procedure on an adult with impaired capacity (referred to in the legislation as a 'patient').

13.44 The *Guardianship and Administration Act 1986* (Vic) now provides a four step process for authorising a 'medical research procedure', other than in an emergency, on a patient.[1314] The Act defines 'medical research procedure' to mean:[1315]

> (a) a procedure carried out for the purposes of medical research, including, as part of a clinical trial, the administration of medication or the use of equipment or a device; or

---

1314 *Guardianship and Administration Act 1986* (Vic) s 42P(3).

1315 *Guardianship and Administration Act 1986* (Vic) s 3(1).

(b) a procedure that is prescribed by the regulations to be a medical research procedure for the purposes of this Act—

but does not include—

(c) any non-intrusive examination (including a visual examination of the mouth, throat, nasal cavity, eyes or ears or the measuring of a person's height, weight or vision); or

(d) observing a person's activities; or

(e) undertaking a survey; or

(f) collecting or using information, including personal information (within the meaning of the *Information Privacy Act 2000*) or health information (within the meaning of the *Health Records Act 2001*); or

(g) any other procedure that is prescribed by the regulations not to be a medical research procedure for the purposes of this Act.

13.45 The first step is to determine whether the relevant research project has been approved by the relevant human research ethics committee ('HREC').[1316] A medical research procedure must not be carried out on a patient if the research project has not been approved by the relevant HREC.[1317] Further, the medical research procedure must be carried out in accordance with the approval of the HREC, including any conditions of the approval.[1318]

13.46 The second step is to determine whether the patient is likely to be capable, within a reasonable period of time, of consenting to the carrying out of a medical research procedure.[1319] If the patient is not likely to be capable, within a reasonable period of time, of giving consent, the medical research procedure may be carried out under the authority of a consent given under section 42S by the 'person responsible' for the patient or under the authority of what is described in the legislation as 'procedural authorisation' under section 42T.[1320] If the patient is likely to be capable, within a reasonable period of time, of giving consent, the medical research procedure may not be carried out under the authority of section 42S or 42T.[1321]

13.47 The third step is to seek the consent of the person responsible for the patient.[1322] The person responsible may consent to the carrying out of a medical research procedure on the patient, but only if he or she believes that

1316 *Guardianship and Administration Act 1986* (Vic) s 42Q(1).

1317 *Guardianship and Administration Act 1986* (Vic) s 42Q(2).

1318 *Guardianship and Administration Act 1986* (Vic) s 42Q(3).

1319 *Guardianship and Administration Act 1986* (Vic) s 42R(1).

1320 *Guardianship and Administration Act 1986* (Vic) s 42R(4).

1321 *Guardianship and Administration Act 1986* (Vic) s 42R(3).

1322 *Guardianship and Administration Act 1986* (Vic) s 42S(1).

the carrying out of the procedure would not be contrary to the best interests[1323] of the patient.[1324] The consent must be consistent with any requirements for consent specified in the HREC approval for the relevant research project or the conditions of that approval.[1325]

13.48 The fourth step of procedural authorisation applies only if the person responsible for the patient cannot be ascertained or contacted.[1326] In specified circumstances, a registered practitioner may carry out, or supervise the carrying out of, a medical research procedure without the consent under section 42S of the person responsible for the patient. The specified circumstances, which are set out in section 42T(2) of the Act, are:[1327]

> (a) the patient is not likely to be capable, within a reasonable time as determined in accordance with section 42R(2), of giving consent to the carrying out of the procedure; and
>
> (b) steps that are reasonable in the circumstances have been taken—
>
> (i) to ascertain whether there is a person responsible and, if so, who that person is; and
>
> (ii) if the person responsible is ascertained, to contact that person to seek his or her consent to the proposed procedure under section 42S—
>
> but it has not been possible to ascertain whether there is a person responsible or who that person is or to contact that person; and
>
> (c) the practitioner believes on reasonable grounds that inclusion of the patient in the relevant research project, and being the subject of the proposed procedure, would not be contrary to the best interests of the patient;[1328] and

---

1323 *Guardianship and Administration Act 1986* (Vic) s 42U(1) provides that, for the purposes of determining whether a medical research procedure would or would not be contrary to the best interests of a patient, the following matters must be taken into account:

> (a) the wishes of the patient, so far as they can be ascertained; and
>
> (b) the wishes of any nearest relative or any other family members of the patient; and
>
> (c) the nature and degree of any benefits, discomforts and risks for the patient in having or not having the procedure; and
>
> (d) any other consequences to the patient if the procedure is or is not carried out; and
>
> (e) any other prescribed matters.

1324 *Guardianship and Administration Act 1986* (Vic) s 42S(2)–(3).

1325 *Guardianship and Administration Act 1986* (Vic) s 42S(4).

1326 *Guardianship and Administration Act 1986* (Vic) s 42T(1).

1327 *Guardianship and Administration Act 1986* (Vic) s 42T(2).

1328 See n 1323 above for the matters that must be taken into account in deciding whether a medical research procedure would or would not be contrary to the best interests of a patient.

> (d) the practitioner does not have any reason to believe that the carrying out of the procedure would be against the patient's wishes; and
>
> (e) the practitioner believes on reasonable grounds that the relevant human research ethics committee has approved the relevant research project in the knowledge that a patient may participate in the project without the prior consent of the patient or the person responsible; and
>
> (f) the practitioner believes on reasonable grounds that—
>
> (i) one of the purposes of the relevant research project is to assess the effectiveness of the therapy being researched; and
>
> (ii) the medical research procedure poses no more of a risk to the patient than the risk that is inherent in the patient's condition and alternative treatment; and
>
> (g) the practitioner believes on reasonable grounds that the relevant research project is based on valid scientific hypotheses that support a reasonable possibility of benefit for the patient as compared with standard treatment. (note added)

13.49 Before, or as soon as practicable after the medical research procedure is carried out, the registered practitioner supervising the carrying out of the medical research procedure (or, if there is no such person, the practitioner carrying out the procedure) must sign a certificate certifying as to each of the matters set out in section 42T(2) of the Act and stating that the person responsible (if any) or the patient (if the patient gains or regains capacity) will be informed as required by the legislation.[1329] The practitioner must forward a copy of the certificate to the Public Advocate and the relevant HREC as soon as practicable and, in any event, within two working days after supervising the carrying out of, or carrying out, the procedure.[1330]

13.50 A registered practitioner involved in the research project must inform the person responsible (if any) or the patient (if the patient gains or regains capacity), as soon as reasonably practicable, of the patient's inclusion in the research project and of the option to refuse consent for the patient for the procedure and withdraw the patient from future participation in the project without compromising the patient's ability to receive any available alternative treatment or care.[1331]

Other Australian jurisdictions

13.51 In the Australian jurisdictions that do not have specific provisions in their guardianship legislation dealing with medical research, the issue of whether adults with impaired capacity may participate in medical research and

---

1329 *Guardianship and Administration Act 1986* (Vic) s 42T(3).

1330 *Guardianship and Administration Act 1986* (Vic) s 42T(5).

1331 *Guardianship and Administration Act 1986* (Vic) s 42T(4).

the circumstances in which they do so depends on the breadth of the definitions in the relevant legislation of medical treatment or health care and on the factors in the legislation that govern the exercise of the power to consent to medical treatment or health care.

ISSUES FOR CONSIDERATION

The requirement of Tribunal consent or approval

13.52 As explained above, in Queensland, only the Tribunal may consent to the participation of an adult with impaired capacity in special medical research or experimental health care. That is also the case in New South Wales where only the NSW Guardianship Tribunal may consent to medical or dental treatment that constitutes special treatment.

13.53 In both jurisdictions, the Tribunal's approval is also required in order for an adult with impaired capacity to take part in a clinical trial. The main difference is that, in New South Wales, the Tribunal has the option of itself consenting to the adult's participation in the approved clinical trial or, in the alternative, determining that the function of giving or withholding consent is to be exercised by the persons responsible for the adult. In Queensland, once clinical research has been approved, it becomes a health matter and the power to consent rests with the adult's substitute decision-maker — that is, the guardian, attorney or statutory health attorney.

13.54 Further, as noted earlier, section 45AB(2) of the *Guardianship Act 1987* (NSW) requires the Tribunal, before determining that the function of giving or withholding consent is to be exercised by the persons responsible, to be satisfied that the form for granting consent and the information about the trial provide sufficient information to enable the persons responsible to decide whether or not it is appropriate that the patients should take part in the trial. Although the consent and information forms would ordinarily be considered by the relevant ethics committee in deciding whether to give ethical approval for the clinical trial, the requirement in section 45AB(2) provides a further opportunity for scrutiny of those documents.

13.55 In contrast, the *Guardianship and Administration Act 1986* (Vic) does not require VCAT consent for an adult with impaired capacity to participate in medical research; nor does it require VCAT approval of clinical trials. Instead, consent to a special medical procedure for an adult with impaired capacity may be given by the person responsible for the adult and, in some circumstances, the special medical procedure is authorised to be carried out without any consent.

13.56 This raises a number of issues about who is the most appropriate person or entity to consent to the participation of an adult with impaired capacity in the different kinds of medical research.

13-1 Is it appropriate that, under the *Guardianship and Administration Act 2000* (Qld), only the Tribunal may consent to an adult's participation in special medical research or experimental health care?

13-2 Is it appropriate that the *Guardianship and Administration Act 2000* (Qld) provides for the Tribunal to approve clinical research?

13-3 Is it appropriate that, under the *Guardianship and Administration Act 2000* (Qld), consent to an adult's participation in approved clinical research may be given by the adult's substitute decision-maker (that is, the guardian, attorney or statutory health attorney)?

13-4 If yes to Question 13-2, should the *Guardianship and Administration Act 2000* (Qld) be amended to provide that the Tribunal may either:

(a) consent to an adult's participation in approved clinical research; or

(b) decide, for particular approved clinical research, that the power to consent to an adult's participation in the research may be exercised by the adult's substitute decision-maker (that is, the adult's guardian, attorney or statutory health attorney)?

13-5 If the *Guardianship and Administration Act 2000* (Qld) continues to provide that an adult's substitute decision-maker may consent to the adult's participation in approved clinical research, should the Act be amended to provide that, before approving the clinical research, the Tribunal must be satisfied that the form for granting consent and the information about the trial provide sufficient information to enable the adult's substitute decision-maker to decide whether or not it is appropriate for the adult to take part in the trial?

No provision for the approval of a special medical research project or an experimental health care project

13.57 As explained earlier, the *Guardianship and Administration Act 2000* (Qld) makes provision for the Tribunal to approve clinical research, which then becomes health care other than special health care. As a result, consent may be given by an adult's substitute decision-maker.

13.58 However, there is no similar mechanism for the Tribunal to approve a special medical research project or an experimental health care project and for

consent then to be given by an adult's substitute decision-maker.[1332] If the particular research involves a number of adults with impaired capacity, application must be made to the Tribunal for consent to the participation of each individual adult. As a matter of practicality, if all the potential research participants have been identified, there may be scope for the applications to be heard together. However, for some research, the potential participants are, of necessity, accrued over a considerable period of time — for example, if the research is about a condition or disease that is reasonably rare. This raises the issue of whether, for at least some types of research (such as those that have a very low risk and are minimally invasive), it should be possible for the Tribunal to approve the research project and for the adult's substitute decision-maker to have the power to consent to the adult's participation in the research.

13-6 Should the *Guardianship and Administration Act 2000* (Qld) be amended to enable the Tribunal, in addition to consenting to an adult's participation in special medical research or experimental health care, to have the option to approve certain special medical research or experimental health care, in which case the research would no longer be special health care and consent could be given by an adult's substitute decision-maker?

13-7 If yes to Question 13-6, to what types of special medical research or experimental health care should that approval mechanism apply?

Approved clinical research as health care

13.59 The consent mechanism in the guardianship legislation for participation in approved clinical research is premised on the fact that the clinical research is itself 'health care' and that, when approved by the Tribunal, it does not constitute special health care.

13.60 The legislation defines 'health care' in the following terms:[1333]

> **5 Health care**
>
> (1) ***Health care***, of an adult, is care or treatment of, or a service or a procedure for, the adult—
>
> (a) to diagnose, maintain, or treat the adult's physical or mental condition; and

1332 Section 74(1) of the *Guardianship and Administration Act 2000* (Qld) provides that, if the Tribunal consents to special health care for an adult, the Tribunal may appoint one or more persons who are eligible for appointment as a guardian or guardians for the adult and give the guardian or guardians power to consent for the adult to continuation of the special health care or the carrying out on the adult of similar special health care. However, the section still requires that the Tribunal has initially consented to the special health care for an individual adult.

1333 *Guardianship and Administration Act 2000* (Qld) sch 2 s 5; *Powers of Attorney Act 1998* (Qld) sch 2 s 5.

(b) carried out by, or under the direction or supervision of, a health provider.

(2) ***Health care***, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

(3) ***Health care***, of an adult, does not include—

(a) first aid treatment; or

(b) a non-intrusive examination made for diagnostic purposes; or

(c) the administration of a pharmaceutical drug if—

(i) a prescription is not needed to obtain the drug; and

(ii) the drug is normally self-administered; and

(iii) the administration is for a recommended purpose and at a recommended dosage level.

Example of paragraph (b)—

a visual examination of an adult's mouth, throat, nasal cavity, eyes or ears

13.61 The legislation defines 'clinical research' and 'approved clinical research' in the following terms:[1334]

13 Approved clinical research

(1) ***Clinical research*** is—

(a) medical research intended to diagnose, maintain or treat a condition affecting the participants in the research; or

(b) a trial of drugs or techniques involving the carrying out of health care that may include the giving of placebos to some of the participants in the trial.

…

(2) ***Approved clinical research*** is clinical research approved by the tribunal.

13.62 Medical research of the kind referred to in subsection (1)(a) of the definition of 'clinical research' clearly falls within section 5(1)(a) of the definition of 'health care' contained in the legislation. However, although the definition of 'clinical research' includes a trial of drugs that involves the giving of a placebo, the definition of 'health care' does not expressly include either 'approved clinical

1334 *Guardianship and Administration Act 2000* (Qld) sch 2 s 13; *Powers of Attorney Act 1998* (Qld) sch 2 s 13.

research' or a trial of drugs or techniques that may include the giving of a placebo. As a result, it is not clear that the giving of a placebo (such as the injection of a saline solution) to a research participant amounts to the health care of the participant. In terms of the definition of health care in schedule 2 of the legislation, it is not strictly 'care or treatment of, or a service or a procedure … to diagnose, maintain, or treat the adult's physical or mental condition'.

13.63 The *Guardianship Act 1987* (NSW), which also provides for the approval by the Tribunal of clinical trials, avoids this problem by expressly including the giving of a placebo in the definition of 'medical or dental treatment or treatment' in section 33(1) of the Act:

> ***medical or dental treatment*** or ***treatment*** means:
>
> (a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by or under the supervision of a medical practitioner, or
>
> (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist, or
>
> (c) any other act declared by the regulations to be treatment for the purposes of this Part,
>
> (and, in the case of treatment in the course of a clinical trial, is taken to include the giving of placebos to some of the participants in the trial), but does not include:
>
> (d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears), or
>
> (e) first-aid medical or dental treatment, or
>
> (f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (being a drug for which a prescription is not required and which is normally self-administered), or
>
> (g) any other kind of treatment that is declared by the regulations not to be treatment for the purposes of this Part. (emphasis added)

13-8 Should the definition of 'health care, of an adult' in schedule 2 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) be amended to add a further subsection to the effect that 'health care, of an adult, includes participation in approved clinical research'?

Chapter 14

The effect of an adult's objection to health care

INTRODUCTION

14.1 The Commission's terms of reference direct it, in reviewing the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), to review the law in relation to 'the ability of an adult with impaired capacity to object to receiving medical treatment'.[1335]

14.2 This chapter gives an overview of the current scheme under the Queensland guardianship legislation for dealing with the effect of an adult's objection to health care, and outlines approaches taken in other jurisdictions. It also raises for consideration specific issues arising under the legislation.

14.3 A scheme for the involuntary treatment of people who have a mental illness is also provided under the *Mental Health Act 2000* (Qld).[1336] The

---

1335 The terms of reference are set out in Appendix 1.

1336 See *Mental Health Act 2000* (Qld) ch 4. For the purposes of that Act, '***treatment***, of a person who has a mental illness, means anything done, or to be done, with the intention of having a therapeutic effect on the person's illness': *Mental Health Act 2000* (Qld) sch 2.

Commission's terms of reference do not extend to this separate regime and the *Mental Health Act 2000* (Qld) will not be dealt with in this chapter.

BACKGROUND

14.4 At common law, every person who has capacity for a particular health matter has the right to refuse health care for that matter. However, if an adult is found not to have capacity for a particular health care decision, generally, an objection by the adult to the health care can be overridden provided the health care is considered to be in the best interests of the adult.[1337]

14.5 The guardianship legislation establishes a scheme for decision-making by and for adults with impaired capacity. A direction about a future health matter or future special health matter may be made by an adult, while he or she has capacity, under an advance health directive.[1338] If an adult does not have an advance health directive (or one that deals with the particular health matter or special health matter) or if the advance health directive does not apply in the circumstances:

- a decision about a health matter may be made for the adult by a substitute decision-maker — that is, by a guardian appointed by the Tribunal, an attorney appointed under an enduring power of attorney or a statutory health attorney;[1339] and
- a decision about certain special health matters may be made by the Tribunal.[1340]

14.6 The *Guardianship and Administration Act 2000* (Qld) also authorises a health provider, in specified circumstances, to carry out health care without consent on an adult with impaired capacity.[1341]

14.7 A person or other entity who performs a function or exercises a power[1342] under the guardianship legislation for a matter in relation to an adult — in this context, a substitute decision-maker, the Tribunal or a health provider — must apply the General Principles and, for a health matter or special health matter, the Health Care Principle.[1343]

1337 See eg *State of Qld v D* [2004] 1 Qd R 426, where the Supreme Court, in the exercise of its *parens patriae* jurisdiction, authorised medical and surgical treatment of the adult.

1338 *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

1339 *Guardianship and Administration Act 2000* (Qld) s 66(3)–(5). Note that this section establishes a hierarchy of persons who may make a decision about a health matter.

1340 *Guardianship and Administration Act 2000* (Qld) s 65(4).

1341 *Guardianship and Administration Act 2000* (Qld) ss 63, 63A, 64.

1342 'Power' includes 'authority': *Acts Interpretation Act 1954* (Qld) s 36.

1343 *Guardianship and Administration Act 2000* (Qld) s 11(1); *Powers of Attorney Act 1998* (Qld) s 76.

14.8 The General Principles require the adult's views and wishes to be sought and taken into account, and require a power under the legislation to be exercised in the way that is least restrictive of the adult's rights.[1344]

14.9 The Health Care Principle requires a power for a health matter or special health matter to be exercised 'in the way least restrictive of the adult's rights' and requires the adult's views and wishes to be sought and taken into account in deciding whether the exercise of the power is appropriate.[1345] The Health Care Principle also acknowledges that it 'does not affect any right an adult has to refuse health care'.[1346]

14.10 Within this framework for decision-making, the *Guardianship and Administration Act 2000* (Qld) also deals with the effect of an adult's objection to health care.

THE LAW IN QUEENSLAND

Guardianship and Administration Act 2000 (Qld)

14.11 The *Guardianship and Administration Act 2000* (Qld) establishes a hierarchy in relation to who may make decisions for an adult with impaired capacity for a special health matter or a health matter. If an adult has impaired capacity for a special health matter or for a health matter and the adult has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.[1347] Accordingly, for health care that is carried out with consent (which is the usual situation), an objection to the health care that is made in an advance health directive has the effect that the matter must be dealt with in accordance with that direction and there is no scope for the Tribunal (for a special health matter) or a substitute decision-maker (for a health matter) to exercise a power for the matter — that is, to consent to the health care.

14.12 The *Guardianship and Administration Act 2000* (Qld) has a number of provisions that govern the effect of an adult's objection to particular types of health care or to health care provided in particular circumstances. Some of these provisions deal with health care carried out with consent; others deal with health care that, in specified circumstances, may be carried out without consent:

1344 *Guardianship and Administration Act 2000* (Qld) sch 1 s 7(3)(b)–(c), (4); *Powers of Attorney Act 1998* (Qld) sch 1 s 7(3)(b)–(c), (4).

1345 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)(a), (2)(a); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)(a), (2)(a).

1346 *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(4); *Powers of Attorney Act 1998* (Qld) sch 1 s 12(4).

1347 *Guardianship and Administration Act 2000* (Qld) ss 65(1)–(2), 66(1)–(2).

- health care generally (section 67);
- specific types of special health care — donation of tissue (section 69) and special medical research or experimental health care (section 72);
- urgent health care without consent (section 63);
- withholding or withdrawal of a life-sustaining measure without consent in an acute emergency (section 63A); and
- minor and uncontroversial health care without consent (section 64).

14.13 The Act provides that, in certain circumstances, the adult's objection is effective to prevent the health care from being consented to or, where consent is not required for the health care, to prevent the health care from being carried out without consent. A table summarising the effect of an objection to different types of health care is set out at [14.79] of this chapter.

Definition of 'object'

14.14 The term 'object, by an adult in relation to health care,' is defined in the *Guardianship and Administration Act 2000* (Qld) as follows:[1348]

> ***object***, by an adult, to health care means—
>
> (a) the adult indicates the adult does not wish to have the health care; or
>
> (b) the adult previously indicated, in similar circumstances, the adult did not then wish to have the health care and since then the adult has not indicated otherwise.
>
> *Example—*
>
> An indication may be given in an enduring power of attorney or advance health directive or in another way, including, for example, orally or by conduct.

Objection to health care generally

14.15 The situation may sometimes arise where a substitute decision-maker, exercising a power for a health matter, or the Tribunal, exercising a power for a special health matter, consents to particular health care to which the adult objects. The general provision governing the effect of the adult's objection to the health care is section 67 of the *Guardianship and Administration Act 2000* (Qld). It provides:

1348 *Guardianship and Administration Act 2000* (Qld) sch 4.

67 Effect of adult's objection to health care

(1) Generally, the exercise of power for a health matter or special health matter is ineffective to give consent to health care of an adult if the health provider knows, or ought reasonably to know, the adult objects to the health care.

Editor's note—

> ***Object*** is defined in schedule 4 (Dictionary). Note also the *Powers of Attorney Act 1998*, section 35(2)(a) (Advance health directives) provides that 'by an advance health directive [a] principal may give a direction—
>
> (a) consenting, in the circumstances specified, to particular future health care of the principal when necessary and despite objection by the principal when the health care is provided'.[1349]

(2) However, the exercise of power for a health matter or special health matter is effective to give consent to the health care despite an objection by the adult to the health care if—

(a) the adult has minimal or no understanding of 1 of the following—

(i) what the health care involves;

(ii) why the health care is required; and

(b) the health care is likely to cause the adult—

(i) no distress; or

(ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care.

(3) Subsection (2) does not apply to the following health care—

(a) removal of tissue for donation;

(b) participation in special medical research or experimental health care or approved clinical research. (note added)

14.16 Under section 67(1) an adult's objection to health care will generally be effective if the health provider knows, or ought reasonably to know, that the adult objects to the health care.

1349 The reference in the Editor's note to s 35(2)(a) of the *Powers of Attorney Act 1998* (Qld) is potentially confusing, as it could suggest that s 35(2)(a) is relevant to the operation of s 67(1) of the *Guardianship and Administration Act 2000* (Qld). However, s 67 of the *Guardianship and Administration Act 2000* (Qld) deals with the effect of an adult's objection to health care where consent is given under an 'exercise of power' for the health matter or special health matter. Such consent may be given by a substitute decision-maker (that is — by a guardian, attorney, statutory health attorney in that order) for a health matter or by the Tribunal for a special health matter. As explained at [14.11] above, if the adult has made an advance health directive giving a direction about the special health matter or health matter (including a direction consenting to future health care under s 35(2)(a) of the *Powers of Attorney Act 1998* (Qld)), the matter may only be dealt with under the direction: *Guardianship and Administration Act 2000* (Qld) ss 65(2), 66(2).

14.17 In order for a substitute decision-maker's consent to override the adult's objection to the health care, the test in section 67(2) must be satisfied — that is:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

14.18 The first limb of this test focuses on the current understanding of the adult, rather than on the understanding of the adult when the objection was made.[1350]

14.19 This test was formulated by the Queensland Law Reform Commission in its original 1996 Report.[1351]

14.20 In that Report, the Commission recommended a provision to the effect of what is now section 67 of the *Guardianship and Administration Act 2000* (Qld). The Commission referred to the earlier discussion of this issue in its Draft Report and stated:[1352]

> The Commission also expressed the view that the legislation should provide for the situation where the patient indicates in any way, or has previously indicated, in similar circumstances, that he or she does not wish the proposed treatment to be carried out. The Commission considered that, generally, a consent given under its proposed legislation on behalf of a person whose decision-making capacity is impaired should be ineffective if the treatment provider is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment.

14.21 However, the Commission did not propose that the adult's objection should be paramount in all circumstances. It further recommended that an objection should be able to be overridden if the patient has little or no understanding of the proposed treatment and if 'the treatment is likely to cause the patient no distress, or if it may cause the patient some degree of distress which is temporary and which is outweighed by the benefit of the treatment to

---

1350 As explained at [14.11] above, ss 65(2) and 66(2) of the *Guardianship and Administration Act 2000* (Qld) provide respectively that, if an adult has impaired capacity for a special health matter or health matter and has made an advance health directive giving a direction about the special health matter or health matter, the matter may only be dealt with under that direction. Accordingly, if the advance health directive contains an objection to particular health care, the matter must be dealt with in accordance with that direction and there is no scope for the Tribunal to exercise a power for the special health matter or for a substitute decision-maker to exercise a power for the health matter. As a result, s 67 has no application in these circumstances. In practical terms, s 67 therefore deals with the effect of an objection made other than in an advance health directive.

1351 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, 362.

1352 Ibid 361–2.

the patient'.[1353] The Commission explained how this test was intended to operate in practice:[1354]

> A doctor would have to consider, firstly, whether the patient had more than a minimal understanding of the proposed treatment. If so, the patient's objection would override substituted consent given by a decision-maker, and the consent would be ineffective. If not, the doctor would then have to consider whether the proposed treatment would be likely to cause the patient distress. If the proposed treatment would be likely to cause the patient a degree of distress that would be more than temporary or that would outweigh the benefit of the proposed treatment to the patient, the patient's objection would override the substituted consent given by a decision-maker, and the consent would be ineffective.
>
> In other words, where a patient objects to proposed treatment, a substituted consent for that treatment will be effective only if the patient has minimal or no understanding of what the health care entails and if the proposed treatment is likely to cause the patient no distress or only a degree of temporary distress which is outweighed by the benefit of the treatment to the patient.

14.22 The rationale for enabling the adult's objection to be overridden in some circumstances is that, if the adult has minimal or no understanding of what is proposed and the adult's objection prevails, it might mean that the adult would not receive necessary treatment.[1355]

14.23 In *Re L*,[1356] the Tribunal considered the test in section 67(2)(a) of the *Guardianship and Administration Act 2000* (Qld):[1357]

> On a first reading it would seem that two different standards are contemplated by the term "capacity" in Schedule 4 and "understand" in section 67(2). It may be possible for an adult to lack "capacity" as defined in Schedule 4, yet have an "understanding" of the kind referred to in section 67(2).

14.24 However, in the later decision of *Re CJ,*[1358] where the adult was refusing treatment for schizophrenia and diabetes, the Tribunal equated the minimal or no understanding test in section 67(2)(a) with the general test for a lack of capacity under the legislation:[1359]

> [33] Section 67 essentially says a consent can prevail over an objection if the person with impaired capacity has 'minimal or no understanding' of 'what the health care involves' or 'why the health care is required'. What does this mean? Does this section import a different test for capacity to that set out in the other sections of the Act? At first glance it would seem to imply that the test

1353 Ibid 362–3.

1354 Ibid.

1355 Ibid.

1356 See *Re L* [2005] QGAAT 13.

1357 Ibid [55].

1358 [2006] QGAAT 11.

1359 *Re CJ* [2006] QGAAT 11, [31]–[35], [39]–[41]. See also *Re Bridges* [2001] 1 Qd R 574.

> for capacity in the Act is not needed to be fulfilled in this instance, but that a lower test of capacity is required which is simply that you need an understanding of the health care and why it's required, rather than the stricter test for capacity in the Act which provides that to have capacity a person must understand not just the decision but the nature and effect of decisions, be able to freely and voluntarily make the decision and also communicate the decision.
>
> [34] … The Tribunal agrees that the section is not clearly expressed but is satisfied that the section does not impose a different test for capacity but simply restates in a different way the test for capacity as set out in the rest of the Act. The Tribunal bases its view in this regard by relying on the use of the word "understanding" in Section 67. It is the use of this word which imports the same test for capacity because understanding means, in the Australian Concise Oxford Dictionary, to "perceive the meaning of …" or "perceive the significance or explanation or cause of". In the context of the Act "understanding" connotes an ability to comprehend the nature, purpose and effect of the proposed health care. It implies a capacity to make an informed decision. The Tribunal is satisfied that understanding in Section 67 means understanding the nature and effect of the decision. That is the consequences of a decision and all its ramifications.
>
> [35] … what is required in Section 67 to validly object is not simply an ability to technically know what the procedure involves and what it is used for but an ability to understand the true nature and effect of a decision.
>
> …
>
> [39] If section 67 applies the same test as set out in the rest of the Act what is the point of the section? The true purpose of section 67 is to essentially operate as a warning bell. The right of a person to make decisions for themselves is a highly prized right which is recognised in the Act, not just in section (s 6(a)) but in the General Principles in Schedule1. Because autonomy in decision making is such a recognised right if a person objects to treatment a substitute decision maker (a guardian in this case) has to stop and essentially double check that they should proceed with authorising the treatment.

14.25 On the view expressed in *Re CJ*, the test in section 67(2)(a) will always be satisfied, as an adult will only be subject to section 67 if he or she has impaired capacity for the health matter or special health matter. Accordingly, for a consent to override an adult's objection, it is effectively necessary only to satisfy the test in section 67(2)(b) — namely, that the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

14.26 This view differs from the approach explained by the Commission in its original 1996 Report. Further, it does not address the fact that the *Guardianship and Administration Act 2000* (Qld) appears to distinguish between the concepts of 'impaired capacity' and 'minimal or no understanding'. For example, section 63 refers in subsection (1)(a) to the requirement that the adult has 'impaired capacity' for the health matter concerned and in subsection (3)(a) to the further requirement that the adult has 'minimal or no understanding' of specified matters.

Objection to special health care

14.27 Section 65 of the *Guardianship and Administration Act 2000* (Qld) provides that, if an adult has impaired capacity for a special health matter and has made an advance health directive giving a direction about the matter, the matter may only be dealt with under the direction.[1360]

14.28 Two provisions of the *Guardianship and Administration Act 2000* (Qld) — sections 69 and 72 — deal with the effect of an adult's objection to specific types of special health care. Although sections 69 and 72 refer simply to an 'objection', because of the operation of section 65, they are confined in practical terms to the effect of an objection made other than in an advance health directive.

Removal and donation of tissue

14.29 Under the guardianship legislation, the removal of tissue from an adult with impaired capacity, while alive, for donation to another person is special health care.[1361] The 'removal of tissue for donation' is defined in the following terms:[1362]

> **8 Removal of tissue for donation**
>
> (1) For an adult, ***removal of tissue for donation*** to someone else includes removal of tissue from the adult so laboratory reagents, or reference and control materials, derived completely or partly from pooled human plasma may be given to the other person.
>
> (2) ***Tissue*** is—
>
> (a) an organ, blood or part of a human body; or
>
> (b) a substance that may be extracted from an organ, blood or part of a human body.

14.30 This would include, for example, the removal, for donation, of an organ, such as a kidney, or the removal of bone marrow.

14.31 If, while an adult had capacity for the special health matter, he or she made an advance health directive giving a direction about the removal and donation of tissue,[1363] the matter may only be dealt with under that direction.[1364] If there is no relevant advance health directive, the Tribunal may make an order

---

1360 *Guardianship and Administration Act 2000* (Qld) s 65(1)–(2). See the discussion of s 65 at [14.11] above.

1361 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7(a); *Powers of Attorney Act 1998* (Qld) sch 2 s 7(a). The removal and donation of tissue after the death of a person is regulated by the *Transplantation and Anatomy Act 1979* (Qld) pt 3.

1362 *Guardianship and Administration Act 2000* (Qld) sch 2 s 8(2); *Powers of Attorney Act 1998* (Qld) sch 2 s 8(2).

1363 *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

1364 *Guardianship and Administration Act 2000* (Qld) s 65(2).

consenting to the removal and donation of tissue,[1365] and the matter may only be dealt with under that order.[1366]

14.32 Section 69 of the *Guardianship and Administration Act 2000* (Qld), which deals with the removal of tissue for donation, provides:

> **69 Donation of tissue**
>
> (1) The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to removal of tissue from the adult for donation to another person only if the tribunal is satisfied—
>
> (a) the risk to the adult is small; and
>
> (b) the risk of failure of the donated tissue is low; and
>
> (c) the life of the proposed recipient would be in danger without the donation; and
>
> (d) no other compatible donor is reasonably available; and
>
> (e) there is, or has been, a close personal relationship between the adult and proposed recipient.
>
> (2) The tribunal may not consent if the adult objects to the removal of tissue for donation.
>
> *Editor's note—*
>
> Section 67, which effectively enables an adult's objection to be overridden in some cases, does not apply.
>
> (3) If the tribunal consents to removal of tissue for donation, the tribunal's order must specify the proposed recipient.

14.33 Section 69(1) sets out the circumstances in which the Tribunal may consent to the removal of tissue from an adult for the purpose of donation. Importantly, section 69(2) provides that the Tribunal 'may not consent if the adult objects to the removal of tissue for donation'. The effectiveness of the adult's objection does not depend on the adult's level of understanding.[1367] The giving of what is, in effect, an absolute power of veto to the adult reflects the fact that the removal of tissue from the adult for donation to another person is not health care undertaken for the benefit (or at least for the direct benefit) of the adult.

1365 *Guardianship and Administration Act 2000* (Qld) ss 68(1), 69(1).

1366 *Guardianship and Administration Act 2000* (Qld) s 65(4). Guardians, attorneys and statutory health attorneys do not have the power to consent to the removal and donation of tissue as their powers apply in relation to health matters and do not extend to special health matters: see *Guardianship and Administration Act 2000* (Qld) ss 65–66.

1367 Cf *Guardianship and Administration Act 2000* (Qld) s 67(2).

Special medical research or experimental health care

14.34 Under the guardianship legislation, the participation by an adult with impaired capacity in special medical research or experimental health care is special health care.[1368] 'Special medical research or experimental health care' is defined in the following terms:[1369]

> **12 Special medical research or experimental health care**
>
> (1) ***Special medical research or experimental health care***, for an adult, means—
>
> (a) medical research or experimental health care relating to a condition the adult has or to which the adult has a significant risk of being exposed; or
>
> (b) medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had.

14.35 However, 'special medical research or experimental health care' does not include psychological research or approved clinical research.[1370]

14.36 If, while an adult had capacity for the special health matter, he or she made an advance health directive giving a direction about his or her participation in special medical research or experimental health care,[1371] the matter may only be dealt with under that direction.[1372] If there is no relevant advance health directive, the Tribunal may make an order consenting to the adult's participation in such research or health care,[1373] and the matter may only be dealt with under that order.[1374]

1368 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7(d); *Powers of Attorney Act 1998* (Qld) sch 2 s 7(d).

1369 *Guardianship and Administration Act 2000* (Qld) sch 2 s 12(1); *Powers of Attorney Act 1998* (Qld) sch 2 s 12(1).

1370 'Approved clinical research' is clinical research approved by the Tribunal: *Guardianship and Administration Act 2000* (Qld) sch 2 s 13(2); *Powers of Attorney Act 1998* (Qld) sch 2 s 13(2). 'Clinical research' is defined as (*Guardianship and Administration Act 2000* (Qld) sch 2 s 13(1); *Powers of Attorney Act 1998* (Qld) sch 2 s 13(1)):

> (a) medical research intended to diagnose, maintain or treat a condition affecting the participants in the research; or
>
> (b) a trial of drugs or techniques involving the carrying out of health care that may include the giving of placebos to some of the participants in the trial.

1371 *Powers of Attorney Act 1998* (Qld) s 35(1)(a).

1372 *Guardianship and Administration Act 2000* (Qld) s 65(2).

1373 *Guardianship and Administration Act 2000* (Qld) ss 68(1), 72(1).

1374 *Guardianship and Administration Act 2000* (Qld) s 65(4). Guardians, attorneys and statutory health attorneys do not have the power to consent to the adult's participation in special medical research or experimental health care, as their powers apply in relation to health matters and do not extend to special health matters: see *Guardianship and Administration Act 2000* (Qld) ss 65–66.

14.37 Section 72(1) and (2) of the *Guardianship and Administration Act 2000* (Qld) sets out the circumstances in which the Tribunal may consent to an adult's participation in special medical research or experimental health care. Section 72(3) provides:

> **72 Special medical research or experimental health care**
>
> …
>
> (3) The tribunal may not consent to the adult's participation in special medical research or experimental health care if—
>
> (a) the adult objects to the special medical research or experimental health care; or
>
> (b) the adult, in an enduring document, indicated unwillingness to participate in the special medical research or experimental health care.

14.38 Consent to an adult's participation in special medical research or experimental health care is considered separately in Chapter 13 of this Discussion Paper.

Other types of special health care

14.39 If the adult has not made an advance health directive giving a relevant direction about the matter, the effect of an adult's objection to the other types of special health care to which the Tribunal may consent[1375] — sterilisation and termination of pregnancy[1376] — is governed by section 67 of the *Guardianship and Administration Act 2000* (Qld).

14.40 An adult's objection to either of these types of special health care will generally make the Tribunal's consent to the health care ineffective if the health provider knows, or ought reasonably to know, that the adult objects to the health care.[1377]

14.41 However, the Tribunal's consent will be effective, despite an objection by the adult, if:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and

---

1375 The Tribunal may, by order, consent to special health care, other than electroconvulsive therapy or psychosurgery: *Guardianship and Administration Act 2000* (Qld) s 68(1).

1376 See *Guardianship and Administration Act 2000* (Qld) sch 2 s 7(b)–(c); *Powers of Attorney Act 1998* (Qld) sch 2 s 7(b)–(c).

1377 *Guardianship and Administration Act 2000* (Qld) s 67(1).

- the health care is likely to cause the adult either no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.[1378]

Objection to urgent health care without consent

14.42 Section 63 of the *Guardianship and Administration Act 2000* (Qld) provides for the circumstances in which urgent health care (other than special health care or the withholding or withdrawal of a life-sustaining measure) may be carried out without consent. It provides:

> **63 Urgent health care**
>
> (1) Health care, other than special health care, of an adult may be carried out without consent if the adult's health provider reasonably considers—
>
> (a) the adult has impaired capacity for the health matter concerned; and
>
> (b) either—
>
> (i) the health care should be carried out urgently to meet imminent risk to the adult's life or health; or
>
> (ii) the health care should be carried out urgently to prevent significant pain or distress to the adult and it is not reasonably practicable to get consent from a person who may give it under this Act or the *Powers of Attorney Act 1998*.
>
> (2) However, the health care mentioned in subsection (1)(b)(i) may not be carried out without consent if the health provider knows the adult objects to the health care in an advance health directive.
>
> (3) However, the health care mentioned in subsection (1)(b)(ii) may not be carried out without consent if the health provider knows the adult objects to the health care unless—
>
> (a) the adult has minimal or no understanding of 1 or both of the following—
>
> (i) what the health care involves;
>
> (ii) why the health care is required; and
>
> (b) the health care is likely to cause the adult—
>
> (i) no distress; or
>
> (ii) temporary distress that is outweighed by the benefit to the adult of the health care.

1378 *Guardianship and Administration Act 2000* (Qld) s 67(2).

(4) The health provider must certify in the adult's clinical records as to the various things enabling the health care to be carried out because of this section.

(5) In this section—

health care, of an adult, does not include withholding or withdrawal of a life-sustaining measure for the adult.

14.43 Generally, section 63(1) authorises a health provider to carry out health care without consent if he or she reasonably considers that the adult has impaired capacity for the relevant health matter and either:

- the health care should be carried out urgently to meet imminent risk to the adult's life or health; or
- the health care should be carried out urgently to prevent significant pain or distress to the adult and it is not reasonably practicable to get consent from a person who may give it under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

14.44 Section 63(2) and (3) deals with the effect of an adult's objection to the health care in these circumstances of emergency.

14.45 Section 63(2) applies if the health provider knows that the adult objects to the health care in an advance health directive. In that situation, section 63 does not authorise the carrying out, without consent, of the health care mentioned in section 63(1)(b)(i) — that is, health care carried out urgently to meet imminent risk to the adult's life or health.

14.46 However, if the adult's objection to the health care is made other than in an advance health directive, the objection has no effect on the health provider's authority to carry out the health care without consent under section 63(1)(b)(i) to meet imminent risk to the adult's life or health.

14.47 Section 63(3) limits the circumstances in which health care may be carried out urgently, without consent, to prevent significant pain or distress to the adult. If the adult objects to the health care (whether the objection is made in an advance health directive or otherwise), the health care may be carried out only if:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the health care.

14.48 Although the Commission recommended a provision to the general effect of section 63 in its original 1996 Report, in dealing with the effect of an adult's objection to urgent health care, it did not distinguish between, on the one

hand, health care to meet imminent risk to the adult's life or health and, on the other hand, health care to prevent significant pain or distress to the adult. The Commission's recommended provision was in the following terms:[1379]

Urgent health care

146.(1) Health care (other than special consent health care) of an adult may be carried out without consent if the adult's health care provider considers—

(a) the adult has impaired decision-making capacity for a decision about the health care; and

(b) the health care should be urgently carried out—

(i) to meet imminent risk to the adult's life or health; or

(ii) to prevent significant pain or distress to the adult; and

(c) it is not reasonably practicable to get consent from a person who may give it under this Act.

(2) However, the health care may not be carried out without consent if the adult objects to the health care unless—

(a) the adult has minimal or no understanding of 1 or both of the following—

(i) what the health care involves;

(ii) why the health care is required; and

(b) the health care is likely to cause the adult—

(i) no distress; or

(ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care.

(3) The health care provider must certify in the adult's clinical records as to the various things enabling the health care to be carried out because of this section.

(4) A health care provider may use the minimum force that is necessary and reasonable to carry out the proposed health care.

1379 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 cl 146.

Objection to the withdrawal or withholding of a life-sustaining measure, without consent, in an acute emergency

14.49 Section 63A of the *Guardianship and Administration Act 2000* (Qld) deals with the circumstances in which a life-sustaining measure may be withheld or withdrawn without consent. It provides:

> **63A Life-sustaining measure in an acute emergency**
>
> (1) A life-sustaining measure may be withheld or withdrawn for an adult without consent if the adult's health provider reasonably considers—
>
> (a) the adult has impaired capacity for the health matter concerned; and
>
> (b) the commencement or continuation of the measure for the adult would be inconsistent with good medical practice; and
>
> (c) consistent with good medical practice, the decision to withhold or withdraw the measure must be taken immediately.
>
> (2) However, the measure may not be withheld or withdrawn without consent if the health provider knows the adult objects to the withholding or withdrawal.
>
> *Editor's note—*
>
> ***Object*** is defined in schedule 4 (Dictionary).
>
> (3) The health provider must certify in the adult's clinical records as to the various things enabling the measure to be withheld or withdrawn because of this section.
>
> (4) For this section, artificial nutrition and hydration is not a ***life-sustaining measure***.

14.50 Section 63A(2) provides that a life-sustaining measure may not be withheld or withdrawn without consent if the health provider knows that the adult objects to the withholding or withdrawal. The effectiveness of the adult's objection does not depend on the adult's level of understanding or the manner in which the objection is made.

14.51 Section 63A, and the effect of an adult's objection, are considered in Chapter 12 of this Discussion Paper.

Objection to minor and uncontroversial health care without consent

14.52 Section 64 of the *Guardianship and Administration Act 2000* (Qld) authorises a health provider, in specified circumstances, to carry out minor and uncontroversial health care without consent. However, the health provider is not authorised to carry out the health care without consent if he or she knows,

or could reasonably be expected to know, that the adult objects to the health care.[1380]

14.53 Section 64 provides:

> **64 Minor, uncontroversial health care**
>
> (1) Health care, other than special health care, of an adult may be carried out without consent if the adult's health provider—
>
> (a) reasonably considers the adult has impaired capacity for the health matter concerned; and
>
> (b) reasonably considers the health care is—
>
> (i) necessary to promote the adult's health and wellbeing; and
>
> (ii) of the type that will best promote the adult's health and wellbeing; and
>
> (iii) minor and uncontroversial; and
>
> (c) does not know, and can not reasonably be expected to know, of—
>
> (i) a decision about the health care made by a person who is able to make the decision under this Act or the *Powers of Attorney Act 1998*; or
>
> (ii) any dispute among persons the health provider reasonably considers have a sufficient and continuing interest in the adult about—
>
> (A) the carrying out of the health care; or
>
> (B) the capacity of the adult for the health matter.
>
> *Examples of minor and uncontroversial health care mentioned in paragraph (b)(iii)—*
>
> • the administration of an antibiotic requiring a prescription
>
> • the administration of a tetanus injection
>
> (2) However, the health care may not be carried out without consent if the health provider knows, or could reasonably be expected to know, the adult objects to the health care.
>
> (3) The health provider must certify in the adult's clinical records as to the various things enabling the health care to be carried out because of this section.

1380 *Guardianship and Administration Act 2000* (Qld) s 64(2).

14.54 If an adult objects to the carrying out of minor and uncontroversial health care, it does not mean that the adult will necessarily be deprived of that health care. It simply means that the health care cannot be carried out without consent under section 64. In that situation, the health provider will need to obtain consent from a substitute decision-maker. The effect of the adult's objection on any purported consent by the substituted decision-maker will then be governed by section 67.

THE LAW IN OTHER JURISDICTIONS

New South Wales

Health care generally

14.55 The guardianship legislation in New South Wales contains a provision that deals with the effect of an adult's objection to medical or dental treatment. Section 46 of the *Guardianship Act 1987* (NSW) provides:[1381]

> **46 Effect of consent**
>
> (1) Subject to subsections (2) and (3), a consent given under this Part in respect of the carrying out of medical or dental treatment on a patient to whom this Part applies has effect:
>
> (a) as if the patient had been capable of giving consent to the carrying out of the treatment, and
>
> (b) as if the treatment had been carried out with the patient's consent.
>
> (2) A consent given by a person responsible for, or the guardian of, the patient has no effect:
>
> (a) if the person carrying out or supervising the proposed treatment is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment, or
>
> (b) if the proposed treatment is to be carried out for any purpose other than that of promoting or maintaining the health and well-being of the patient.
>
> (3) A consent given by the guardian of the patient has effect despite any objection made by a patient to the carrying out of the treatment if the guardian has consented to that treatment in accordance with the authority of the Tribunal under section 46A.

1381 Section 46 of the *Guardianship Act 1987* (NSW) formed the basis for s 67 of the *Guardianship and Administration Act 2000* (Qld): 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, 362, nn 1045, 1046; 368.

(4) For the purposes of this section, an objection by a patient to the carrying out of proposed medical or dental treatment is to be disregarded if:

(a) the patient has minimal or no understanding of what the treatment entails, and

(b) the treatment will cause the patient no distress or, if it will cause the patient some distress, the distress is likely to be reasonably tolerable and only transitory.

(5) Nothing in this Part precludes the Tribunal, a person responsible or a guardian from giving consent to the carrying out on a patient to whom this Part applies of medical or dental treatment specifically excluded from the definition of that expression in section 33(1). This section applies to any such consent as if that treatment were not excluded from that definition.

14.56 Section 46 of the *Guardianship Act 1987* (NSW) is supplemented by section 46A of that Act, which empowers the New South Wales Guardianship Tribunal to give power to a guardian to override an adult's objection to health care. Section 46A provides:

46A Power of guardian to override patient's objection to treatment when authorised by the Tribunal

(1) The Tribunal may confer on the guardian of a patient to whom this Part applies authority to override the patient's objection to the carrying out on the patient of major or minor treatment.

(2) The Tribunal may confer such an authority only at the request or with the consent of the guardian and only if it is satisfied that any such objection will be made because of the patient's lack of understanding of the nature of, or reason for, the treatment.

(3) The Tribunal may at any time:

(a) impose conditions or give directions as to the exercise of such an authority, or

(b) revoke such an authority.

(4) The guardian may exercise such an authority only if satisfied that the proposed treatment is manifestly in the best interests of the patient.

Urgent and minor health care without consent

14.57 The New South Wales legislation provides that, in specified circumstances, urgent medical and dental treatment and minor treatment may be carried out without consent. Section 37 of the *Guardianship Act 1987* (NSW) provides:

37 When treatment may be carried out without any such consent

(1) Medical or dental treatment may be carried out on a patient to whom this Part applies without consent given in accordance with this Part if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency:

(a) to save the patient's life, or

(b) to prevent serious damage to the patient's health, or

(c) except in the case of special treatment—to prevent the patient from suffering or continuing to suffer significant pain or distress.

(2) Minor treatment may (subject to subsection (3)) also be carried out on a patient to whom this Part applies without any consent given in accordance with this Part if:

(a) there is no person responsible for the patient, or

(b) there is such a person but that person either cannot be contacted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment.

(3) The medical practitioner or dentist carrying out, or supervising the carrying out of, minor treatment in accordance with subsection (2) is required to certify in writing in the patient's clinical record that:

(a) the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being, and

(b) the patient does not object to the carrying out of the treatment.

14.58 Although minor treatment may be carried out without consent only if the patient does not object, there is no similar limitation to carrying out urgent medical or dental treatment without consent.

Tasmania

14.59 Tasmania also has a provision similar to section 37 of the *Guardianship Act 1987* (NSW). Section 41 of the *Guardianship and Administration Act 1995* (Tas) provides:

41 Medical or dental treatment without consent

(1) Where—

(a) it is proposed to carry out any medical or dental treatment which is not special treatment on a person to whom this Part applies; and

(b) there is no person responsible for that person; and

(c) the treatment is necessary and is the form of treatment that will most successfully promote that person's health and well-being; and

(d) that person does not object to the carrying out of the treatment—

it is lawful, subject to subsection (2), for the medical or dental treatment to be carried out on that person without consent under this Division.

(2) The regulations may provide that in such cases as are specified in the regulations medical or dental treatment may not be carried out on a person to whom this Part applies without consent under this Division.

(3) A medical practitioner or dentist who carries out or supervises any medical or dental treatment under subsection (1) without the consent of the relevant person must certify in the clinical records relating to the treatment that—

(a) the treatment is necessary and is the form of treatment that will most successfully promote that person's health and wellbeing; and

(b) the person does not object to the carrying out of the treatment.

Other Australian jurisdictions

14.60 The guardianship legislation in the remaining Australian jurisdictions does not contain specific provisions regarding the effect of an adult's objection to health care.

ISSUES FOR CONSIDERATION

Objection to health care generally

14.61 Under section 67 of the *Guardianship and Administration Act 2000* (Qld), an adult's objection to health care will prevail unless:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care.

14.62 In the absence of this provision, the General Principles and the Health Care Principle would, in any event, require a person making a health care

decision for the adult to seek and take into account the adult's views and wishes.[1382]

14.63 This raises the issue of whether the legislation should provide, as it presently does, that an adult's objection will prevail in the specified circumstances or whether an adult's objection should simply be taken into account in the decision-making process. The Commission notes that the absolute effect given to an adult's objection in the specified circumstances differs from the approach taken under the legislation in relation to other types of decisions, where the adult's views and wishes must be taken into account, but do not determine the particular issue.

14.64 Section 67 gives maximum effect to the autonomy of an adult who has more than minimal understanding of the relevant matters. However, it also has the effect, in those circumstances, of giving the final decision-making power to an adult who necessarily has impaired capacity for the relevant health matter or special health matter.[1383]

14.65 This means that, in the specified circumstances, neither a substitute decision-maker nor the Tribunal is capable of consenting to the health care for the adult.[1384] In that situation, only the Supreme Court, exercising its *parens patriae* jurisdiction, may authorise the health care.[1385]

14.66 As mentioned earlier, section 46A of the *Guardianship Act 1987* (NSW) empowers the NSW Guardianship Tribunal to confer on a guardian the authority to override the adult's objection to the medical or dental treatment, even though the adult has sufficient understanding of the proposed health care to prevent it from being carried out under section 46 of that Act.[1386] The Tribunal may confer such authority only at the request, or with the consent of, the guardian and only if it is satisfied that the objection will be made because of the adult's lack of understanding of the nature of, or reason for, the treatment.[1387] The guardian may exercise the power only if he or she is satisfied that the proposed treatment is manifestly in the best interests of the adult.[1388]

1382 *Guardianship and Administration Act 2000* (Qld) sch 1 ss 7(3)(b), (4), 12(2)(a); *Powers of Attorney Act 1998* (Qld) sch 1 ss 7(3)(b), (4), 12(2)(a).

1383 As explained at n 1350 above, the effect of s 66(2) of the *Guardianship and Administration Act 2000* (Qld) is that, in practical terms, s 67 deals with the effect of an objection made other than in an advance health directive.

1384 See *Re L* [2005] QGAAT 13, [81].

1385 *Guardianship and Administration Act 2000* (Qld) s 240 provides that the Act does not affect the court's inherent jurisdiction, including its *parens patriae* jurisdiction.

1386 *Guardianship Act 1987* (NSW) s 46A is set out at [14.56] above.

1387 *Guardianship Act 1987* (NSW) s 46A(2).

1388 *Guardianship Act 1987* (NSW) s 46A(4).

14.67 The effect of the New South Wales legislation is that, unlike the position in Queensland, it is not necessary to apply to the Supreme Court to authorise the health care; an application to the Tribunal will suffice.

14.68 On one view, by limiting the circumstances in which the objection of an adult with more than minimal understanding of the relevant matters may be overridden, section 67 of the *Guardianship and Administration Act 2000* (Qld) provides a greater safeguard for the adult against unwanted medical intervention. However, on another view, by making the adult's objection paramount in the relevant circumstances, the adult may be deprived of appropriate health care.

14.69 If it is considered desirable to have greater flexibility to override an adult's objection to health care, one approach is for the *Guardianship and Administration Act 2000* (Qld) to be amended to include a provision to the effect of section 46A of the *Guardianship Act 1987* (NSW). Another approach would be to amend the *Guardianship and Administration Act 2000* (Qld) so that it does not provide that, in specified circumstances, the adult's objection prevails. If such a change were made, the adult's objection would still be a matter to be taken into account by the substitute decision-maker or the Tribunal in deciding whether to consent to health care for the adult.

14-1 Is it appropriate that section 67 of the *Guardianship and Administration Act 2000* (Qld) provides that, in relevant circumstances, an adult's objection to health care prevails over a substitute decision-maker's or the Tribunal's consent?

14-2 If yes to Question 14-1, should the adult's objection to health care prevail unless the matters specified in section 67(2)(a) and (b) are satisfied — namely, that:

(a) the adult has minimal or no understanding of one or both of the following—

(i) what the health care involves;

(ii) why the health care is required; and

(b) the health care is likely to cause the adult:

(i) no distress; or

(ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care?

14-3 Alternatively, should section 67 of the *Guardianship and Administration Act 2000* (Qld) specify different circumstances in which the adult's objection to health care should prevail? If so, under what circumstances should the adult's objection prevail?

14-4 If no to question 14-1, should the *Guardianship and Administration Act 2000* (Qld) be amended so that, although an adult's views and wishes about the health care are to be sought and taken into account by a substitute decision-maker or the Tribunal in deciding whether to consent to the health care, the adult's objection to the health care does not determine the issue?

Objection to urgent health care without consent

14.70 As explained earlier in this chapter, section 63 of the *Guardianship and Administration Act 2000* (Qld) authorises a health provider to carry out health care, other than special health care or the withholding or withdrawal of a life-sustaining measure, without consent if he or she reasonably considers:

- that the adult has impaired capacity for the health matter concerned; and
- either the health care should be carried out urgently:
  - to meet imminent risk to the adult's life or health; or
  - to prevent significant pain or distress to the adult and it is not reasonably practicable to get consent from a person who may give it under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld).

14.71 Under section 63(2), if the health provider knows that the adult objects to the health care in an advance health directive, the health care may not be carried out urgently, without consent, to meet imminent risk to the adult's life or health.

14.72 Under section 63(3), if the health provider knows that the adult objects to the health care (whether the objection is made in an advance health directive or otherwise), the health care may be carried out urgently, without consent, to prevent significant pain or distress to the adult if:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the health care.

14-5 Is it appropriate that an adult's objection to the carrying out of urgent health care without consent to meet imminent risk to the adult's life or health is effective only if the objection is made in an advance health directive?

14-6 Is it appropriate that, despite an adult's known objection to particular health care, the health care may be carried out urgently without consent to prevent significant pain or distress to the adult if:

(a) the adult has minimal or no understanding of one or both of the following:

(i) what the health care involves;

(ii) why the health care is required; and

(b) the health care is likely to cause the adult:

(i) no distress; or

(ii) temporary distress that is outweighed by the benefit to the adult of the health care?

Objection to minor and uncontroversial health care without consent

14.73 As explained earlier in this chapter, section 64(2) of the *Guardianship and Administration Act 2000* (Qld) provides that a health provider may not carry out minor and uncontroversial health care without consent if he or she knows, or could reasonably be expected to know, that the adult objects to the health care. In that situation, the health provider will need to obtain the consent of a substitute decision-maker in order to carry out the health care.

14-7 Is it appropriate that an adult's objection to minor and uncontroversial health care is effective to prevent the health care from being carried out without consent?

Present and previous objections

14.74 The *Guardianship and Administration Act 2000* (Qld) defines 'object, by an adult, to health care' as follows:[1389]

> ***object***, by an adult, to health care means—
>
> (a) the adult indicates the adult does not wish to have the health care; or
>
> (b) the adult previously indicated, in similar circumstances, the adult did not then wish to have the health care and since then the adult has not indicated otherwise.
>
> *Example—*
>
> An indication may be given in an enduring power of attorney or advance health directive or in another way, including, for example, orally or by conduct.

14.75 This definition includes present and previous objections to the health care. It does not distinguish between an objection made at a time when the adult had capacity for the health matter or special health matter and an objection made at a time when the adult has impaired capacity for the matter.

14.76 A previous objection to health care may well have been made at a time when the adult still had capacity for the health matter or special health matter, although that will not necessarily be the case. Further, if the objection appears in an advance health directive, it will have been made with the intention of being binding in the future, is likely to have been an informed decision, and will have been made subject to the safeguards that apply in relation to the making of advance health directives.

14.77 On the other hand, a present objection to health care, although a strong indication of the adult's current wishes, is necessarily made at a time when the adult has impaired capacity for the health matter or special health matter.

14.78 It is also possible that a person's previously expressed objection about particular health care may be inconsistent with his or her present wishes about that health care. The Law Commission of England and Wales has noted that:[1390]

> Realistically, the former views of a person who is without capacity cannot in every case be determinative of the decision which is now to be made. Past wishes and feelings may in any event conflict with feelings the person is still able to express in spite of incapacity. People who cannot make decisions can still experience pleasure and distress. *Present* wishes and feelings must therefore be taken into account, where necessary balanced with past wishes and feelings. (original emphasis; note omitted)

1389 *Guardianship and Administration Act 2000* (Qld) sch 4.

1390 Law Commission of England and Wales, *Mental Incapacity*, Report No 231 (1995) [3.29]

14.79 Although the definition of 'object' encompasses present and previous objections (which, in the case of a previous objection could be an objection made with or without capacity), the effect of an adult's objection to particular health care depends on the type of health care involved and the circumstances in which it is carried out, as illustrated in Table 1 below.

	Objection made in an advance health directive (ie when the adult has capacity)	**Objection made other than in an advance health directive (ie when the adult may or may not have capacity)**
Health care <u>with</u> consent		
Health care (other than special health care or participation in approved clinical research)[1391]	Substitute decision-maker may not exercise power to consent (s 66(2))	Substitute decision-maker's consent is effective if: • the adult has minimal or no understanding of what the health care involves or why the health care is required; and • the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care (s 67(2))
Special health care—Removal of tissue for donation	Tribunal may not exercise power to consent (s 65(2))	Tribunal may not consent if the adult objects (s 69(2)); Tribunal's consent is ineffective if the health provider knows, or ought reasonably to know, that the adult objects (s 67(1), (3)(a))[1392]
Special health care—Participation in special medical research or experimental health care[1393]	Tribunal may not exercise power to consent (ss 65(2), 72(3)(b))	Tribunal may not consent if the adult objects (s 72(3)(a)); Tribunal's consent is ineffective if the health provider knows, or ought reasonably to know, that the adult objects (s 67(1), (3)(b))[1394]

1391 Special health care (ie removal of tissue for donation, sterilisation, termination of pregnancy and participation in special medical research or experimental health care) and participation in approved clinical research are considered separately below.

1392 It may be that the adult does not object when the Tribunal is hearing the application, but objects after the Tribunal has given its consent.

1393 The effect of an adult's objection to special medical research or experimental health care is considered in greater detail in Chapter 13 of this Discussion Paper.

1394 It may be that the adult does not object when the Tribunal is hearing the application, but objects after the Tribunal has given its consent.

	Objection made in an advance health directive (ie when the adult has capacity)	Objection made other than in an advance health directive (ie when the adult may or may not have capacity)
Special health care—Sterilisation; Termination of pregnancy[1395]	Tribunal may not exercise power to consent (s 65(2))	Tribunal's consent is effective if: • the adult has minimal or no understanding of what the health care involves or why the health care is required; and • the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the proposed health care (s 67(2))
Health care—Participation in approved clinical research[1396]	Substitute decision-maker may not exercise power to consent (s 66(2))	Substitute decision-maker's consent is ineffective if the health provider knows, or ought reasonably to know, that the adult objects (s 67(1), (3)(b))
Health care <u>without</u> consent		
Urgent health care, without consent, to meet imminent risk to the adult's life or health	Health care may not be carried out without consent if the health provider knows that the adult objects to the health care in an advance health directive (s 63(2))	Health care may be carried out, without consent, despite the adult's objection (s 63(1))
Urgent health care, without consent, to prevent significant pain or distress to the adult	Health care may not be carried out without consent if the health provider knows that the adult objects to the health care unless: • the adult has minimal or no understanding of what the health care involves or why the health care is required; and • the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the health care (s 63(3))	Health care may not be carried out without consent if the health provider knows that the adult objects to the health care unless: • the adult has minimal or no understanding of what the health care involves or why the health care is required; and • the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the health care (s 63(3))

1395 Sterilisation is more likely to arise as an issue in relation to an adult who has never had capacity. Accordingly, it will be rare for an adult to have an advance health directive dealing with the matter. Note that under the guardianship legislation, 'sterilisation' does not include health care primarily to treat organic malfunction or disease of the adult: *Guardianship and Administration Act 2000* (Qld) sch 2 s 9; *Powers of Attorney Act 1998* (Qld) sch 2 s 9.

1396 The effect of an adult's objection to participation in approved clinical research is considered in greater detail in Chapter 13 of this Discussion Paper.

	Objection made in an advance health directive (ie when the adult has capacity)	Objection made other than in an advance health directive (ie when the adult may or may not have capacity)
Withholding or withdrawal of a life-sustaining measure without consent	The measure may not be withheld or withdrawn without consent if the health provider knows that the adult objects to the withholding or withdrawal (s 63A(2))	The measure may not be withheld or withdrawn without consent if the health provider knows that the adult objects to the withholding or withdrawal (s 63A(2))
Minor and uncontroversial health care without consent	Health care may not be carried out without consent if the health provider knows, or could reasonably be expected to know, that the adult objects to the health care (s 64(2))	Health care may not be carried out without consent if the health provider knows, or could reasonably be expected to know, that the adult objects to the health care (s 64(2))

Table 1: Effect of the adult's objection on the carrying out of health care

14.80 It can be seen from the above table that an objection made in an advance health directive will generally have the effect that neither a substitute decision-maker nor the Tribunal may consent to the health care for the adult.[1397]

14.81 It is also the case that an objection (however made) has the effect that:

- the Tribunal may not consent to the removal of tissue from the adult for donation to another person or to the adult's participation in special medical research or experimental health care;
- a life-sustaining measure may not be withheld or withdrawn without consent; and
- minor and uncontroversial health care may not be carried out without consent.

14.82 However, an objection to health care generally (being an objection not made in an advance health directive)[1398] will not necessarily be effective to override a substitute decision-maker's consent to the health care. Whether the

1397 The one type of health care for which an objection made in an advance health directive does not operate as an absolute veto is urgent health care, without consent, to prevent significant pain or distress to the adult. Health care of that kind may be carried out without consent, despite an objection made in an advance health directive, if:

- the adult has minimal or no understanding of what the health care involves or why the health care is required; and
- the health care is likely to cause the adult no distress or temporary distress that is outweighed by the benefit to the adult of the health care.

See *Guardianship and Administration Act 2000* (Qld) s 63(3).

1398 See n 1350 above.

adult's objection has that effect in a particular case depends on the adult's level of understanding and on the level of distress that the proposed health care is likely to cause the adult.

14-8 Given the effect under the *Guardianship and Administration Act 2000* (Qld) of an adult's objection to particular types of health care, is the definition in the Act of 'object, by an adult, to health care' appropriate?